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(15)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

CLEMM v. STATE.

[154 Ala. 12, 45 South. 212.]

INDICTMENT—Larceny of the Property of Different Owners.—Where articles of property belonging to different owners are stolen at the same time and place, the offense is single and must be charged in the same count; but to come within the rule, the indictment must show affirmatively that the property of different owners was stolen at the same time and place. (pp. 17, 18.)

Indictment for larceny in which the defendant was charged with the taking of sundry articles of property belonging to the Gray & Dudley Hardware Company, a corporation, and other articles belonging to one C. M. A. The place of the taking was not known, nor was the time, except that it was stated to have been before the finding of the indictment. Demurrers were interposed on the ground that the indictment stated two offenses in the same count, that there was a misjoinder of ownership, and that the indictment was indefinite and uncertain. The demurrers were overruled and the defendant convicted. He appealed.

Lea & Conniff, for the appellant.

Alexander M. Garber, attorney general, for the state.

13 TYSON, C. J. The rule is well established that, when articles of property belonging to different owners are stolen at the same time and place, the offense is single **14** and must be charged in the same count: Dalton v. State, 91 Miss. 162, 124 Am. St. Rep. 637, 44 South. 802, and authorities there cited: 22 Cyc. 383, and note. But to come within this rule the averments of the count should affirmatively show that the property of the different owners was stolen at the same time and place. Good pleading requires this, in order to exclude the intendment, which must be indulged on demurrer, to

avoid the objections so taken, that two distinct larcenies were committed. The averment of the indictment in this case was faulty in that respect, and the demurrer to it should have been sustained.

Reversed and remanded.

Haralson, Simpson and Denson, JJ., concur.

The Crime of Larceny is the subject of a note to *People v. Miller*, 88 Am. St. Rep. 559. It has recently been decided that however diverse the ownership of property which is the subject of larceny, if the act of taking constitutes but a single act, but one offense is committed. And an indictment which charges the larceny of property belonging to different owners in a single count is not demurrable: *Dalton v. State*, 91 Miss. 162, 124 Am. St. Rep. 637, and see cases cited in the cross-reference note thereto. According to *State v. Douglas*, 26 Nev. 196, 99 Am. St. Rep. 688, the stealing of the property of different persons at the same time and place, and by the same act, may be prosecuted, at the pleasure of the state, as one offense or several distinct offenses.

WRAY v. STATE.

[154 Ala. 36, 45 South. 697.]

CRIMINAL LAW—Right to be Confronted with the Witness—Cross-examination.—The right of the accused to be confronted with the witnesses against him imports the privilege of cross-examining them. (p. 21.)

CRIMINAL LAW—The Right to be Confronted with and to Cross-examine Witnesses does not exclude the admission of dying declarations, nor the admission of testimony taken on a prior trial, where the accused had the opportunity to cross-examine the witness. (p. 22.)

CRIMINAL LAW—Cross-examination of a Witness Whose Physical Condition will not Permit of Such Examination.—Where the condition of a witness is such, and the court so rules, that it is not proper to submit him to a cross-examination, it is error to permit his examination on a criminal trial against the objection of the accused, and the fact that the court does not refuse the right to cross-examine, but purports to admit it, does not relieve from prejudice its error in allowing such witness to be asked and to answer a question, and in refusing to exclude the answer when made. (p. 22.)

CRIMINAL LAW—Being Confronted by a Witness.—To permit the cross-examination as a witness on a criminal trial of one who is too ill to be subjected to cross-examination amounts to a denial to the accused of the right to be confronted by the witnesses against him. (pp. 22, 23.)

CONSTITUTIONAL LAW—Jury Trial.—The statute of Alabama of 1895 in reference to the drawing of jurors for the trial of capital cases does not conflict with section 6 of the constitution of 1901 of that state. (p. 23.)

Prosecution for murder and conviction of murder in the second degree. Defendant appealed.

B. M. Allen, Robert N. Bell, Gaston & Pettus and E. W. Winston, for the appellant.

Alexander M. Garber, attorney general, for the state.

38 McCLELLAN, J. The tragedy, out of which arose the indictment and conviction of this defendant of murder in the second degree, took place in a large room in a house of ill-fame. At the time there were present, beside the deceased, Freeman, and the defendant Wray, four persons, two women and two men. The cause of the death of the deceased, it is conceded, was a wound inflicted by a pistol ball. The ball appears to have entered the body just above the hip bone on the right side; and the examining physician described the course of the bullet to have been indeflectively "upward at an angle of forty-five degrees, penetrated the right lobe of the liver, and ranged more to the front than to the lateral portion, from a perpendicular or medial line of the body." When this physician reached the body of the deceased in the room where he was killed his foot struck a revolver then lying on the floor. The scabbard of the weapon was near by. There appears from the bill no controversy as to the facts as here briefly rehearsed. We refrain from specific reference to any testimony adduced further than is necessary to decision.

The state's theory was, of course, that the defendant inflicted the immediately mortal wound; while the defendant, always asserting his innocence, advanced the theory that the death of the deceased was due to his own act. The evidence, in respect of the agency producing the wound, was purely circumstantial. The state sought to fix the responsibility on the accused by testimony tending to show that deceased, just prior to his death, had incurred the ill-will of the accused by familiar conduct **39** with a woman with whom it appeared the accused had frequently shared her bed. However, the accused denied such ill-will and adduced testimony to show his friendly relations with the deceased. It is obvious, from this record, that one of the material elements involved on the trial was: Who, of those in the room, shot Freeman? On this vital issue, cast as the conclusion must have been by the whole circumstances attending the event, including the location of the parties in the room, their attitudes, and their general conduct within the *res gestae* of the transaction, it

was, of course, important to draw, by their chief and cross examination of all those present, from all the witnesses produced, their knowledge of every incident connected with the death of Freeman.

C. M. Landsdowne was of those in the room at the time Freeman was shot. He was a witness for the state; but at the time of the trial he was, the record shows, a very sick man. After some delay he was brought into the courtroom and the bill of exceptions thus details the condition of the witness, the contention of the defendant, and the action of the court in the premises: "On the next morning C. M. Landsdowne was brought into court on a cot upon the opening of court. He appeared to be very ill, and was scarcely able to speak. The defendant objected to the examination of the witness Landsdowne, who was brought into the courtroom in the presence of the jury on a cot and placed in front of the jury on a cot, as tending to prejudice the rights of the defendant, and as being improper and illegal, and because he appeared to be mentally and physically not in condition to be cross-examined. The court overruled the objection, and the defendant then and there duly reserved an exception. On this objection the defendant asked leave of the court to examine Dr. Paul Cocke, the physician of ⁴⁰ said Landsdowne, and to this the court agreed. After some examination of the witness the court stated: 'Mr. Heflin, I don't believe this man is in a physical condition to go through the ordeal of an examination. I think it would be wrong and inhuman. I don't feel like taking the responsibility, because I don't need the physician to tell me he is not in condition to go through the ordeal of an examination. He is a mighty sick man, and his condition is such that an examination might bring on complications that might prove fatal, and I don't feel like taking the responsibility myself, and will not do it. I have talked to the witness myself, and, while he could make a statement, I believe, to the satisfaction of himself and to the satisfaction of the jury, I don't believe'— At this point the witness' physician, Dr. Paul Cocke, came into the courtroom, and after conferring with him the court said: 'After talking with the doctor, I don't feel like it would be humane to subject this witness to examination and the possible excitement that an examination might bring on. The doctor says it might result in bringing on a hemorrhage, which might result fatally, and I cannot give my consent to permit it to be done.' Immediately after this ruling by the court the solicitor offered to introduce the evidence taken on the

preliminary before Justice of the Peace Russell, stating in the presence of the jury that they had taken it down stenographically and that he offered to introduce it, and asked whether the lawyers on the other side would agree to anything. Whereupon the solicitor asked the court to let him introduce it, to which the court replied that he could not, unless the defendant agreed to it. The solicitor stated that he wanted to ask the witness one question. The court ruled that he would permit the solicitor to ask the witness one question, to which ruling of the court the defendant then and there duly excepted. The ⁴¹ question that was proposed to be asked, and which was asked, was: 'Mr. Landsdowne, did you kill George Freeman?' To which the witness answered: 'No, sir.' The counsel for the defendant asked the court whether or not he refused to allow the defendant to cross-examine the witness. The court held that he did not so refuse. Thereupon the defendant reserved an exception to the court's permitting defendant to cross-examine said witness after stating that he was not in a condition to be examined, and upon the further ground that, in the condition the witness was in, any statement he would be liable to make would be liable to be given undue weight or credit by the jury; and the defendant moved to exclude the answer of the witness to the question asked by the state, upon the ground assigned to the examination of the witness, and upon the further ground that he was not in a condition to stand a cross-examination. The court overruled the motion, and the defendant then and there duly excepted."

Counsel for the defendant take the point that the defendant was deprived of his constitutional right to be "confronted" by the witnesses against him. We are of that opinion, and will state the grounds of our conclusion. Constitution of 1901, article 1, section 6, provides that the accused in criminal prosecutions has the right "to be confronted by the witnesses against him." This provision of our organic law is similar to that existing in many of the United States, and so, in other jurisdictions, as well as our own, has been the subject of judicial construction. The consensus of such construction is, and in this we can discover no possible contrary opinion, that the right "to be confronted by the witnesses against him" imports the constitutional privilege to cross-examine the opposing witnesses. We set down a few of the authorities in support of this interpretation of the clause: *Tate v.* ⁴² *State*, 86 Ala. 33, 5 South. 575; *Hawser v. Commonwealth*, 51 Pa. 332; *State v. Mannion*, 19 Utah,

505, 75 Am. St. Rep. 753, 57 Pac. 542, 45 L. R. A. 638; Bishop's New Criminal Law and Procedure, sec. 1194; *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337, 39 L. ed. 409; 1 Elliott on Evidence, sec. 506. This right is, of course, subject to exceptions as well as to reasonable, within lawset bonds, regulation by the trial court. A notable exception is found in the introduction of dying declarations. As to this class of testimony the accused is denied the right to be so confronted. And the constitutional rule has also been held to not apply where, on a previous investigation in a prosecution against the accused, the opportunity was open or availed of by the accused to cross-examine a witness who has since passed without the jurisdiction of the trial court, or has died, or has become incapable of giving his testimony. It is seen from the bill that this defendant was not denied the right to cross-examine Landsdowne; on the contrary, the court expressly afforded him that opportunity, which he declined. But we apprehend that, though the opportunity to cross-examine an opposing witness in a criminal case may be in fact affirmatively offered the accused, yet conditions and surroundings may so circumstance this opportunity to cross-examine as that the right itself loses its substance and becomes a shadow. It necessarily results that, where the opportunity is given by the trial court in its well-reposed discretion in the premises, its action will not be condemned in exercise in the given case, unless it clearly appears that that discretion has been prejudicially exerted against the right of the accused to cross-examine the witness.

In this instance the witness was so ill as that the court pronounced it inhuman to subject him to the ordeal of an examination. This conclusion was confirmed ⁴³ by the statement of the physician present, who foreshadowed the probable extreme result that might attend an examination. Manifestly, this condition of the witness was such as to not only embarrass the state in the prosecution of the defendant; but it also submitted to defendant, or his counsel, the opportunity to cross-examine him, burdened with the foreknown and fore-announced probability that a cross-examination might result fatally. The right to cross-examine cannot be so conditioned—so conditioned as that to avail himself of it the defendant must assume the hazard of ending the life of the witness. That this view is justified is proven by the action of the court in permitting the solicitor, and in thus limiting him, to ask the "one question." The question propounded sought to elicit and did elicit an extremely important reply from the

desperately sick witness. Perhaps it was the question of all others possible of address to him most probably influential in support of the state's contention that the defendant, and he alone, shot deceased. To permit the state to propound, and the sick witness to answer, that question, was to let him testify in support of the theory of the state, and in refutation of that advanced by the defendant, and to lay upon the defendant the imperative necessity, the conditions warranting, to cross-examine. The witness was not, as affirmatively appears, in a condition to submit to the cross-examination, and the defendant pursued the proper course in refraining from crossing him. The motion of the defendant to exclude the answer was well made, since no cross-examination could be had, and its denial was error to reversal: *Tate v. State*, 86 Ala. 33, 5 South. 575; 3 Elliott on Evidence, sec. 993; *Heath v. Waters*, 40 Mich. 457; 8 Ency. of Pl. & Pr. 99 et seq.

There is no merit in the appellant's insistence that the act approved February 8, 1895 (Local Acts 1894-95, ⁴⁴ p. 425), is violative of section 6, article 1, of the constitution in respect of trial by jury drawn from a territory within two miles of the courthouse of Jefferson county. The organic law expressly recognizes the propriety and convenience of taking the jury, under the circumstances stated in the act assailed, from a district less than a county. The brief of the attorney general collates many authorities decisive of the objection here made.

Other questions argued by counsel need not be now considered. For the error stated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

Tyson, C. J., and Simpson and Anderson, JJ., concur.

CONSTITUTIONAL RIGHT OF AN ACCUSED TO BE CONFRONTED BY THE WITNESSES, AND WHAT IS AN INVASION OF THAT RIGHT.

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I. Right of an Accused to be Confronted by the Witnesses Against Him.

a. In General.—Since the date of Magna Charter, if not before, it has been a rule of the common law, founded on natural justice, that no man accused of a crime shall be prejudiced by evidence which he had not the right to cross-examine. The right of an accused to be confronted by the witnesses against him has always been deemed one of the most sacred bulwarks of liberty wherever common-law principles obtain. This great principle was made a part of our organic law by the sixth amendment of the constitution of the United States, which provides that the accused in all criminal prosecutions shall have the right to "be confronted with the witnesses who testify against him"; and the same, or a similar provision, has been copied in the constitution of nearly every state in the Union.

Speaking of this provision in the federal constitution, Mr. Justice Brown, of the supreme court of the United States, said: "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief": *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337, 39 L. ed. 409. And not only has an accused the right to be confronted by the witness against him, but, "by and through his counsel, given an opportunity to be informed and advised of all the evidence that is submitted against him": *Morris v.*

United States, 149 Fed. 123. Thus, where an accused is deaf and dumb and cannot hear the evidence of the witness for the state, the presiding judge should permit some reasonable mode of having their evidence communicated to him; and allowing counsel for the accused to write down the testimony as the trial progressed, and give it to his client to be read by him, was a proper method of bringing the evidence to the attention of the accused: *Ralph v. State*, 124 Ga. 81, 52 S. E. 298, 2 L. R. A., N. S., 509.

But in a prosecution for rape, when the complaining witness was rational and intelligent, but unable to talk because of violence done her by the defendant, there was no violation of the constitutional provision guaranteeing the accused the right to be confronted with the witnesses against him, in permitting her to reply to questions by a nod of the head when that was possible, and to answer others in writing, though no notice was given to the defense that she would be produced in that condition: *Robertson v. State* (Tex. Cr. App.), 49 S. W. 398.

So, too, in a trial for robbery, refusal of the court to require the prosecutrix to repeat to the jury in open court, on her direct examination, a proposal which she said was made to her by accused, did not invade any constitutional right of the accused, when the information desired was obtained on cross-examination by a response given to the counsel of accused in writing as requested by him, since it could not be presumed that, had accused insisted on an oral response, the court would not have required the witness to answer orally: *People v. White*, 5 Cal. App. 329, 90 Pac. 471.

But an excellent illustration that it is only in cases of the gravest necessity and in order to prevent a miscarriage of justice that the courts will permit any infringement of the constitutional right of an accused to be confronted with the witnesses against him, is supplied by the principal case (ante, p. 18), where it was held this right was invaded by allowing a witness for the state to answer one question propounded by the state's attorney after it appeared that the witness was too sick to undergo an examination, and the defendant, though not denied permission to cross-examine, refused to do so because it might endanger the life of the witness.

And in *State v. Manion*, 19 Utah, 505, 75 Am. St. Rep. 753, 57 Pac. 542, 45 L. R. A. 638, the defendant was convicted of an assault with an intent to commit a rape upon his six year old daughter. The daughter, after being sworn, and before giving any testimony, stated, in the presence of the court and jury, "I am afraid to tell, because I am afraid of my papa." The court thereupon, without further testimony or cross-examination of the witness, ordered the defendant, who was sitting by his counsel, to take a seat in another part of the courtroom, some twenty-four feet away from the prosecuting witness, and also permitted the witness to turn her back to the accused. From the place where the defendant was ordered to sit during the examination of the witness he could not see all of the jurors, neither could he see the witness, nor hear her testimony. It was held that this was

an invasion of the defendant's constitutional right of being confronted with the witnesses against him, and the judgment was accordingly reversed, the court saying: "The accused had a right to be present at the trial, to be confronted by the witnesses against him, and to meet his accusers face to face. He also had the right to appear and defend against the accusation preferred against him in person and by counsel. He had the right not only to examine the witnesses, but to see into the face of each witness while testifying against him, and to hear the testimony given upon the stand. He had the right to see and be seen, hear and be heard, under such reasonable regulations as the law established. . . . The constitutional right to be confronted by witnesses against him, and to defend in person, would be of little avail to the accused if he could be compelled to remain away, during his trial, out of the sight and hearing of the witnesses against him. The right to defend in person would be a meaningless term if the accused is required to remain so far away from the witness that he cannot hear the testimony, and therefore could not cross-examine them."

Likewise, the constitutional privilege of an accused to be confronted by the witnesses against him is infringed by permitting the district attorney to furnish a paper to a witness, and allow the witness to testify from and by that paper, without having previously exhibited it to the defendant on his demand: *Morris v. United States*, 149 Fed. 123.

b. Construction of Constitutional Provisions.

1. Meaning of Word "Confronted" in Criminal Law.—The word "confronted," as appearing in the constitutional provisions under consideration, has been construed by the courts generally to mean face to face. The authority for giving the word this interpretation appears most clearly from the case of *State v. Mannion*, 19 Utah, 505, 75 Am. St. Rep. 753, 57 Pac. 542, 45 L. R. A. 638, where the opinion quotes the different definitions taken from various leading sources. It says: "Webster defines 'confront' as follows: 1. To stand facing or in front of; to face. 2. To stand in direct opposition; to oppose. 3. To sit face to face for examination and discovery of the truth; to sit together for comparison; to compare."

Bouvier's Law Dictionary defines "confrontation" in criminal law to mean "the act by which a witness is brought in the presence of the accused; so that the latter may object to him, if he can, and the former may know and identify the accused, and maintain the truth in his presence. No man can be a witness unless confronted with the accused, except by consent."

In *Anderson's Law Dictionary*, page 226, the following definition is given: "Confront. To bring face to face. The constitutional provision that the accused shall be 'confronted with the witnesses against him' means that the witnesses on the part of the state shall be personally present when the accused is on trial; or that they shall be examined in his presence, and be subject to cross-examination by him."

In *State v. Thomas*, 64 N. C. 74, it is said: "In all criminal prosecutions every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other witnesses. We take it that the word 'confront' does not simply secure to the accused the privilege of examining witnesses in his behalf, but is in affirmance of the rule of the common law, that in trial by jury the witnesses must be present before the jury and accused, so that he may be confronted—that is, put face to face."

In speaking of the constitutional right of an accused to be confronted by the witnesses against him, it was said by the court in *Brown v. State*, 38 Tex. 482: "The accused should not only be within the walls of the courthouse, but he should be present where the trial is conducted, that he may see and be seen, hear and be heard, under such regulations as the law established."

2. **Right to be Confronted Applies Only to the Trial.**—It was said by Chief Justice Marshall, many years ago, that, "Before the accused is put upon his trial all the proceedings are *ex parte*": *Ex parte Bollman*, 4 Cranch (8 U. S.), 75, 2 L. ed. 554. Consequently, the right of an accused to be confronted by the witnesses against him applies only to the trial: *Harper v. State*, 131 Ga. 771, 63 S. E. 339; *In re Bates*, Fed. Cas. No. 1099a; and does not therefore apply to an application for continuance: *Lipscomb v. State*, 76 Miss. 223, 25 South. 158; or to an investigation before the grand jury: *Harper v. State*, 131 Ga. 771, 63 S. E. 339. Another important question was also raised in this very recent case (decided January 13, 1909), which is worthy of note, namely, whether the constitutional right of an accused in homicide cases entitles the defendant to be confronted by all the eye-witnesses to the homicide. The defendant had been convicted for murder, and the judgment had been affirmed on appeal. He then made an extraordinary motion for a new trial, and this appeal was taken from an order denying such motion. The ground for the extraordinary motion was that the defendant was not confronted by the only eye-witness to the homicide, who testified before the grand jury and upon whose testimony the indictment against defendant was returned. It was most urgently contended that this was in violation of the sixth amendment to the federal constitution guaranteeing the defendant the right to be confronted by the witnesses against him. This contention was not upheld. Said the court: "The meaning of the provision of the constitution referred to, providing that the accused shall be 'confronted with the witnesses against him,' is that the testimony of no witness shall be used against a defendant upon his trial unless the defendant is confronted with such witness while he is delivering such testimony. It does not mean that the defendant is entitled to be confronted with the witness, when he is delivering testimony before the grand jury, which must find an indictment before the defendant can be put upon trial. The defendant was not put upon trial before the grand jury. Nor does this provision of the constitution mean that any witness who testified before the grand jury, and upon whose testimony an indictment is found, must be introduced as a

witness upon the trial of the defendant for the offense for which he is indicted." And in *State v. Stewart*, 117 Ga. 476, 41 South. 798, and *State v. Kapelino*, 20 S. D. 591, 108 N. W. 335, it is also held that the state is not compelled in a criminal trial to call all the eye-witnesses to the alleged crime.

Likewise, no constitutional right of an accused is infringed by permitting the state's attorney to read affidavits in aggravation of the crime for which the defendant was convicted, since the verdict of the jury is not affected: *State v. Reeder*, 79 S. C. 139, 60 S. E. 434.

So, also, in *Re Bates*, Fed. Cas. No. 1099a, it was held that the constitutional right of an accused to be confronted by the witnesses against him does not apply to proceedings before the committing magistrate.

But in *State v. McLain*, 13 N. D. 368, 102 N. W. 407, it was held that section 7960, Revised Codes of 1899, which provides that the witnesses upon a preliminary examination of a person accused of crime must be examined in the presence of the accused, guarantees to the accused the right to confront the witnesses against him at such hearing. It was further held in this case, however, that, if the accused has given bail for his appearance before the magistrate at a time and place fixed for the hearing, and neglects, without excuse, to personally appear, but is represented by counsel, he cannot impeach the commitment because the magistrate, at the stated time and place, proceeded to hear the evidence in the absence of the accused, but in the presence of his counsel.

3. Imports Right to Cross-examine Opposing Witnesses.—The construction placed upon the constitutional provision under discussion, by the court, in the principal case (ante, p. 18), that it imports the constitutional privilege of cross-examining the opposing witnesses, seems to be recognized as correct by all the authorities, but is pointedly upheld in the following cases: *Tate v. State*, 86 Ala. 33, 5 South. 575; *People v. Lee Fat*, 54 Cal. 527; *Ralph v. State*, 124 Ga. 81, 52 S. E. 298, 2 L. R. A., N. S., 509; *Howser v. Commonwealth*, 51 Pa. 332; *State v. Mannion*, 19 Utah, 505, 75 Am. St. Rep. 753, 57 Pac. 642, 45 L. R. A. 638; *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337, 39 L. ed. 409. Thus, in *Howser v. Commonwealth*, 51 Pa. 332, the court, after remarking that when the common law of England was transported to the colonies, it gave a person charged with a capital crime no compulsory process to obtain witnesses, and entitled him to no examination by himself or his counsel of witnesses brought against him, said: "To remedy this state of the law, our constitutions all declared, what statutes had then provided in England, that the accused should have an impartial trial by jury, should have process for witnesses, and be entitled to counsel to examine them, and to cross-examine those for the prosecution in the presence of (confronting) the accused."

4. Where a Conspiracy has been Accomplished.—In *State v. Hinkle*, 33 Or. 93, 34 Pac. 155, it was held that under constitution, article 1, section 11, providing that an accused shall have the right to

meet the witnesses against him face to face, where the object of a conspiracy has been accomplished, the admissions of a co-conspirator, by way of recitals of past facts, are not admissible against his alleged confederate.

5. With Reference to Evidence of Character.—The constitutional right of an accused to confront the witnesses against him is not impaired by the admission of testimony as to general reputation.

An excellent illustration of this is furnished in *State v. Waldron*, 16 R. I. 191, 14 Atl. 847. The defendant here was on trial for maintaining a liquor nuisance. The state asked nearly all of the witnesses to testify as to their knowledge of the notorious place kept by the defendant, and the reply of the witnesses was that the reputation of the place was bad. On cross-examination these witnesses admitted that the persons who had spoken of the place had spoken only of the reputation of the place as they had heard it, and none of the witnesses testified from their own knowledge. The defendant moved to exclude the testimony upon the ground that it impaired his constitutional right to be confronted by the witnesses against him, and, as he contended, "to examine all persons by whose statements a fact in issue is to be proved." The defendant insisted that evidence of reputation as to a fact is only evidence of what third persons have said about the fact, and that, therefore, the state, instead of proving what they have said by others, should produce such third persons themselves to testify, so that the accused could see them face to face, and have an opportunity to cross-examine them, urging in support of this that if evidence of reputation may be given as to one fact, it may be given as to every fact in issue, and a man might be convicted of a grave offense by hearsay or common rumor. In overruling these contentions the court said it was the fact that the reputation exists, which is put in proof, and in such cases, "it is not the people whose utterances create the reputation who are the witnesses, but the persons who testify to the existence of the reputation."

6. With Reference to Statutes Which Make Possession Prima Facie Evidence of Guilt.—Public Laws of 1902, page 36, chapter 969, providing for the punishment of persons having short lobsters in their possession, and that the possession of any such lobster shall be prima facie evidence to convict, is not in conflict with Constitution, article 1, section 10, providing an accused shall be confronted with the witnesses against him: *State v. Sheehan*, 28 R. I. 160, 66 Atl. 66.

7. Apply Only to Witnesses for Prosecution.—In *Petty v. State*, 4 Lea (72 Tenn.), 326, it was held that the constitutional provision that an accused has the right to meet the witnesses face to face refers to witnesses for the prosecution and not to those on behalf of the defense.

8. Provision in Federal Constitution does not Apply to Prosecutions in State Courts.—Constitution of the United States, amendment 6, providing that in all criminal prosecutions the accused shall enjoy the right to be confronted by the witnesses against him, does not

apply to prosecutions in state courts: *People v. Welsh*, 84 N. Y. Supp. 703, 88 App. Div. 65, 14 N. Y. Ann. Cas. 124; and to same effect are *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *State v. Jones*, 7 Nev. 408; *State v. Paul*, 5 R. I. 185; *Eilenbecker v. Plymouth County District Court*, 134 U. S. 31, 10 Sup. Ct. Rep. 424, 33 L. ed. 801.

9. **Right is Mutual Under Federal Constitution.**—The constitutional guaranty that the accused shall enjoy the right to be confronted with the witnesses against him (Const. Amend., art. 6) is without exception, and, if the accused has this right, it must be mutual, and exist on the part of the government: *United States v. Angell* (C. C.), 11 Fed. 34.

c. **Use of Depositions—General Rule.**—Depositions in criminal cases were unknown and unauthorized at common law: *Cline v. State*, 36 Tex. Cr. 320, 61 Am. St. Rep. 850, 36 S. W. 1099, 37 S. W. 722; and the general current of decisions in this country establishes the doctrine that the use of a deposition by the state in a criminal prosecution violates the constitutional right of the accused to be confronted with the witnesses: *Anderson v. State*, 89 Ala. 12, 7 South. 429; *State v. Chambers*, 44 La. Ann. 603, 10 South. 886; *People v. Sligh*, 48 Mich. 54, 11 N. W. 782; *Dominges v. State*, 7 Smedes & M. (Miss.) 475, 45 Am. Dec. 315; *People v. Restell*, 3 Hill (N. Y.), 289; *State v. Webb*, 2 N. C. 103; *Commonwealth v. Zorambo*, 205 Pa. 109, 54 Atl. 716; *Garza v. State*, 43 Tex. Cr. 499, 66 S. W. 1098.

In reversing a judgment of conviction for murder, where the state had been permitted to use an *ex parte* affidavit of a statement made by the defendant, it was said by the court in *Commonwealth v. Zorambo*, 205 Pa. 109, 54 Atl. 716: "Neither an *ex parte* affidavit nor a deposition regularly taken can be substituted with us for testimony 'face to face' in any criminal prosecution."

The case of *State v. Jones*, 7 Nev. 408, furnishes an exception to the general rule of evidence with reference to the use of depositions in criminal prosecutions, for it was there held that it is competent for the state to provide for the use of depositions, in criminal cases, on behalf of the state. True, the statutes of this state provide for the use of depositions in criminal cases by the state, but the decision is based upon the ground that the sixth amendment of the federal constitution does not apply to prosecutions in the state courts; and it is to be inferred that there was no provision in the constitution of the state of Nevada which guaranteed to an accused the right to be confronted by the witnesses.

In other states, where the use of depositions in criminal cases is permitted by statute, it has been generally recognized that such statutes are in derogation of the constitutional right of the accused to be confronted by the witnesses, and they have been construed together with the constitutional provision, and unless they could be so construed and strictly followed, the depositions taken under them have been rejected. Thus, the Alabama Code, sections 4465, 4466, provides that in certain cases depositions may be taken in behalf

of one accused of crime. Section 4467 permits them, in like cases, to be taken in behalf of the state, "when the defendant files his written consent thereto." On a trial for larceny it was held that, when depositions taken for defendant, but not offered by him, were offered for the state, it was error to admit them against his objection, under the constitutional provision of the state which guarantees to everyone charged with an indictable offense the right "to be confronted by the witnesses against him": *Anderson v. State*, 89 Ala. 12, 7 South. 429.

And that statutes which permit the taking of depositions on behalf of the people in a criminal case are in derogation of a defendant's right to be confronted by the witnesses, and must be strictly construed and followed, or the deposition will be rejected, is clearly upheld in *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862; *Ryan v. People*, 21 Colo. 119, 40 Pac. 775, it being said in the latter case: "It requires no argument to show that provisions of this character, being an exception to the general rules of evidence in criminal cases requiring the prosecution to confront the accused upon final trial with the witnesses against him, deal with one of the most sacred rights of the individual, and must be followed in all substantial particulars, or the deposition will not be permitted to be read to the jury."

But in *Butler v. State*, 97 Ind. 378, it was held that Revised Statutes of 1881, section 1805, permitting accused to take depositions in a foreign jurisdiction to be read on the trial, on condition that he consent to the prosecution doing the same, is not in conflict with the provision in the state constitution declaring that an accused shall have the right to meet witnesses face to face; the condition annexed to the right granted not being an abridgment of any common-law right, but merely a limitation of a purely statutory one.

And in *People v. Molins*, 10 N. Y. Supp. 130, 7 N. Y. Cr. Rep. 51, the court of general sessions held that depositions in a criminal case, taken *de bene esse*, under a stipulation by counsel that they shall be read on the trial with the same force and effect as if the witness had testified, are not open to the objection that defendant is deprived of his constitutional right to be confronted by his accusers.

An excellent illustration of how carefully the courts protect the right of an accused to be confronted by the witnesses, and deny the use of depositions in criminal prosecutions, is found in the case of *Price v. State*, 71 Ark. 180, 71 S. W. 948. The ruling in this case was on a motion for continuance, moved for by defendant on the ground of the absence of a witness who had been summoned to testify first for the state, and, secondly, for the defendant, but who did not attend on account of sickness. The witness resided within a few miles of the place of trial, and her testimony was material to defendant. The trial court denied the motion for continuance, but ordered the defendant to take her deposition, the prosecuting attorney agreeing to waive notice, etc., in order to enable the defendant to take the deposition to be used at the trial. The refusal of the court to grant a continuance was held error. Said the court: "The defendant

could not be compelled to take her deposition by order of the court, and, on the contrary, had the right to be confronted by her on the trial as a witness for the state, and to have compulsory process for obtaining witness' testimony in his favor: Const., art. 2, sec. 10. The fact that the witness was sick and unable to attend was not a circumstance to be made to work to the prejudice of the defendant. The state could better afford to suffer a continuance than to have one of her citizens deprived of evidence that might save him from a conviction of so grave a crime. . . . While the subject of continuances is one over which the trial courts have a sound discretion, and their action will not be controlled, except in cases where the discretion is abused, yet in the latter case this court will not hesitate to reverse."

But while the right of an accused to be confronted by the witnesses has always been regarded by the courts as of such supreme importance to the citizen, and so essential to the proper and impartial administration of the criminal law, still, the right does not mean that never, under any circumstances, shall a criminal charge be prosecuted except by the presence of living witnesses. That the principle has always been subject to several well-recognized exceptions is uniformly conceded. Even the supreme court of North Carolina, in the late case of *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002, after saying that the right of an accused to be confronted by the witnesses appealed most impressively to the courts of that state, because North Carolina had declined to adopt the federal constitution until the amendment by which such right was guaranteed had been formulated by the federal Congress and its adoption practically assured, then gave its approval of exceptions to the right by quoting with approval as follows: "Says Mr. Greenleaf (volume 1, 163): 'The constitutional clause purported merely to adopt the general principle of the hearsay rule, that there must be confrontation, but it did not purport to enumerate all the exceptions and limitations to that principle. There were a number of well-established exceptions, and there might be others in the future. The constitution indorsed the general principle, subject to these exceptions, merely naming and describing it sufficiently to indicate the principle stated.'"

We will now note these exceptions.

d. Exceptions to General Rule.

1. **Documentary Evidence—In General.**—The constitutional provision giving a party accused of crime the right to be confronted with the witnesses against him does not apply to the proof of facts in their nature essentially and purely documentary, and which can only be proved by the original, or by a copy officially certified: *People v. Jones*, 24 Mich. 215; *People v. Dow*, 64 Mich. 717, 8 Am. St. Rep. 873, 31 N. W. 597; *State v. Behrman*, 114 N. C. 797, 79 S. E. 220, 25 L. R. A. 449; *Reeves v. State*, 7 Cold. (47 Tenn.) 96; *Patterson v. State*, 17 Tex. App. 102.

"Where facts from their very nature can only be proved by a record, or a duly authenticated copy of a record, proof of them does

not fall within the constitutional inhibition, since the genuineness of the original was determined by inspection and of the copies by an examination of the certificates, and the right to confront accused was intended to be secured to the accused, not under all circumstances, but only when it would bring with it the benefit of testing the truth of testimony by meeting a prosecuting witness face to face and subjecting him to cross-examination": *State v. Behrman*, 114 N. C. 797, 79 S. E. 220, 25 L. R. A. 449. "In such cases, the paper is the witness": *Reeves v. State*, 7 Cold. (47 Tenn.) 96.

Thus, on trial of one indicted as a defaulter to the state, under Acts of 1872, chapter 329, the comptroller's certificate attached to the statement of the account of defendant with the state treasury, showing the amount for which he was in default as collector of state taxes, is admissible in evidence against him, said act not being in contravention of the Declaration of Rights, article 21, entitling a party to be confronted with the witnesses against him: *Johns v. State*, 55 Md. 350.

In *People v. Jones*, 24 Mich. 215, the defendant was on trial for an attempt to burn property insured by a named insurance company with intent to injure such company. It was held that the introduction on behalf of the state of a certificate from the Secretary of State showing the articles of incorporation of the insurance company, a certified copy of its annual statement, and certain renewal certificates, showing its authority to do business in the state, was not a violation of defendant's right to be confronted by the witnesses against him.

Likewise, in a prosecution for the unlawful sale of spirituous liquor, the admission in evidence for the state of a certified copy by the collector of internal revenue of the list of persons paying special taxes was not an invasion of defendant's constitutional right to confront the witnesses against him: *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002; *State v. Toler*, 145 N. C. 440, 58 S. E. 1005.

And in a prosecution for violation of the acts of 1901-02, and the act of March 15, 1906, relating to the illegal sale of intoxicating liquors, said acts are not unconstitutional on the ground that proof that accused held a license as a retail liquor dealer shall be presumptive proof of his guilt, which may be furnished by a copy of the record in the office of the United States internal revenue collector; and the constitutional provision which guarantees the right of an accused to be confronted with the accusers and witnesses does not exclude a copy of such license from the office of the internal revenue collector: *Runde v. Commonwealth*, 108 Va. 873, 61 S. E. 792.

In the recent case of *King v. State*, decided February 12, 1908, 109 S. W. 182, the court of criminal appeals of Texas held that the testimony of a witness, on a trial for a violation of the local option law, that he knew the internal revenue collector for the district, that he examined the record of the office of the internal revenue collector and made a copy of the internal revenue license issued to accused, together with such copy, was properly received so far as the source

from which the record came was concerned, and as against the objection that it violated the constitutional right of the accused to be confronted by the witnesses against him. We have found no other case which has sanctioned the introduction of the copy of a record, in a criminal case, where the copy had not been officially certified, for in all the other cases it is clearly recognized that it is the presumption of its being an official record is all that saves documentary evidence from being hearsay testimony, and to admit the copy of a record which does not bear an official certificate of its correctness is not sanctioned by the weight of authority.

In strong contrast to the Texas case last mentioned is that of *People v. Daw*, 64 Mich. 717, 8 Am. St. Rep. 873, 31 N. W. 597, where the defendant was on trial for burglary. The defense was an alibi, and the question of the condition of the weather on the night of the alleged crime was important in determining whether the testimony in support of the defense was true or not. The trial court, over defendant's objection, admitted in evidence the official record of the weather for the night in question, as kept in the office of the signal service station at the place of trial. The signal service officer identified the record as the official record, but testified that it was not in his handwriting but was taken under his supervision. He further testified that he was not at the office on the night the observations were taken, but he had left the office in charge of his assistant. It was held that the record was erroneously admitted. Judge Morse, speaking for the court, after saying that it had previously been held that the records of the weather were properly admitted in civil cases, added: "The record of the weather in this case was not one made by the witness, or one that he knew certainly to have been accurately made in accordance with the actual state of the weather. It seems to me that the presumption in favor of the correctness of this record, because it is an official one, if such presumption can be said to exist under the circumstances shown as to the manner of the observations being taken and the record being kept, cannot be used against the defendant in a criminal case. . . . If Conger (the signal service officer) had made the record himself, or taken the observations himself, the evidence would have been competent; but the respondent was entitled to have the testimony of Baldwin, or the assistant who took the observations and made the record of the same, and to be confronted with such witness." That the court was also of opinion that a certified copy of this record would not be admissible, because the facts could be otherwise proved, also appears, for the learned judge further says: "This official statement or record of the weather, though required to be kept, and therefore an official document, is not, however, a record of facts which can only be proved by the original, or a properly certified copy. The facts therein stated are facts open to the observation of anybody, and capable of being established satisfactorily by oral testimony, or minutes kept by a private person, if such minutes refresh his recollection. The record ought not to have been introduced in evidence without the presence of the man who made

the observations and the record, on the stand, so that the accuracy of such record could have been inquired into."

In *United States v. Swan*, 7 N. M. 306, 34 Pac. 533, it was held that Revised Statutes, section 4046, providing that on trial for an indictment for embezzlement of money order funds a transcript from the money order account-books of the sixth auditor should be prima facie evidence of a balance due, is not in violation of the sixth amendment to the federal constitution guaranteeing the accused in all criminal cases the right to be confronted by the witnesses against him. "Documentary evidence," said the court in this case, "when pertinent and material, may be as competent upon the trial of criminal as upon the trial of civil cases. . . . Were such not the case, the conviction and punishment of many guilty persons, especially if public officers, would often be impracticable."

And where defendant was on trial for the forgery of a deed purported to have been signed by one G., it was not error to admit as evidence for the state an original entry in a record-book of the general land office, for the purpose of showing that the land agency firm of which the defendant was a member made application (anterior to the alleged date of the forgery) for a copy of the original title granted to G. It was not incumbent on the state to confront the defendant with the person who made the original entry upon the record-book: *Rogers v. State*, 11 Tex. App. 608.

Also in a prosecution for burglary where defendant proved the statement of his deceased mother as to his age, and the state contradicted it by offering in evidence a school census containing a record of the ages of the children of defendant's father, who testified that the signature of the record was that of his deceased wife, it was not in violation of the constitutional right of the accused to be confronted with the witnesses against him: *McAnally v. State* (Tex. Cr. App.), 73 S. W. 404.

But on a trial for murder, where a controversy arose over occurrences which took place between the state's attorney and witnesses in the attorney's office, the facts could not be shown by *ex parte* affidavits, but defendant was entitled to be confronted by those witnesses and to cross-examine them: *Wilburn v. State* (Tex. Cr. App.), 77 S. W. 3.

And the rule that an accused shall have the right to be confronted by the witnesses against him does not preclude evidence in its nature purely and essentially documentary is upheld by the federal courts: *United States v. Liddle*, Fed. Cas. No. 15,598, 2 Wash. C. C. 205; *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. Rep. 854, 34 L. ed. 222.

A. Notarial Certificates.—We find but two cases where the question has been directly adjudicated whether the admission of a notarial certificate on the part of the state, in a criminal case, is an infringement of the accused's constitutional right to be confronted by the witnesses, and these two decisions are conflicting. In the earlier case, *State v. Reidel*, 26 Iowa, 430, defendant was on trial for obtaining money under false pretenses, consisting in representations by defend-

ant that he had money on deposit in a bank in another state, upon which he drew drafts and placed them in the hands of a local bank to be forwarded for collection. It was squarely held that the notarial certificate of protest of the notary who protested the drafts thus drawn was not admissible in evidence, because the defendant had the constitutional right to be confronted with the witnesses against him. The reasoning given by the court for this holding is that a certificate of protest is not conclusive proof that the drawer had no funds in the drawee bank—a fact essential to be proved in order to convict the defendant; while in a civil case the drawer and indorsers would be liable if a bill is dishonored and notice given whether the drawer had or had not funds in the drawee's hands.

The other case is that of *May v. State*, 15 Tex. App. 430, where the statutory offense for which the defendant was on trial was designated as "swindling," but the facts constituting the alleged crime were the same as those in the *Reidel* case (26 Iowa, 430), namely, drawing and giving a draft upon a bank in which defendant had no funds. It was held that the certificate of protest of the notary who protested the draft was proper evidence against the defendant for the purpose of showing the protest, but for no other purpose. The court admitted that the certificate of protest was not conclusive proof of the fact that the drawees had no funds of the defendant in their hands, and that the jury probably considered it proof of this important fact, still it was of opinion that the fact that the draft was protested was a circumstance to be weighed by the jury, in connection with the other facts in the case, and such evidence did not infringe the defendant's constitutional right to be confronted by the witnesses. The court was of the further opinion, however, that the jury should have been instructed as to the limited purpose for which the draft was admissible as evidence, and the trial judge having failed to do this, the judgment of conviction was reversed.

B. Affidavits in Proceedings for Criminal Contempt.—A conviction for a criminal contempt, based on affidavits, is not a deprivation of the constitutional privilege of the respondent to meet the witnesses face to face: *O'Neil v. People*, 113 Ill. App. 195; and to same effect is *State v. Mitchell*, 3 S. D. 223, 52 N. W. 1052.

C. Record Proof of Marriage.—The question has often arisen in prosecutions for bigamy whether record proof of the former marriage could be introduced by the state without violating the constitutional privilege of the accused to meet the witnesses against him face to face. According to the decided weight of authority, record proof of the marriage in such cases is competent and admissible and does not violate any constitutional guaranty of the accused: *Tucker v. People*, 122 Ill. 583, 13 N. E. 809; *Sokol v. People*, 212 Ill. 238, 72 N. E. 382; *State v. Mablock*, 70 Iowa, 229, 30 N. W. 495; *Patterson v. State*, 17 Tex. App. 102. In the last case the question was, whether a copy of the certificate of a marriage solemnized in another state could be admitted against the defendant on trial for bigamy in the state of

Texas. It was held that where a certificate of marriage is required to be registered, and is properly registered under the state law where the marriage is solemnized, so that it can be authenticated as an exemplification of a record to another state, under the act of Congress when thus authenticated it is admissible as other documentary evidence would be.

The supreme court of Michigan, though holding, as we have seen, that the constitutional privilege of an accused to be confronted by the witnesses is not infringed by the use of evidence which is in its nature essentially and purely documentary, and can only be proved by the original or an officially certified copy, does not seem willing to extend this rule to record proofs of marriage. The question first came before this court in *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49. The defendant was on trial for bigamy. The second marriage was proved to have taken place in Michigan, and the trial court admitted as evidence a certificate from New Jersey of the first marriage. The supreme court said: "The certificate of marriage, even if the law of New Jersey had been proved, was improperly admitted in evidence. Without deciding whether the act of Congress can be made to apply to such documents at all, we can discover no ground upon which this certificate could be received in a criminal case. By the English law, a register of marriage is not a clergyman's certificate, but is signed by the parties in the presence of witnesses: 1 Russell on Crimes, 216. Proof of a register there is proof of the act of the party as much as proof of his signature to a deed would be. But a certificate merely signed by the minister, while it may perhaps avail in civil proceedings, if properly supported, cannot avail in criminal trials, where the defendant is entitled to confront the witnesses." This case in its material aspects is very similar to the case of *Patterson v. State*, 17 Tex. App. 102, and the Texas court in reaching a directly opposite conclusion criticised the ruling in this case, saying no authority had been cited by the Michigan court in support of its doctrine. That the supreme court of Michigan, however, adheres to the doctrine in the case of *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49, is quite apparent from the comparatively recent case of *People v. Goodrode*, 132 Mich. 542, 94 N. W. 14, where, speaking of the admissibility of marriage records in a prosecution for bigamy, the court refers to the decision in the case of *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49, with approval, and also gives an additional reason why in its opinion such records do not fall within the rule that documentary evidence is not precluded by the constitutional guaranty that an accused shall be confronted by the witness. The additional reason given is, that the fact of a marriage does not depend upon the existence of documents, but upon whether or not a marriage ceremony has been performed, and that "This could best be shown by the persons who are said to have been present as the contracting parties, the minister, or anyone else who might have been present."

2. Dying Declarations.—It has been so uniformly held that the constitutional right of an accused to confront the witnesses against

him is not impaired by the admission of dying declarations in homicide cases to show the circumstances of the death, that it is perhaps unnecessary to cite any authorities on this point, but we give a few where this doctrine is squarely announced: *Green v. State*, 66 Ala. 40, 41 Am. Rep. 744; *People v. Glenn*, 10 Cal. 32; *State v. Oliver*, 2 Houst. (Del.) 585; *Gardner v. State*, 55 Fla. 25, 45 South. 1028; *Jones v. State*, 130 Ga. 274, 60 S. E. 840; *State v. Nash*, 7 Iowa, 347; *Walston v. Commonwealth*, 16 B. Mon. (55 Ky.) 15; *Commonwealth v. Carey*, 66 Mass. (12 Cush.) 246; *Woodside v. State*, 2 How. (3 Miss.) 655; *McDaniel v. State*, 8 Smedes & M. (16 Miss.) 401, 47 Am. Dec. 93; *Robbins v. State*, 8 Ohio St. 131; *State v. Jeswell*, 22 R. I. 136, 46 Atl. 405; *Anthony v. State*, Meigs (19 Tenn.), 265, 33 Am. Dec. 143; *Taylor v. State*, 38 Tex. Cr. App. 552, 43 S. W. 1019; *Payne v. State*, 45 Tex. Cr. App. 564, 78 S. W. 934; *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. Rep. 50, 36 L. ed. 917; *Kirby v. United States*, 174 U. S. 47, 19 Sup. Ct. Rep. 574, 43 L. ed. 890. In the last case Mr. Justice Harlan, speaking for the court, said: "This exception was well established before the adoption of the constitution, and was not intended to be abrogated. The ground upon which such exception rests is that from the circumstances under which dying declarations are made, they are equivalent to the evidence of a living witness upon oath. The condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth."

In fact many of the decided cases do not countenance the view that dying declarations are admitted under any exception to the right of the accused to be confronted by the witnesses against him, but, on the contrary, hold that they are admissible because they were so at common law, and there is nothing in the constitutional provision to shut them out: *Walston v. Commonwealth*, 16 B. Mon. (55 Ky.) 15; *Woodside v. State*, 2 How. (3 Miss.) 655; *State v. Waldron*, 16 R. I. 191, 14 Atl. 847; *State v. Jeswell*, 22 R. I. 136, 46 Atl. 405; *Anthony v. State*, Meigs (19 Tenn.), 265, 33 Am. Dec. 143; *Taylor v. State*, 38 Tex. Cr. App. 552, 43 S. W. 1019; *Payne v. State*, 45 Tex. Cr. App. 564, 78 S. W. 934. In *Walston v. Commonwealth*, 16 B. Mon. (55 Ky.) 15, the court said: "The constitutional right of an accused to confront the witnesses against him is not impaired by this rule of evidence. The person who testifies to the dying declarations is the witness against the accused; and it is only by failing to discriminate between the witness and the testimony which he gives that the constitutional objection assumes the appearance of plausibility. The constitution does not alter the rules of evidence, or determine what shall be admissible testimony against the prisoner, but it only secures to him the right to confront the witnesses who may be introduced to prove such matters as, according to the settled principles of law, are evidence against him. . . . The law determines the admissibility of testimony—the constitution secures to the accused the right to meet the witness who deposes face to face. But what the witness,

thus confronted, shall be allowed to state as evidence, the constitution does not undertake to prescribe, but leaves it to be regulated by the general principles of the law of evidence. When the declarations of the deceased are offered to the jury, they constitute facts in legal contemplation, which tend to establish the truth of the matter to which they relate. The position, therefore, that their admission as evidence infringes upon the right of the prisoner to confront the witnesses against him is wholly without foundation, and cannot be maintained."

e. Statement as to What Absent Witness will Testify.—The admission, against a prisoner's consent, of a written statement as to what absent state's witness would prove is a violation of his constitutional right to be confronted by the witnesses against him: *Wills v. State*, 73 Ala. 362; and to same effect is *Dominges v. State*, 7 Smedes & M. (15 Miss.) 475, 45 Am. Dec. 315. And in *People v. Diaz*, 6 Cal. 248, it was held that it is the constitutional right of the accused to have his witnesses orally examined in court, and to confront them with those called to impeach their testimony; and this right cannot be frittered away by the admission of a statement as to what the witnesses will testify to, and this though the witnesses be his own. This decision arose over a refusal of the trial court to grant a continuance on account of the absence of a witness for defendant where the state's attorney was willing to admit that the absent witness would testify as set forth in the defendant's affidavit for the continuance. And upon this question, whether a defendant's constitutional right to be confronted by the witnesses is infringed by forcing him to trial in the absence of one of his witnesses when the state's attorney admits he will testify as claimed, is not entirely free from doubt. We have already seen that in *Petty v. State*, 4 Lea (72 Tenn.), 326, it was held that the constitutional provision relating to the right of an accused to be confronted by the witnesses referred only to the witnesses for the prosecution and not to those for the defense.

And, too, the supreme court of Kentucky have held that the provisions of the Criminal Code authorizing the state, on an application by defendant for a continuance on the ground of absent witnesses, to force trial by agreeing that the witnesses, if present, would testify as stated in the affidavits—such statements being read to the jury—are not in violation of the constitutional rights of defendant to meet the witnesses face to face: *Davis v. Commonwealth*, 25 Ky. Law Rep. 1426, 77 S. W. 1101.

This question also came before the supreme court of Louisiana in *State v. Pruett*, 49 La. Ann. 283, 21 South. 842, where it was contended that Act No. 84 of 1894, providing that the state may coerce a trial by making the admission that, if the witness named in an affidavit for continuance were present, he would testify to the truth of the statement contained therein, was in conflict with the constitutional guaranty that the accused shall be confronted with the witnesses against him. But as the case was disposed of on other grounds, the supreme court refused to pass upon the constitutionality of the

statute, but said: "We content ourselves with saying for the present that the law is, at least, in derogation of common right, and that recourse to it should be avoided, if possible." In the latter part of the same year, however, it became necessary for the court to pass squarely upon the question whether this act was or was not in conflict with the constitutional right of an accused to be confronted by the witnesses; and it was held that the act was not unconstitutional: *State v. Lee*, 50 La. Ann. 9, 22 South. 954.

f. Testimony at Preliminary Examination, Former Trial or in Other Proceedings.

1. In General.—The question of the admissibility in criminal cases of the evidence of an absent witness who has testified at a preliminary examination or former trial of the same offense, is treated at some length in a note appended to *Cline v. State*, 61 Am. St. Rep. 886, and all the earlier cases bearing upon the question will be found there collected. By reference to that note it will be seen that the mere absence of a witness from a criminal trial who has testified at a preliminary examination or former trial is not sufficient ground to admit the testimony which he gave at the preliminary examination or former trial of the same offense, provided it is not shown that he is beyond the jurisdiction, or his absence was not procured through the connivance of the accused. There are no later cases which dispute this general rule, but, on the contrary, it was most strongly sanctioned by the supreme court of the United States in the comparatively recent case of *Motes v. United States*, 178 U. S. 458, 20 Sup. Ct. Rep. 993, 44 L. ed. 1150. In this case a witness for the United States who had been committed to bail was allowed by an official agent of the United States to leave the jail, after the trial had commenced, and spend a night at a hotel with his family, in charge of one of the government witnesses. When called as a witness he failed to respond, and it was then shown that some time previously, but on the same day, he had absconded, and though telegrams had been sent to several places and diligent search made in the city and the county where the trial was had, no trace of his whereabouts could be gotten. It was held that a written statement of the testimony the absent witness had given at the preliminary examination of the accused could not be admitted without violating defendant's constitutional right to be confronted by the witnesses, since it did not appear that the witness had absented himself from the trial at the instance, by the procurement or with the assent of the accused, nor that he was permanently beyond the jurisdiction of the court.

A relaxation, however, of the general rule that the testimony of an absent witness given at the preliminary examination cannot be admitted if the witness is within the jurisdiction of the court and his absence was not procured by the accused is recognized, where the absent witness is in such a state, mentally or physically, either by reason of sickness or insanity, that in all reasonable probability he would never be able to attend the trial. In such cases his testimony

given at the preliminary examination is admissible, notwithstanding the constitutional provision guaranteeing an accused the right to meet the witnesses against him face to face: *Spencer v. State*, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462. But the decision in this case clearly recognizes that the mere temporary illness or disability of the witness would not be sufficient to justify the reception of his former evidence, and is not, therefore, in conflict with the cases on that point cited in the former note to which we have referred. But it is in direct conflict with the case there cited of *State v. Staples*, 47 N. H. 113, 90 Am. Dec. 565, where it was held that the evidence given on a previous trial of a witness who was sick at the time of the last trial could not be received, and that in no case was such evidence admissible if the witness was living; and also of the cases of *Commonwealth v. McKenna*, 158 Mass. 207, 33 N. E. 389; *State v. Houser*, 26 Mo. 431, and *United States v. Augell*, 11 Fed. 34, which lay down the same rule as the *Staples* case.

The reasons given by the court in *Spencer v. State*, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, for its decision are thus stated: "The accused has met the witness face to face. He has had the opportunity to cross-examine. The witness is to all intents and purposes dead. Why should not the evidence already given be admitted for the same reason that it would be admitted if the witness were in fact physically dead? We see no logical ground of distinction. It is true that there is a remote possibility that the court may be imposed upon by a feigned illness; but, on the other hand, there is far more danger that justice may miscarry or fail entirely if the testimony be excluded. The evidence of the sick or insane witness may be absolutely essential to conviction, and he may linger along for years until other essential evidence has disappeared, and thus a serious crime may go unpunished."

Another exception to the rule seems to have been recognized by the supreme court of Michigan in *People v. Case*, 105 Mich. 92, 62 N. W. 1017, where it was held that, where a witness in a prosecution for keeping a saloon open on Sunday was required by law to be called by the people, and was apparently unwilling to testify, it was proper to allow the prosecution to use as a basis of interrogation statements subscribed and sworn to by the witness on the preliminary hearing of the case. It is true the witness in this case was present, and his former testimony was not received as proof of substantive facts, but merely as a basis of interrogation; still the court permitted the former testimony to be read to the jury because of the apparent unwillingness of the witness to tell the truth, and it is to be inferred that if this unwillingness of the witness had caused him to absent himself from the trial, there would have been even stronger reason, according to this opinion, to have admitted the former testimony. The court said that the constitutional right of the accused to be confronted by the witnesses was not violated because he had been given that opportunity on the preliminary examination. We have observed no other case like this one, and it may not be regarded by all, under the

circumstances, as upholding any exception to the general rule, but we have thought it best to give it for what it is worth.

2. Where Absent Witness is Beyond the Jurisdiction.

A. In General.—It was shown in the former note to which we have referred that though there was some conflict among the cases, the great weight of authority established the doctrine that the testimony of a witness who was examined on the former trial of a criminal charge, or on the preliminary examination thereof, an opportunity to cross-examine being afforded to the accused, is admissible on the subsequent trial, on proof that the witness is beyond the jurisdiction of the court; and this rule is amply upheld by the later cases: *Butter v. State*, 83 Ark. 272, 103 S. W. 382; *State v. Nelson*, 68 Kan. 566, 75 Pac. 505; *State v. Harmon*, 70 Kan. 476, 78 Pac. 805; *State v. Kline*, 109 La. 603, 33 South. 618; affirmed in *West v. State of Louisiana*, 294 U. S. 258, 24 Sup. Ct. Rep. 650, 48 L. ed. 965; *State v. Banks*, 111 La. 22, 35 South. 370; *State v. King*, 24 Utah, 482, 91 Am. St. Rep. 808, 68 Pac. 418.

The rule in California on this subject is somewhat peculiar. In *State v. Devine*, 46 Cal. 46, it was held that in a criminal case proof may be introduced of what a witness testified on a former trial, if such witness has left the state; and this was undoubtedly the rule sanctioned in this state before the adoption of the codes. But it is now held that since the adoption of section 686 of the Penal Code, providing that a defendant shall have the right to confront the witnesses against him, except in those cases where the charge has been preliminarily examined by a committing magistrate, and testimony taken down in the presence of defendant, restricts the right of the prosecution to evidence given on a preliminary examination, and therefore the state cannot introduce the evidence of an absent or even a deceased witness, which was taken on a former trial of the case: *People v. Bird*, 132 Cal. 261, 64 Pac. 259.

But the right of the state to introduce the testimony given by a witness on the preliminary examination, when such witness is out of the jurisdiction at the trial, is still fully upheld, and the statute allowing the admission in evidence at the trial of reporter's notes of the testimony taken at the preliminary examination of the defendant is constitutional: *People v. Plylen*, 126 Cal. 379, 58 Pac. 904.

B. Where Witness is Absent by Procurement of Accused.—The cases cited in our former note (61 Am. St. Rep. 886) establish the rule that no constitutional right of an accused is violated by the admission of secondary evidence of the testimony given by a witness on the former trial or preliminary examination of the same charge against him, where the absence of such witness was procured by the defendant. This rule is manifestly founded on the legal aphorism that no man should be allowed to take advantage of his own wrong, and none of the late cases are in conflict with those heretofore cited.

3. When the Witness is Dead.—It was shown in the note to *Cline v. State*, 61 Am. St. Rep. 886, that whatever differences may have

formerly existed, the rule is now too well settled to require any discussion that no constitutional right of an accused is invaded by admitting the testimony of a witness since deceased, given under oath in a criminal proceeding authorized by law, where the defendant had the opportunity of a cross-examination against him in any subsequent trial of the same case. A formidable array of authorities from nearly all the states, as well as from the federal courts, in support of this rule was cited in that note; and the doctrine seems to be so well established that its correctness has not been questioned in many of the later cases. Wherever it has been raised, however, it has been held, with one or two notable exceptions, that such testimony is not in violation of any constitutional right of an accused: *People v. Elliott*, 73 N. Y. Supp. 279, 66 App. Div. 179; affirmed 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318; *State v. Walton (Or.)*, 99 Pac. 431; *Porch v. State*, 51 Tex. Cr. 7, 99 S. W. 1122.

One of the cases opposed to this rule, in so far as it applies to the testimony of a witness since deceased, given on a former trial, is that of *People v. Bird*, 132 Cal. 261, 64 Pac. 259; but this decision, as we have seen, was based upon a statutory provision limiting the right of the state to introduce only the evidence of such a witness given in the preliminary examination. And the court in this case seemed to have questioned the wisdom of the legislature in thus modifying the common-law rule, but gave the statute such construction as its language required.

The other case is that of *Cline v. Case*, 36 Tex. Cr. 320, 61 Am. St. Rep. 850, 36 S. W. 1099, 37 S. W. 722, where, after a lengthy discussion of the principle involved, it was squarely held that the evidence of a witness on the examining trial (since deceased) could not be received on the trial of the action, because it violated the constitutional right of the accused to be confronted by the witnesses.

The unsoundness of this decision, however, both historically and philosophically, is shown in the very able dissenting opinion by Judge Henderson (61 Am. St. Rep. 873), and in the former note appended thereto (61 Am. St. Rep. 886). Moreover, the decision in this case (which overruled all former decisions in that state) has recently been repudiated by the same court: *Porch v. State*, 51 Tex. Cr. 7, 99 S. W. 1122.

g. Trial in the Absence of Accused.—There is no conflict of judicial opinion on the general proposition that under the constitutional right of an accused to be confronted by the witnesses against him, he has the right to be present at every stage of his trial. Nevertheless a statute which provides that a defendant on trial for a felony must be present at the trial, but that if he escapes from custody after commencement of the trial, or "if on bail shall absent himself during the trial," the trial may progress to a verdict, does not violate the constitutional right of the accused to be confronted by the witnesses, since the defendant himself by absconding refuses to be confronted: *Gore v. State*, 52 Ark. 285, 12 S. W. 564, 58 L. R. A.

§32. And to same effect is *Collier v. Commonwealth*, 22 Ky. Law Rep. 1929, 110 Ky. 516, 62 S. W. 4.

And the fact that defendant in a trial for murder was absent from the courtroom when evidence already given was read over to the jury at their request, after they had retired to make up their verdict, does not violate the constitutional right of the defendant to meet the witnesses against him face to face: *State v. Haines*, 36 S. C. 504, 15 S. E. 555. In this case, after the jury had retired to make up their verdict, the defendant's attorney, fearing violence might be offered to defendant if a verdict of acquittal was rendered, requested the presiding judge to allow the sheriff to carry the defendant back to jail, not again to appear in the courtroom until after the verdict had been announced. This request was granted. While the defendant was thus absent from the courtroom the jury came into court, and, at their request, and in the presence of defendant's counsel, the court permitted the stenographer to read to the jury the testimony of four witnesses for the state. Counsel for defendant did not object to this at the time, but most urgently insisted before the supreme court that the reading over of such testimony in the absence of the accused was in violation of his constitutional rights. In denying this contention Judge Pape, speaking for the court, after saying that the question presented demanded very careful consideration and more than ordinary care, continued: "Unquestionably it is the law that a prisoner on trial for crime, except misdemeanors, shall be present at his trial. No step, original in its nature, should occur in the prisoner's absence from the courtroom. No juror can be sworn in his absence. No witness can testify in his absence. No new charge from the judge can be given. No step, in fact, which is original in its character. But after the jury has been impaneled; after the testimony has been fully given; after the arguments of counsel are heard; after the judge has charged the jury; and after the jury have retired to make up their verdict,—after all these things, if the jury should desire the testimony, or any part thereof, read from the stenographer's notes, or even to have the stenographer to read from his notes the judge's charge, and this should occur in the absence of the prisoner from the courtroom, it not being original in its character, but merely a repetition of what was original in its character when offered, cannot operate to vitiate the trial."

Likewise, under the provisions of the New York Code of Criminal Procedure, section 356, trial of a misdemeanor may be had in the absence of the defendant, if he appear by counsel, notwithstanding the provision of section 8, that the defendant in criminal actions is entitled to be confronted by the witnesses against him, since he may by counsel waive this provision: *People v. Welsh*, 84 N. Y. Supp. 703, 88 App. Div. 65, 14 N. Y. Ann. Cas. 124.

And in *Shifflett v. Commonwealth*, 90 Va. 386, 18 S. E. 838, it was held that when a defendant indicted for disturbing religious worship had been duly summoned to answer a prosecution for the offense, and fails to be present, it is no violation of his constitutional right to be

confronted by the witnesses against him, for the state to proceed with the trial in his absence and for the judge to sentence him to imprisonment. It does not appear in this case that the defendant was even represented by counsel, but the court said the defendants "were given the opportunity, as the statute requires, to appear and defend, and their choice not to appear, but to make default, was a waiver of the constitutional provision now relied on."

h. Taking Testimony Through Interpreter.—We have discovered but one case where the question has been raised whether the taking of testimony of a witness in a criminal case, who does not understand the English language, is an invasion of the defendant's constitutional right to be confronted by the witnesses. This contention was made by a defendant, on trial for robbery, in the case of *State v. Hamilton*, 42 La. Ann. 1204, 8 South. 304, but it was held that, where an interpreter has been appointed and duly sworn to interpret the testimony of a witness, who did not understand the English language, and there was no pretension that the interpreter was incompetent or unfaithful in interpreting the testimony, or that the interpretation was not correct, the defendant has no cause of complaint on this ground.

II. Waiver of Right.

a. In General.—The authorities are practically uniform on the proposition that the constitutional right of an accused to be confronted by the witnesses against him is a personal privilege, which the defendant can waive: *Rosenbaum v. State*, 33 Ala. 354; *Wells v. State* (Ark.), 16 S. W. 577; *People v. Bird*, 132 Cal. 261, 64 Pac. 259; *Shuler v. State*, 105 Ind. 289, 55 Am. Rep. 211, 4 N. E. 870; *State v. Polson*, 29 Iowa, 133; *State v. Olds*, 106 Iowa, 110, 76 N. W. 644; *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305; *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131; *Wrightman v. People*, 67 Barb. (N. Y.) 44; *State v. Bowker*, 26 Or. 309, 38 Pac. 124; *Hancock v. State*, 14 Tex. App. 392; *Allen v. State*, 16 Tex. App. 237; *Odell v. State*, 44 Tex. Cr. 307, 70 S. W. 964; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633; *Williams v. State*, 61 Wis. 281, 21 N. W. 56. And the same rule prevails in North Carolina, except as to capital felonies: *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783, 1020. In other jurisdictions, however, the right of waiver is not restricted to cases other than capital felonies. In *Perteet v. People*, 70 Ill. 171, it was said: "A prisoner, in a capital case, is not to be presumed to waive any of his rights, but that he may, by express consent, admit them all away can be neither doubted nor denied. He may certainly plead guilty, and thus deprive himself of one of the most valuable rights secured to the citizen—that of a trial by jury. If he can expressly admit away the whole case, then it follows that he can admit away part of it, but will not be presumed to have done so. The consent must be expressly shown."

The cases which uphold the right of an accused to waive confrontation of the witnesses are based upon the theory that the constitution only secures him the right to be confronted if he so desires, but does

not compel him to be,—that it is only a personal privilege accorded the accused, and does not amount to a jurisdictional limitation upon the power of the court, nor is of the essence of a valid conviction or judgment.

The case of *State v. Polson*, 29 Iowa, 133, is regarded as a leading case on the doctrine that a defendant in any criminal case can waive his constitutional right to be confronted by the witnesses against him. Speaking of the constitutional provision guaranteeing this right, the court in this case said: "It will be observed that the right secured by this provision to the accused to be confronted with the witnesses against him is a personal right limited to proceedings in criminal prosecutions, or where life or liberty of the citizen is involved. The provision is not in the nature of an inhibition upon a proceeding not in accord with the one secured. Neither is it in the nature of a jurisdictional limitation upon the authority of the court prohibiting the exercise of power except in the manner specified. It simply secures a personal right, and in no manner affects the jurisdiction of the court when prosecutions are tried. It very clearly appears that this right in proper cases, where no wrong can be done the accused, may be by him voluntarily waived."

Again, the right of an accused to waive the benefit of constitutional provisions is thus stated by the supreme court of New Hampshire: "The benefit of statutory and constitutional provisions, both in civil and criminal jurisprudence, may be waived by a party interested. A person ought not to be heard to complain of that to which he has consented. For instance, he may not object to the grand jury after he has pleaded to the indictment; nor challenge a petit juror for a known cause after verdict; nor object after a trial that a copy of the indictment was not furnished him when the statute requires it; nor that inadmissible evidence was received without objection; nor that the jury separated after verdict with his consent. . . . The cross-examination of a prisoner who volunteers himself as a witness is permissible, because by electing to testify he subjects himself to the scrutiny of a cross-examination, and consents to waive the constitutional provision that no subject shall be compelled to accuse or furnish evidence against himself": *State v. Albee*, 61 N. H. 423, 60 Am. Rep. 325.

Speaking of the right of a defendant in a capital case to waive confrontation of a witness against him, the supreme court of Utah said: "It is a personal right, a personal privilege of which every defendant in a criminal proceeding may avail himself. It is limited to criminal prosecutions, and in no way affects the jurisdiction of the court to try the cause or to pass a valid judgment. Nor is the provision which secures to the accused the right in the nature of an inhibition upon a proceeding not authorized by law. Nor is it in the nature of a limitation restraining the court from exercising its power in a place or manner prohibited by law, or without its jurisdictional limits. It is not very unlike which everyone accused of, and being prosecuted for, a crime has to plead guilty and thereby waive the production of any

evidence by the prosecution, and surely all agree that in such case, where a plea of guilty is entered, a court of competent jurisdiction has power to pass judgment and authorize the penalties of the law to be executed": *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633.

b. How Waiver may be Made.—The constitutional right of an accused to be confronted by the witnesses against him may be waived either (1) by express consent, (2) by failure to assert it in apt time, or (3) by conduct inconsistent with a purpose to insist upon it: *State v. Mitchell*, 119 N. C. 874, 25 S. E. 873, 1020.

As to the last of these, we have already seen that when a criminal absconds or voluntarily absents himself from the courtroom during the trial, or procures the absence of a state's witness, he cannot afterward raise the objection that his constitutional privilege of confrontation has been violated. What constitutes waiver under the other two ways suggested will appear from the following illustrations.

c. Illustrations Showing What Constitutes Waiver.

1. By Express Consent.—There is no conflict of authority over the proposition that, when a defendant in a criminal case expressly consents that secondary evidence of the testimony of a witness may be used against him on the trial, he thereby waives his constitutional right of confrontation by such witness. This doctrine will hereafter be seen running through all the cases. And in determining what amounts to such consent in any particular case, no distinction has generally been made by the courts between admissions or stipulations made by the defendant himself and those made by his counsel. In fact, in nearly all the cases where there has been any contention over the question whether a defendant had waived his constitutional right of confrontation, the admission or stipulation which was the basis for the alleged claim of waiver is spoken of as having been made by the defense, and it is only by careful reading of the opinion that it can be discovered whether it was made by the defendant himself or by his attorneys. In one state, at least, however, this is a question of the utmost importance, as we shall presently see. But, according to the great weight of authority, an agreement or stipulation made by counsel for an accused, in reference to a waiver of the defendant's right of confrontation, has the same effect as if made by the defendant himself.

Thus in *Rosenbaum v. State*, 33 Ala. 354, defendant was on trial for assault and battery. A deposition taken in a civil suit between the defendant and the person on whom the assault was charged to have been committed was offered in evidence for the prosecution, and objected to by the defendant. It appeared that the attorneys for the defendant had entered into a written agreement with the prosecuting attorney that the deposition could be read as evidence on the trial. It was held that the defendant had waived his right to be confronted by the witness, and that the deposition was properly admitted, the court saying: "We think that well-settled principles of law, as well as sound policy, require us to give an agreement of counsel, as to the

conduct of trials in court, the same binding efficacy as if the agreement had been made by the party"; but added that when such admissions or agreements appeared to have been made improvidently or through mistake, the court would relieve against them by means of its coercive power over its own officers.

Likewise, in *State v. Fooks*, 65 Iowa, 452, 21 N. W. 773, in a prosecution for obtaining money by false pretenses, a written statement of an absent witness for the state was read to the jury by the prosecuting attorney, under an agreement made by him with the attorney for the defense that such statement could be read. It was held this was a waiver of the presence of the witness; and to same effect is *State v. Willford*, 111 Mo. App. 668, 86 S. W. 570, where, on a trial for embezzlement, the testimony introduced on a former trial of defendant was introduced against him in accordance with an agreement between his counsel and the prosecuting attorney.

In *United States v. Sacramento*, 2 Mont. 239, 25 Am. Rep. 742, which was a prosecution under the act of Congress for selling spirituous liquor to Indians, the United States attorney moved the court, upon affidavit, for a continuance upon the ground of the absence of two material witnesses for the government. The defendant's attorney, in open court, then offered to admit that the witnesses named in the affidavit would, if present in court, testify to the facts set forth in said affidavit. The motion for continuance was denied, and upon the trial the prosecution offered to read the affidavit for continuance, to which the defendant and his counsel objected, as violating defendant's right to be confronted by the witness. In overruling this contention the court said: "The counsel for the appellant insists that his admission, relative to the affidavit for a continuance, extended only to the belief of the affiant that the absent witnesses would testify as therein set forth. This seems to be more of a technical than a real or legal objection. The admission was that the witnesses named in the affidavit, if present, would testify to the facts as stated in the affidavit, which, if uncontroverted, would have warranted a conviction. . . . Therefore, the admission was a waiver, by the appellant, of his constitutional right to be confronted by the witnesses against him." And to same effect is *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633, where the defendant was on trial for a capital offense.

And with respect to admissions which constitute a waiver of defendant's right of confrontation in a criminal case, it does not seem to make any difference whether the attorney for the defendant who makes such admission is one who has been selected by the defendant or appointed to represent him by the court. This question was considered in the case of *People v. Murray*, 52 Mich. 288, 17 N. W. 843, where the defendant was convicted of murder. Certain depositions in behalf of both the state and the accused, taken out of court, of witnesses not present at the trial were read to the jury without objection, under a stipulation made between the prosecuting attorney and the attorney for the defendant who had been appointed by the court to defend him. The question as to the admissibility of these

depositions was first raised on appeal, when it was urgently insisted their admission was a violation of defendant's constitutional right to be confronted by the witnesses against him. It was held by a majority of the court that this right had been waived. In a very learned dissenting opinion, however, Judge Sherwood vigorously attacks the decision of the majority, and his exhaustive review of the constitutional right of an accused to be confronted by the witnesses against him, and the care with which the courts should guard that right in the interest of public policy, will be found both interesting and instructive.

However, in the comparatively recent case of *Ruiz v. Territory*, 10 N. M. 120, 61 Pac. 126, the defendant, on trial for a capital offense, was held to have waived his constitutional right to be confronted by an absent witness for the territory, and to have authorized the introduction in evidence of a statement made by such witness, where the attorney appointed by the court to defend him admitted in open court that the witness, if present, would testify to the facts contained in such statement, notwithstanding this admission was made subject to the objection that the defendant was "entitled to his presence in court." This case, however, can hardly be considered as squarely holding that an attorney appointed by the court to defend a prisoner can waive the defendant's right of confrontation under all circumstances, for it was said in the opinion that the evidence admitted was favorable rather than unfavorable to the accused, and that if any error was committed at all, it would be harmless and not reversible.

A notable exception to the doctrine advocated in the foregoing cases is found in Texas. The courts of that state, as we have seen, clearly uphold the right of a defendant in a criminal case to waive his constitutional right of confrontation, but they are squarely opposed to the doctrine that this right may be waived by any admission or stipulation of his counsel.

In *Bell v. State*, 2 Tex. App. 215, 28 Am. Rep. 429, the defendant was convicted of burglary. The court had permitted the state to introduce in evidence the written statement of an absent witness, with the agreement therein of the defendant's attorney that it should be read upon the trial against the defendant. This was held a violation of the constitutional right of the defendant to "be confronted with the witnesses against him," and the judgment of conviction was accordingly reversed. Said the court: "While, as a general rule, much latitude is allowed an attorney for the defendant in the management and control of the cause of his client, we do not believe that, in a case involving the life or liberty of his client, an attorney at law is authorized to make such an agreement as the one we are now discussing, which would be binding on his client. The law does not, and should not, sanction such a rule of practice, the effect of which would be to deprive the defendant on his trial of that great constitutional privilege, so essential to liberty and free government, of being

confronted by the witnesses against him and the benefit of a cross-examination."

And in the more recent case of *Allen v. State*, 16 Tex. App. 237, speaking of the statutory provision (Code Crim. Proc., art. 23), that, "The defendant to a criminal prosecution for any offense may waive any right secured to him by law except the right of trial by jury in a felony case," the court said: "Such an agreement to be binding must be made by the defendant himself."

2. By Failure to Assert the Right in Apt Time.—It seems to be the general rule that if a defendant in a criminal case fails to exercise his right at the proper time to insist upon his constitutional privilege of confrontation, that he will be deemed to have waived it. Thus, where accused consents that the testimony of one who testified against him on a former trial and was cross-examined by his counsel may be read to the jury on a subsequent trial, he cannot object that he does not meet the witnesses face to face as provided by the constitution: *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250.

And where the defendant accepts a right to take depositions in a foreign jurisdiction, under a statute requiring him to concede a like privilege to the state, he waives the constitutional privilege of being confronted by the witnesses: *Butler v. State*, 97 Ind. 378.

So, too, where the testimony of an absent witness was taken during the trial in the presence of defendant's counsel and the county attorney, with the consent of defendant, such testimony being afterward read to the jury without objection, defendant cannot subsequently complain that the testimony was taken in his absence: *State v. Minard*, 96 Iowa, 267, 65 N. W. 147.

Also, where upon the suggestion of the prosecuting attorney, in a criminal case, the defendant prepared and read to the jury an agreed statement of what an absent witness, who had been duly subpoenaed for the defendant would testify to, held a waiver of defendant's right to have the witness personally present: *State v. O'Connor*, 65 Mo. 374, 27 Am. Rep. 291.

In *Wells v. State* (Ark.), 165 S. W. 577, the defendant was on trial for murder. One of the state's witnesses was too ill to appear in court. The prosecuting attorney offered to read his testimony given at a former trial. To this the defendant objected, and insisted that the statement of the witness made before the examining magistrate which had been reduced to writing and signed by the witness in the presence of defendant should be read instead of his testimony at the former trial. This was done, but when the evidence was half read defendant objected to the reading without stating any ground. Held, that defendant had waived his right to be confronted by the witness.

DOZIER v. STATE.

[154 Ala. 83, 46 South. 9.]

SALE OF PERSONAL PROPERTY, Where Consummated—Interstate Commerce.—Where an order is taken and given for the enlargement of a photograph and is accompanied by an agreement for an appropriate frame, which the person giving the order is entitled to accept at the factory prices, and he does accept and pay for such frame, its sale is to be regarded as taking place in the state where the frame is so accepted and paid for, rather than in a state where the enlargement was made, and it does not constitute interstate commerce. (p. 53.)

CONSTITUTIONAL LAW—Interstate Commerce—Discrimination Against Nonresident, What is not.—A statute providing that each person who solicits orders for the enlargement of photographs or pictures or picture frames shall pay a license tax, but that the act shall not apply to merchants or dealers having a permanent place of business within the state and keeping picture frames as a part of their stock in trade, does not conflict with the federal constitution in discriminating against merchants residing without the state. (p. 53.)

BILL OF EXCEPTIONS, Construction of.—A bill of exceptions should be construed strongly against the party excepting. (p. 54.)

Prosecution and conviction under the statute of March, 1907, referred to in the opinion. The defendant was the agent of a corporation doing business in Chicago. He took an order for the enlargement of a picture or photograph. This order was accompanied by an agreement that the portrait was to be delivered in an appropriate frame, which the contract entitled the contracting party to accept at factory prices. The trial court gave a charge in favor of the state and refused one in favor of the defendant. He was thereafter convicted, and appealed.

Hill, Hill & Whiting, for the appellant.

Alexander M. Garber, attorney general, and Thomas W. Martin, assistant attorney general, for the state.

⁸⁶ DENSON, J. Section 17 of an act of the legislature approved March 7, 1907, and entitled "An act to further amend the revenue laws of the state of Alabama," reads as follows:

"Sec. 17. That each person, firm, or corporation either in person or through agents, who solicits orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they make charge for such frames or not, or any person, firm or corporation either in person or through agents, who sells or disposes of picture frames, shall pay a license tax of twenty-five dollars in each county in

which they do business; that this act shall not apply to merchants or dealers having a permanent place of business in this state and keeping picture frames as a part or all of their stock in trade": Acts 1907, p. 469.

⁸⁷ The defendant was arrested under a warrant issued on an affidavit sued out before a justice of the peace, charging him with a violation of this law; the warrant being made returnable to the county court of Montgomery county. The defendant was tried in said court, and convicted, and from the judgment of conviction he appealed to the city court of Montgomery. In the city court the solicitor filed a complaint, which is in the following language: "The state of Alabama, by its solicitor, complains of Alfred Dozier that within twelve months before the commencement of this prosecution he did engage in or carry on the business of soliciting orders for the enlargement of photographs or of selling and disposing of picture frames without a license and contrary to law, against the peace and dignity of the state of Alabama. S. H. Dent, Jr., Solicitor." From a judgment of conviction rendered by the city court, this appeal is taken.

The cause was tried on an agreed statement of facts, which is fully set out in the record. It is conceded that the defendant cannot be convicted for delivering the pictures, because the taking of the orders therefor and the delivery in pursuance of the order contracts, in the manner shown by the statement of facts, is interstate commerce. But the insistence of the state is that the sale of the frames for the pictures was made and completed in Alabama, by the agent, after they came into the state, and while in possession of the agent, and, therefore, that the transactions in respect to the frames were not interstate, but intrastate, commerce, and that the conviction should be sustained under the latter alternative in the complaint.

The precise question presented by this insistence has never been passed upon by the supreme court of the United States, so far as we are advised. The cases decided by that court, which are cited and relied on by the ⁸⁸ appellant, show in the statement of the facts that the written contracts for the goods were made out and completed by the soliciting agent, with nothing remaining to be done by the delivering agent but to deliver the goods, as was the case in respect to the contracts for the pictures in the instant case. In other words, the contracts were completed, between the purchaser and the soliciting agent acting for the company, in such way as made them binding on both parties and of enforceable efficiency

by either party upon compliance with its terms: See brief of appellant's counsel for the cases. In the case in judgment it appears, from the statement of facts, that upon securing the orders for portraits (in form as shown by exhibit "A" to said statement), which orders are signed by the customer and witnessed by the agent, an agreement (in form as shown by exhibit "B" to said agreed statement of facts) is signed by the agent, acting for the company, and left with the customer, and a duplicate thereof is forwarded to the company in Chicago. Construing the two exhibits together, it seems to us clear of doubt that no sale was made by the soliciting agent of the frame. The purchaser is not bound by the terms of either of the exhibits to accept and pay for a frame, and the extent of the meaning of the two is that an opportunity will be afforded the purchaser, at the time the portrait is delivered, to purchase a suitable frame, so that the minds of seller and purchaser do not concur in the consummation of a sale contract, in respect to the frame, until the delivering agent has exhibited the frame, with its price, and the purchaser accepted it at that price. It is at that time the sale is consummated, and not before.

It is true that the supreme court of South Carolina (in the case of *State v. Coop*, reported in 52 S. C. 508, 30 S. E. 609, 41 L. R. A. 501, and *City of Laurens v. Elmore*, ⁸⁹ 55 S. C. 477, 33 S. E. 560, 45 L. R. A. 249) has decided the question contrary to the conclusion we here reach; and that Judge Speer, United States District Judge, in the case of *Chicago Portrait Company v. Mayor etc. of the City of Macon (C. C.)*, 147 Fed. 967, adopted the reasoning employed in the *Coop* case (52 S. C. 508, 30 S. E. 609, 41 L. R. A. 501), and reached the same conclusion as was arrived at in that case. But the United States district court is not a court of last resort; and we are not impressed nor persuaded by the reasoning employed by the South Carolina court, but prefer to accept and follow that of the supreme court of Maine in the case of *State v. Montgomery*, 92 Me. 433, 43 Atl. 13, and that of the supreme court of Georgia in the case of *Chrystal v. City of Macon*, 108 Ga. 27, 33 S. E. 810, in which cases the same conclusion was reached that we here announce. The sale of the frames in the manner and under the circumstances disclosed by this record did not constitute interstate commerce.

There is no merit in the contention that the law is in conflict with the federal constitution, in that it discriminates in favor of merchants having a permanent place of business

as against merchants residing without the state. It is too clear for argument that any merchant, whether he resides in the state or out of it, may be exempt from the license, provided he has a permanent place of business in the state and keeps picture frames as a part or all of his stock in trade. In other words, this condition or exception applies to all alike, whether residents or nonresidents, and there can be no discrimination where this is true.

Construing the bill of exceptions most strongly against the exceptor, as the rule requires shall be done (*McGehee v. State*, 52 Ala. 224), it must be held that the court committed no error in giving the general affirmative ⁹⁰ charge, with hypothesis, requested by the state, nor in refusing that requested by the defendant.

Affirmed.

Tyson, C. J., and Anderson and McClellan, JJ., concur.

The Question Whether a Statute Requiring Agents to Pay a License Tax amounts to an interference with interstate commerce is discussed in the recent cases of *Saulsbury v. State*, 43 Tex. Cr. 90, 96 Am. St. Rep. 837; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386; *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948; *Adkins v. Richmond*, 98 Va. 91, 81 Am. St. Rep. 705.

CITY COUNCIL OF MONTGOMERY v. WALKER.

[154 Ala. 242, 45 South. 586.]

JUDGMENT Against One Taxpayer, When Binding on Another.—Where a citizen and taxpayer files a petition in behalf of himself and other taxpayers against a city council to contest the validity of a law, every citizen must be regarded as a party to the proceedings, and bound by the judgment entered therein. (p. 56.)

C. P. McIntyre, for the appellant.

Wilson & Martin, for the appellee.

²⁴³ **SIMPSON, J.** This is a petition by the appellee, who is a citizen and taxpayer of the city of Montgomery, praying for a writ of mandamus to compel the city council of Montgomery to execute and put in force an act of the legislature approved February 18, 1903, entitled "An act to establish a board of commissioners of police for the city of Montgomery, Alabama," and forthwith elect members of the said board as provided by said act. Said act is found on page

12 of the Local Acts of 1903, and requires the city council, at their first regular meeting after November 1, 1903, to elect said police commissioners.

²⁴⁴ A plea of *res judicata* was interposed, based upon the following facts, to wit: In 1903 another taxpayer, G. A. Thomas, filed a similar petition in the city court of Montgomery, upon which said city court sustained a motion to quash the alternative writ of mandamus, and also sustained demurrers to the petition, on the ground that the act in question is unconstitutional. The case was appealed to this court, where the judgment of the city court was affirmed; the court holding that said act was unconstitutional: *Thomas v. City Council of Montgomery*, 140 Ala. 656, 35 South. 1025. This court based its decision on the previous case of *Little v. State*, 137 Ala. 659, 35 South. 134, which declared unconstitutional another act, relating to the city of Bessemer, which is similar to the act now in question. In a later case, wherein another act, creating a recorder's court in another city, was held to be constitutional, the case of *Little v. State*, 137 Ala. 659, 35 South. 134, was overruled; but the case of *Thomas v. City Council of Montgomery*, 140 Ala. 656, 35 South. 1025, has not been overruled *eo nomine*: *State v. Hubbard*, 148 Ala. 391, 41 South. 903. So the only question to be decided now is whether the case of *Thomas v. City Council of Montgomery*, 140 Ala. 656, 35 South. 1025, is *res judicata* as to this case.

The contention of the appellee is that the *Thomas* case is *res inter alios acta* as to the appellee. There is no controversy as to the general principle that a former adjudication is *res judicata* only as to the parties and their privies. So the question arises: Who were the parties in the *Thomas* case? The answer is: A citizen and taxpayer, who filed his petition in behalf of himself and every other taxpayer, on the one side, and the city council of Montgomery on the other side, which body also represents the great body of the people of said city. It is true that the machinery of the law is set in motion here by a different taxpayer; but the issues are the same, and ²⁴⁵ the interests involved are the same. The results of the proceedings, in each case, would operate for or against the citizen body of the city of Montgomery. It would seem, then, that there should be some limit to such proceedings. If, after the determination of such a question, any other citizen could inaugurate similar proceedings and relitigate the same questions, the matter would never be finally settled until every citizen in the city had haled the city council into court and thus kept them in continual litigation.

Accordingly, we find that the courts have decided, with considerable unanimity, that in these public matters, where proceedings are instituted by one taxpayer, for the benefit of himself and others, against the governing board of a municipality, to test the validity of a law, all of the citizens and taxpayers are parties in interest, and bound by the proceedings as fully as if they had been parties to the proceedings: Freeman on Judgments, 4th ed., sec. 178; 2 Van Fleet's Former Adjudication, secs. 569, 570; Clark v. Wolf, 29 Iowa, 197; State v. Chester, & L. R. R. Co., 13 S. C. 290; Lyman v. Faris, 53 Iowa, 498, 5 N. W. 621; Harmon v. Auditor, etc., 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161; Cannon v. Nelson, 83 Iowa, 242, 48 N. W. 1033; Ashton v. City of Rochester, 133 N. Y. 187, 28 Am. St. Rep. 619, 30 N. E. 965, 31 N. E. 334. In the last case cited the New York court of appeals states that if the question were open, the court would render a decision different from that which had been rendered by the supreme court, yet the judgment could not be questioned collaterally, and must stand as res judicata: 28 Am. St. Rep. 622, 623. For this court to inquire into the question as to whether the former decision was erroneous or not would be to destroy the doctrine of res judicata, which the wisdom of our laws has set up for the protection of the citizens.

246 The judgment of the court is reversed, and a judgment will be here rendered denying the writ of mandamus.

Tyson, C. J., and Haralson and Denson, JJ., concur.

The Question Whether Taxpayers are Bound by a Judgment for or against the municipality or its officers is considered in the notes to Henderson Co. v. Henderson Bridge Co., 105 Am. St. Rep. 213; People v. Holladay, 27 Am. St. Rep. 196. In a suit instituted by an individual to establish his title to and recover the possession of land claimed by a city as a public street, it is not necessary that both the city and the people of the state should be made parties to make the judgment binding upon the public. If the city is a party, the public is bound by the judgment: Healy v. Deering, 231 Ill. 423, 121 Am. St. Rep. 331.

HUFFSTUTLER v. LOUISVILLE PACKING COMPANY.

[154 Ala. 291, 45 South. 418.]

ACTIONS, Right to Dismiss or Discontinue.—One who institutes a civil action has the right to dismiss or discontinue it at any time before verdict. (p. 57.)

ACTIONS, Right to Dismiss not Affected by a Claim of Set-off.—Though the defendant has pleaded a setoff and introduced evidence in its support, the plaintiff may dismiss his action at any time before the verdict in the absence of any statute expressly taking away this right. (pp. 58, 59.)

B. M. Allen, for the appellant.

Von L. Thompson, for the appellee.

292 **ANDERSON, J.** The general rule is, where the plaintiff has instituted a civil action, he has the right to dismiss or discontinue at his own cost at any time before verdict. This practice has been adopted, even in those cases where the defendant has pleaded a setoff and introduced **293** evidence to sustain it: *Griel v. Loftin*, 65 Ala. 591; *Branham v. Brown's Admx.*, 1 Bail. (S. C.) 262; *Cummings v. Pruden*, 11 Mass. 206; *Waterman on Setoff*, 659, 660; *Breese v. Allen*, 12 Ind. 426; *Moore v. Bres*, 18 La. Ann. 483.

It is insisted by counsel for the appellant that the rule above declared is merely applicable to the common law, which does not authorize judgment over for the defendant when the cross-demand exceeds the plaintiff's claim; that our statutes authorize a judgment over for the defendant, upon pleas of setoff and recoupment; and that what was said in the case of *Griel v. Loftin*, 65 Ala. 591, was dictum. We concede that what was said in that case, on this subject, was dictum, as this question was not there involved; but the expression of the writer seems to be fortified by the weight of authority, and what was there said is applicable in jurisdictions where judgment over is provided, as well as under the common law: *Anderson v. Gregory*, 43 Conn. 61; *Merchants' Bank of Canada v. Schulenberg*, 54 Mich. 49, 19 N. W. 741. This Michigan case was by a divided court, and resulted in an affirmance of the doctrine that the plaintiff can dismiss his suit at any time before verdict, although the defendant claimed a judgment over, and was authorized, under the statute, to receive for said excess. The opinion which controlled in this case was rendered by Cooley, C. J., and as it deals with several authorities on the subject, including the case relied upon by appellant's counsel, of *Riley v. Carter*, 3 Humph. (Tenn.)

230, we quote at length: "In this case the defendant relied upon a setoff, which, he claimed, was larger than the plaintiff's demand, and he brings the case to this court, assigning for error the order of the circuit court permitting the plaintiff, notwithstanding his objection, to submit to a nonsuit. The general right of the plaintiff to discontinue ²⁹⁴ his suit or to submit to a nonsuit at any time before verdict is undoubted; and, in the absence of any statute taking away the right, it exists in the cases where setoff is relied upon to the same extent as in other cases. This is fully recognized in *Cummings v. Pruden*, 11 Mass. 206, and *Branham v. Brown's Admx.*, 1 Bail. (S. C.) 262. In several states statutes have been passed taking away the right; but we have no such statute. The fact that the statute of setoffs permits judgment to be taken by the defendant for the balance found due him does not preclude a discontinuance: *Cummings v. Pruden*, 11 Mass. 206. But it is said there are decisions to the contrary of these, and several are referred to. The Texas cases are not in point, as they are decided under the civil law, which does not prevail in this state: *Egery v. Power*, 5 Tex. 501; *Walcott v. Hendrick*, 6 Tex. 406; *Bradford v. Hamilton*, 7 Tex. 55. The case of *Francis v. Edwards*, 77 N. C. 271, was decided upon a construction of the Code of that state, and therefore has no bearing. In *Riley v. Carter*, 3 Humph. (Tenn.) 230, the defendant had obtained judgment for his setoff in justice's court, and the plaintiff removed the case to the circuit court by certiorari, and then, in that court, was given leave to dismiss his suit. This was palpable error, and the court so held; but we discover no analogy between that case and this. The defendant had his judgment, and, unless error was shown, had a right to retain it. The three New York cases of *Cockle v. Underwood*, 3 Duer (N. Y.), 676, *Rees v. Van Patten*, 13 How. Pr. 258, and *Van Allen v. Schermerhorn*, 14 How. Pr. 287, are not in point, because decided under the state Code; but, so far as they can be considered as having a bearing, they are against the defendant, instead of for him, for they all recognize the power of the court in its discretion to permit the plaintiff to discontinue, which is all that is necessary to sustain this judgment."

²⁹⁵ It seems that the statement by the compiler on page 848 of 6 *American and English Encyclopedia of Pleading and Practice*, as to the modern rule, is not sustained by the weight of authority as to actions of law, but does obtain in chancery. The leading authority to the effect that a dismissal by the plaintiff will not deprive the defendant of his right

to a judgment over is the case of *East St. Louis v. Thomas*, 102 Ill. 453. In that jurisdiction, they have a statute providing that, "when a plea of setoff shall have been interposed, the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant or leave of court."

Whether the plaintiff was entitled to a bill of exceptions, under section 614 of the Code of 1896, or not, because his claim was admitted by the defendant and there was no adverse ruling in reference to same, we need not decide, as it is clear he had the right to nonsuit or dismiss at any time before the verdict. The trial court erred in not permitting the plaintiff to dismiss his case, and properly corrected the error by granting the motion for a new trial.

The judgment of the city court is affirmed.

Tyson, C. J., and Simpson and McClellan, JJ., concur.

Where the Defendant in an Action sets up a counterclaim in his answer, the court has no authority to grant plaintiff leave to discontinue the action, except as to his own claim or demand: McLeod v. Bertschy, 33 Wis. 176, 14 Am. Rep. 755. See in this connection Nashua R. R. Corp. v. Boston R. R. Corp., 164 Mass. 222, 49 Am. St. Rep. 454.

STOUFFER v. SMITH-DAVIS HARDWARE COMPANY.

[154 Ala. 301, 45 South. 621.]

NEGOTIABLE INSTRUMENTS.—Drafts or Bills of Exchange are commercial paper governed by the law-merchant. (p. 60.)

CORPORATIONS—Ultra Vires, Defense of, When not Admissible.—If a corporation has, under its charter, the power to issue commercial paper for any purpose, and issues such paper not showing the purpose for which it issued, the defense of ultra vires is not available against an innocent purchaser thereof before maturity. (p. 60.)

FRAUD, PLEA OF.—A plea of fraud by the defendant is not sufficient unless it alleges the facts constituting the fraud. (p. 61.)

PLEADING—Unverified Plea, When will be Stricken Out.—If, to an action on commercial paper, a plea is filed denying the plaintiff's ownership, it should be stricken out if not verified. (p. 61.)

Action upon two drafts drawn by the Lyon-Taylor Company upon the Smith-Davis Hardware Company, across the face of each of which was written, "Accepted. Smith-Davis Hardware Company, W. K. Smith, Jr., President." The defendant pleaded that the contract out of which the drafts arose was one for the sale of jewelry and was ultra vires, because the power to make such sale was not conferred on the

corporation by its charter, nor did such charter confer upon it the power to accept a draft in payment thereof. The defendant also pleaded that the transaction between the plaintiff and the Lyon-Taylor Company and the defendant corporation was a fraud upon the corporation, in this, that the Lyon-Taylor Company entered into a bond with the defendant, whereby it warranted that a lot of jewelry sold to the defendant would wear for the space of five years, and that it would exchange any jewelry that did not come up to the warranty for a space of twelve months, and that before the expiration of such time and before the warranty could be made good, the jewelry was returned to the Lyon-Taylor Company with a check for a small amount which had been sold. The defendant further alleged that the plaintiff, though it pretends to be the bona fide holder, without notice, of the instruments sued upon, in fact was a party to the fraud, and connived and abetted, and was still aiding and abetting, the Lyon-Taylor Company in perpetrating a fraud on the defendant, and was a simple tool of the Lyon-Taylor Company and not the sole beneficial owner of the acceptance. The plaintiff moved to strike these pleas from the file.

Estes, Jones & Welch, for the appellant.

W. K. Smith, for the appellee.

³⁰⁴ DOWDELL, J. The instruments sued on and described in the complaint, being commercial paper, are governed by the law-merchant. The plaintiff sues as transferee. The defendant is a private business corporation, chartered to engage in and carry on a hardware business. The defendant filed two pleas to the complaint. By the first plea the defense of ultra vires the particular contract out of which the instruments sued on arose is sought to be made. The instruments do not show on their face for what they were given. It is not denied that the defendant corporation has power under its charter to issue commercial paper, and having done so, nothing otherwise appearing, the presumption in favor of innocent ³⁰⁵ purchasers for value is that it had such power. Having the authority to issue commercial paper for any purpose, and it not appearing upon the face of the paper for what purpose it was issued, the defense of ultra vires the particular contract is not available as against an innocent purchaser for value before maturity of the commercial paper. The doctrine is thus stated in 29 American and English Encyclopedia of Law, second edition, page 66: "If the corporation

is authorized to issue negotiable paper for any purpose, the defense of *ultra vires* will not be available to it in a suit by a bona fide indorsee, although the particular contract might have been really unauthorized; the reason being that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. This doctrine is applied to commercial paper made by a corporation for the accommodation of a third person when in the hands of a bona fide holder, who has taken it before maturity on the faith of its being business paper. But if the corporation is not authorized to issue negotiable paper under any circumstances, such paper is void, not only in the hands of the original payee, but in those of any subsequent holder as well; and this for the reason that all persons dealing with a corporation are bound to take notice of the extent of its charter powers." See note 1 on page 67, where the cases are collated in support of the doctrine. See, also, the case of our own court, Florence Railroad & Improvement Co. v. Chase National Bank, 106 Ala. 364, 17 South. 720, where the same principle is decided. The present case was tried in the court below without the intervention of a jury, and it is apparent from the rulings of the trial court on the pleadings and evidence, as pointed out here by the assignments of error, that the trial as had and the judgment rendered was not in accordance with the principles above stated.

³⁰⁶ By the second plea the defense of fraud in the particular contract out of which the paper sued on arose was sought to be set up, and the further defense in this same plea denying the assignment of the paper to the plaintiff. As a plea of fraud it was faulty in averment of facts showing fraud, and therefore open to the demurrer interposed. The plea was not verified, and for that reason, as a plea denying plaintiff's ownership of the instrument sued on was subject to the motion to strike.

What we have said sufficiently indicates the errors committed, and will be sufficient to guide the court on another trial. The judgment is reversed and the cause remanded.

Tyson, C. J., and Anderson and McClellan, JJ., concur.

The Defense of Ultra Vires in relation to the contracts of private corporations is the subject of a note to *In re Assignment Mut. etc. Ins. Co.*, 70 Am. St. Rep. 156. *Ultra vires* as a defense to negotiable paper is discussed in the note to *Fidelity Trust Co. v. Louisville Gas Co.*, 111 Am. St. Rep. 322.

LEDBETTER v. DAVENPORT BROS.

[154 Ala. 336, 45 South. 467.]

FRAUDULENT TRANSFERS—Evidence to Prove the Consideration.—In a suit by creditors to set aside a transfer as fraudulent, the transferee must assume the burden of proving that he paid a valuable and adequate consideration. (p. 62.)

FRAUDULENT TRANSFERS—Burden of Proof as to Notice of Intent.—When a person claiming property under a transfer alleged to be fraudulent as against the creditors of the transferrer proves that he has paid a valuable and adequate consideration, then his adversary must prove either that such purchaser had notice of the fraudulent intent, or such facts as put him on inquiry, which, if followed up, would have disclosed the fraudulent purpose. (pp. 62, 63.)

John B. Talley and W. L. Martin, for the appellant.

Virgil Bouldin, for the appellee.

338 **TYSON, C. J.** The bill in this cause is exhibited by creditors of J. M. Ledbetter, and seeks to subject to the payment of their debts certain property attempted to be conveyed by him, in fraud of their rights, to one Gullatt, and to have declared void a mortgage upon this property **339** by Gullatt to one Matthews. It attacks the consideration of these alleged conveyances as being simulated, and also upon the theory, if adequate consideration was paid for the property, that Gullatt and Matthews had notice of Ledbetter's intent to hinder, delay or defraud his creditors in the making of the sale to Gullatt.

Complainants being existing creditors of Ledbetter at the date of his attempted sale to Gullatt, it will not be doubted that the burden of proof was upon Gullatt to show that he paid a valuable consideration for the property, and that it was adequate, and upon Matthews to establish that he was a bona fide purchaser for value. If each of these respondents had borne this burden put upon him by the law, it then became incumbent upon the complainants to prove that they had notice of Ledbetter's fraudulent intent, or—its equivalent—of such facts as put them upon inquiry which, if followed up, would have disclosed his fraudulent purpose; and, if this was shown, the complainants would be entitled to the relief granted them by the decree appealed from. The fraudulent design and purpose of Ledbetter to put his property beyond the reach of his creditors is established beyond serious controversy; and we entertain the opinion, after a careful examination of the testimony, not only that Gullatt has failed to show that he paid an adequate consideration

for the property, if, indeed, he paid anything, but that he is chargeable with knowledge of Ledbetter's fraudulent purpose, and that Matthews is also chargeable with like knowledge, if, indeed, he parted with anything of value to Gullatt on the mortgage which he claims to hold.

Affirmed.

Simpson, Anderson and McClellan, JJ., concur.

The Burden of Proof Where a Voluntary Conveyance is Attacked as Fraudulent is discussed in the note to Crary v. Kurtz, 119 Am. St. Rep. 556. The burden of proof in the case of a conveyance between relatives or between husband and wife is considered in Harvey v. Godding, 77 Neb. 289, 124 Am. St. Rep. 841; Flint v. Chaloupka, 78 Neb. 594, 126 Am. St. Rep. 639. According to Butler v. Thompson, 45 W. Va. 660, 72 Am. St. Rep. 838, a grantee need not prove the payment of a consideration until the fraudulent intent of the grantor is shown, but when that is shown it is incumbent on him to establish the payment by competent evidence, for the proof is almost conclusively within his knowledge and power. And according to Hart v. Church, 126 Cal. 471, 77 Am. St. Rep. 195, if one attacks a conveyance as in fraud of his rights, it is incumbent upon him first to show the fraudulent intent of the vendor. The burden then shifts to the purchaser to show a valuable consideration, and, this shown, the burden again shifts to the plaintiff, who must show the vendee's knowledge of the fraudulent intent of the vendor.

BRYAN v. MAYOR AND ALDERMEN OF THE CITY OF BIRMINGHAM.

[154 Ala. 447, 45 South. 922.]

EQUITY—Right to Enjoin Crimes.—Courts of equity are without power to enjoin threatened crimes or threatened prosecutions under a municipal ordinance, but this rule does not prevent such courts from restraining any act, whether connected with the crime or not, which tends to the destruction or impairment of property or a property right. (pp. 64, 65.)

INJUNCTION Against the Enforcement of a Municipal Ordinance.—Where a municipal ordinance and its threatened enforcement greatly diminish and practically destroy the value of property by forbidding the only use to which it is adapted, its enforcement may be restrained by equity. (p. 65.)

CEMETERIES.—A Burial Ground is not Necessarily a Nuisance to persons living in the immediate vicinity. (p. 65.)

CEMETERIES, Legislative and Municipal Control Over.—The legislature has the right to provide for the establishment or discontinuance of cemeteries, and to regulate their use, and this authority can be delegated to municipal corporations; but the exercise of this power must not be for the purpose of discriminating against any citizen in favor of the municipality or another citizen, or create in the city or others a monopoly, but the health and well-being of the city

are to be the prime consideration in attempting to regulate the burial of the dead. (pp. 65, 66.)

CEMETERIES, Limitations upon Municipal Control of.—A municipality can prohibit the opening or the continuance of a cemetery in case it is or will likely become a nuisance, but it cannot prohibit an owner from devoting his land to cemetery purposes in a sparsely settled locality, although within the corporate limits or police jurisdiction, unless burials are likely to impair the public health. (pp. 65, 66.)

MUNICIPAL ORDINANCE—Burden of Proof and Allegation.—If an ordinance is not void on its face, but its validity is dependent upon facts, a party claiming it to be invalid must allege and prove the facts making it so. (p. 66.)

MUNICIPAL ORDINANCES are Presumed to be Reasonable, and, when against the maintenance of a cemetery, to have been enacted for the protection of the city or certain parts thereof. (p. 66.)

CEMETERY, Continuance of, When not Shown not to Impair the Health of the Community.—Evidence to the effect that the drainage of a city does not run over the lands of the witnesses, and that they do not object to it, does not of itself show that the public health would not be impaired by its continuance, nor that an ordinance prohibiting it is unreasonable. (p. 66.)

CEMETERIES—Discrimination Between, on the Part of a Municipality.—If there are several cemeteries in a city and the conditions are similar as to location, surroundings, drainage, etc., and the other cemeteries are as close to the populous parts of the city and not conducted with a greater degree of precaution as to burials, the city may not prohibit the use of the complainant's cemetery while permitting the continuance of the use of the others. (p. 66.)

CEMETERIES—Unlawful Discrimination Between, in a Municipal Ordinance, When not Shown.—If an ordinance prohibiting the maintenance of a cemetery within prescribed limits is assailed as an unreasonable discrimination between cemeteries within and those without such limits, and it appears that the complainant's cemetery is nearer the city than the others, is separated from them by a highway, that there are houses between the highway and the cemetery, and that many houses were built nearer to the prohibited cemetery than to the others, and there is no evidence to show that the city had not adopted the highway as a line to separate cemetery from noncemetery area, nor that the sanitary conditions may not make it dangerous to maintain the cemetery on one side of the highway, he does not show that the ordinance prohibiting the continuance of the cemetery is invalid or unreasonably discriminatory. (pp. 66, 67.)

A. Latady and W. E. Martin, for the appellant.

E. D. Smith, for the appellee.

450 **HARALSON, J.** The jurisdiction of equity is purely and exclusively civil, and such courts are without power to enjoin or restrain threatened crimes or threatened prosecutions, and this rule applies to prosecutions under municipal ordinances as well as state laws: *Brown v. Birmingham*, 140 Ala. 590, 37 South. 173, and cases there cited. Applying this rule, the courts should not lose sight of the fact that a court of equity can and should interfere by injunction to restrain

any act or proceeding, whether connected with crime or not, which tends to the destruction or impairment of property or property right: 5 Pom. 635; *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; *Deems v. Mayor of Baltimore*, 80 Md. 164, 45 Am. St. Rep. 339, 30 Atl. 648, 26 L. R. A. 541.

The bill in the case at bar avers that the existence and threatened enforcement of the ordinance will not only greatly diminish the value of his property, but will practically destroy its value, by forbidding the use to which it is better or exclusively adaptable. In fact, the facts averred put the case at bar almost on all-fours with the case of *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528, where the court, speaking through Gaines, C. J., says: "As long as the ordinance remains undisturbed it acts in *terrorem* and ⁴⁵¹ practically accomplishes a prohibition against the burial of the dead within the limits of the city of Austin, save in the excepted localities. Under these conditions, who would venture to bury, or to be concerned in burying, a dead body in appellees' ground, or who would purchase a lot in the cemetery?"

The bill also avers that the ordinance is void, and is not wanting in equity.

Whatever may be the rule in other states, with reference to the use of land for burial purposes, our court, speaking through Brickell, C. J., says: "Burial places for the dead are indispensable. They may be the property of the public, devoted to the use of the public; or the owner of the freehold may devote a part of his premises to the burial of his family or friends. It is but a just exercise of his dominion over his own property. Neither adjoining proprietors nor the public can complain, unless it is shown that, from the manner of burial, or some other cause, irreparable injury will result to them. It is quite an error to suppose that of itself a burying ground is a nuisance to those living in its immediate vicinity": *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14.

The legislature, in the exercise of its police power, has the right to provide for the establishment or discontinuance of cemeteries, and to regulate their use, and this authority can be delegated to a municipal corporation; but in the exercise of the power, it must not be for the purpose of discriminating against any citizen in favor of the municipality or of another

citizen, or create in the city or in others a monopoly, but the health and well-being of the city is to be the prime consideration in attempting to regulate the burial of the dead. That a municipality can prohibit the opening or the continuation of a cemetery in case it is or will likely become a ⁴⁵² nuisance, there can be no doubt; and that it cannot prohibit the owner from devoting his land to cemetery purposes in a sparsely settled locality, although within the corporate limits or police jurisdiction, there can be no doubt, unless the burials are calculated to impair the public health. So the question is, Does the cemetery in this case amount to a nuisance or will it become one if permitted to continue, or was the enactment of the ordinance an arbitrary, unreasonable and capricious abuse of the authority conferred upon the city? When an ordinance is not void upon its face, but its validity is dependent upon facts, it is incumbent upon the party relying upon the invalidity to aver and prove the facts which make it so: *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; *Marion v. Chandler*, 6 Ala. 899. The presumption therefore is, that the ordinance is reasonable, and was enacted as a sanitary measure for the protection of the health of the city or certain parts thereof. The complainant attempted to show that the continuation of his cemetery would not impair the health of the community, but most of his witnesses merely testified that drainage from the cemetery did not run over their lots, and that they did not personally object to same. The water may not run over their lots and they may not object to the cemetery, but this is not of itself sufficient to show that the public health would not be impaired or that the ordinance was unreasonable. Complainant contends that there are other cemeteries near his land and closer to the city which are permitted, and that he had been discriminated against, and that the ordinance is therefore void. It would seem that if conditions were similar as to locations, surroundings, drainage, etc., and the other cemeteries were as close or closer to the populous parts of the city, and the complainant's cemetery was conducted with an equal degree of precaution as to burials, to prohibit the use to ⁴⁵³ one and permit it in others, would be an arbitrary and unreasonable discrimination. But these facts have not been established in the case at bar. While the bill avers that the other cemeteries are closer to the city, the proof shows that complainant's is nearer. The proof also fails to show that the one in question joins any of the others, but that it is separated by a

public highway, and that there are houses between it and said highway. For all we know, this road or highway may have been adopted as a line of demarcation for the purpose of separating cemetery and noncemetery area, and sanitary conditions may have made it all right on one side and dangerous on the other. There was proof that many houses were built up, and being built, near to this cemetery, and no proof that any existed at or near the others. At any rate, it was incumbent upon complainant to show that the ordinance was an arbitrary discrimination against him, which we think he has failed to do.

The decree of the chancery court is affirmed.

Tyson, C. J., and Simpson and Anderson, JJ., concur.

While Cemeteries are Within the Power of Reasonable Regulation by cities, counties, and towns, they are not to be regarded as nuisances per se, in measuring the extent of the police power to regulate them: *Los Angeles v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 76; *Ex parte Wygant*, 39 Or. 429, 87 Am. St. Rep. 673; note to *City Council of Montgomery v. West*, 123 Am. St. Rep. 49. As to what constitutes a public nuisance, see the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 195.

That Equity will Enjoin Enforcement of a Void Municipal Ordinance in order to prevent the destruction of property rights, see *New Orleans Baseball etc. Co. v. City of New Orleans*, 118 La. 228, 118 Am. St. Rep. 366; *Riley v. Town of Greenwood*, 72 S. C. 90, 110 Am. St. Rep. 593.

PULLMAN CAR COMPANY v. LUTZ.

[154 Ala. 517, 45 South. 675.]

RAILWAYS.—Sleeping-car companies are under the duty of notifying a passenger of his arrival at his destination. (p. 68.)

RAILWAYS—Sleeping-car Companies, Liability of for Carrying a Passenger Beyond His Destination.—A sleeping-car company is liable for carrying a passenger beyond his place of destination, and may be subjected to exemplary damages where the place and manner of putting the passenger off of a car are attended with circumstances of aggravation. (p. 69.)

DAMAGES, COMPENSATIVE, What are.—Compensatory damages imply a recompense or award for some loss or service. (p. 69.)

DAMAGES, COMPENSATORY—Fright.—Mere fright unattended by any harmful results to the person frightened in mind or body furnish no ground for the award of compensatory damages. (p. 70.)

DAMAGES, COMPENSATORY, When not Excessive.—Where a plaintiff suing a sleeping-car company for damages resulting from the failure to notify her of her arrival at her place of destination, and subsequently putting her off at another place, is awarded one

thousand dollars as compensatory damages, there being no personal injury, and the only loss as to property rights being the payment of a street-car fare, such award will not be set aside as excessive where she suffered mentally from fright because of her surroundings at the time and place of being discharged from the train. (p. 70.)

Knox, Acker & Blackmon and Campbell & Walker, for the appellant.

Matthews & Matthews, for the appellee.

⁵¹⁹ DOWDELL, J. The complaint as amended averred the duty of the defendant to notify plaintiff of her arrival ⁵²⁰ at her destination. It is unimportant whether the duty arose out of a special contract or out of the relation between the parties. It is urged in argument that, as the defendant was not a common carrier, the defendant was under no legal duty to notify a passenger being transported in one of its cars of arrival at his destination. We cannot give our assent to the proposition. Sleeping-car companies, while neither common carriers nor innkeepers, are nevertheless as distinctly public servants as either of the former, with such duties imposed by law in their relation to the general public as fairly and reasonably pertains to the business and arise out of such relation in the service they undertake to perform. They operate their cars in connection with and attached to trains for the transportation of passengers, and though they do not contract to transport as common carriers, yet in the course of transportation by the carrier they hold themselves out to the traveling public as affording in their palace-cars accommodations, comforts, and conveniences superior to those of the ordinary day coach of the carrier, and which they promise to furnish for a reward. They have their own conductors in the management and control of their cars, and their porters to serve and wait upon the passenger; and, as a matter of common knowledge, it is their custom to render assistance to their passengers in disembarking from the train. It is also a matter of common knowledge that it is a common practice for the Pullman conductor to collect from his passenger the train fare, and it is of no importance in this connection by what arrangement with the common carrier or its agents this is done. These conditions and circumstances attending a public service company are in law sufficient to impose the duty of notifying the passenger of arrival at his destination. While no case ⁵²¹ directly in point has been brought to our attention, there are adjudged cases which in principle point to the conclusion announced: Pullman Palace Car Co. v. Smith, 79 Tex. 468, 23 Am. St. Rep. 356, 14 S. W. 993, 13

L. R. A. 215; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222. 46 Am. Rep. 688; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654, 15 Am. St. Rep. 873, 12 S. W. 744; 6 Cyc. 656, 657, 4a, 4b, 4c. See, also, *Hutchinson on Carriers*, 3d ed., p. 1343, sec. 1142. We do not mean to intimate in what we have said above in respect to the duty imposed by law on sleeping-car companies that the common carrier is thereby relieved of its duty to likewise notify the passenger of arrival at his destination. Our conclusion is that the court committed no error in overruling the demurrer.

A motion for a new trial was made by the defendant on grounds that the verdict of the jury was contrary to the evidence and that the same was also excessive. The evidence was in conflict and the verdict in a general sense was not palpably opposed to the general weight of the evidence; and under the well-settled rule in this court we cannot say that the trial court erred in overruling the motion on this ground. The verdict, however, was a special finding by the jury as to the damages awarded. The jury in its finding and award of damages assessed as compensatory damages one thousand dollars and as punitive damages five hundred dollars; total, fifteen hundred dollars. In respect to the punitive damages assessed, it is insisted by counsel for appellant that no malice was shown, and that the facts otherwise did not furnish any ground for the assessment of exemplary or punitive damages. In this case we cannot agree with counsel. If the plaintiff's evidence is to be believed, the negligence of the defendant's agent or servant in failing to notify her of her arrival at her destination, and the time, place and manner in which ⁵²² she was put off the train, were attended with circumstances of aggravation sufficient to justify the imposition of exemplary damages, and we are not prepared to say that the amount imposed was either oppressive or excessive.

But as to the amount of compensatory damages awarded, namely, one thousand dollars, we are of a different opinion. The term "compensatory damages" by necessary implication intends a recompense or reward for some loss or service; a reimbursement for loss suffered by reason of injury to person or property. "They proceed from a sense of natural justice, and are designed to repair that of which one has been deprived by the wrong of another": 13 Cyc. 22. The evidence is without dispute that the plaintiff received no personal injury, and the only loss sustained as to property rights was the payment of five cents street-car fare. It is true her evidence shows that she suffered mentally from fright because

of her surroundings at the time and place of being discharged from the train; but these conditions were but momentary, and attended with no serious consequences whatever to body or mind. The weight of authority seems to be that mere fright, unattended by any harmful results to the person frightened in mind or body, furnishes no ground for the recovery of compensatory damages. This doctrine accords with the sense of natural justice. There being no loss or injury to person consequent upon the fright, but merely momentary mental suffering, there is nothing to reimburse. Even if it were conceded that compensatory damages were recoverable for momentary mental suffering from mere fright, on the undisputed evidence we are of the opinion that the damages assessed as compensatory were excessive, and on this ground a new trial should have been granted.

523 The foregoing expresses the views of the writer. Anderson, J., is of the opinion that the verdict as to compensatory damages is excessive, and for that reason a new trial should be granted. Tyson, C. J., and Haralson, Simpson, Denson and McClellan, JJ., are of a contrary opinion as to the compensatory damages, holding that on the facts such damages are here recoverable, and that the verdict is not excessive, and on this holding the judgment appealed from must be affirmed.

Tyson, C. J., and Haralson, Simpson, Denson, and McClellan, JJ., concur.

Dowdell and Anderson, JJ., dissent.

The Liability of a Carrier for Taking a Sleeping Passenger Past His Destination without awakening and giving him an opportunity to alight is considered in *Seaboard Air-Line Ry. v. Rainey*, 122 Ga. 307, 106 Am. St. Rep. 134; *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477, 59 Am. St. Rep. 910; *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 23 Am. St. Rep. 356.

Fright as an Element of Damages is the subject of a note to *Hubbard v. Chicago etc. Ry. Co.*, 76 Am. St. Rep. 859. Some authorities hold that there can be no recovery for an injury caused by mere fright or shock, where the act of negligence is unaccompanied by wantonness or intentional wrong: *Miller v. Baltimore etc. R. R. Co.*, 78 Ohio St. 309, 125 Am. St. Rep. 699, and see cases cited in the cross-reference note thereto.

BROCK v. DESMOND & CO.

[154 Ala. 634, 45 South. 665.]

LANDLORD AND TENANT.—A subtenant holds the premises subject not only to the terms of his own demise, but also to the performance of the terms and conditions imposed upon the estate by the provisions of the original lease. (p. 71.)

LANDLORD AND TENANT—Subtenants.—If the original tenant fails to pay his rent or to perform any other condition of his lease, the landlord may enforce such performance, though the result may be to remove a subtenant who has paid his rent and performed all the other conditions of his lease from the original tenant. (p. 71.)

LANDLORD AND TENANT—Subtenant, Voluntary Surrender of the Original Tenant, When Affects.—If the original tenant has incurred a forfeiture of his lease, and for that reason the landlord annuls the lease with the consent of the original tenant, this is a mere surrender of possession to which the landlord is entitled, and carries with it the right to the possession as against the sublessee. (p. 72.)

Sterling A. Wood, for the appellant.

John T. Glover, for the appellee.

635 ANDERSON, J. The intestate, Brock, being the under-tenant, held the premises subject not only to the terms of his own demise, but subject as well to the performance of the terms and conditions impressed upon the estate by the provisions of the original lease from the ground landlord. If, therefore, the tenant fails to pay his rent or perform any other condition of the original lease, the landlord may by appropriate legal proceedings enforce such performance, and, if they result ⁶³⁶ in removing the tenant, the under-tenant may, as a necessary consequence, be removed also, and this, notwithstanding the under-tenant may have paid his rent to his immediate landlord and in every other way performed the conditions of his lease; the remedy of the under-tenant for such eviction being confined to his immediate lessor upon covenants of the under-lease for quiet enjoyment. "The under-tenant is chargeable with knowledge of the contents of the original lease. Notice of the lease is generally notice of its contents": McAdams on Landlord and Tenant, p. 816, sec. 248.

The original lease provided for a forfeiture in case of default in payment of the rent, and the proof shows that the lessee, Killan-Randle Produce Company, was in arrears; that the rent was demanded, and upon nonpayment the lease was declared annulled by the agent of the owner, after notice to

the lessee. This annulment of the original lease gave the original owners the right to take possession and re-lease the premises, and their new lessee had the right to the possession as against anyone, including the under-tenant of the Killan-Randle Produce Company. It is true a tenant in chief cannot voluntarily surrender a possessory right that has accrued to him to the prejudice of a subtenant (24 Cyc. 1383; *Brown v. Butler*, 4 Phila. [Pa.] 71); but in the case at bar there was no voluntary surrender of a right, but a forfeiture for nonpayment of the rent, which gave the landlord the right to annul the contract under the terms thereof, and the act of the lessee in assenting was not the surrender of any right, as the right to hold had been forfeited, but it was a mere surrender of possession, to which the owners were entitled.

While there are many assignments of error, the brief of counsel for appellant consists of a mere statement of the case, with perhaps an insistence that the trial court ⁶³⁷ erred in giving the general charge requested by the defendant. The defendants in this case having been entitled to the possession of the property, and having committed no breach of the peace, and used no unnecessary force to acquire the same, the trial court did not err in giving the general charge requested by the defendant.

The judgment of the circuit court is affirmed.

Tyson, C. J., and Dowdell and McClellan, JJ., concur.

The Rights and Liabilities of a Subtenant as between him and the original landlord are discussed in the notes to *Mitchell v. Young*, 117 Am. St. Rep. 99; *Washington Natural Gas Co. v. Johnson*, 10 Am. St. Rep. 560. The original lease does not pass to the subtenant; there is no contractual tie between him and the original lessor: *Audubon Hotel Co. v. Braunnig*, 120 La. 1089, 124 Am. St. Rep. 456.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

FRANK v. FRANK.

[88 Ark. 1, 113 S. W. 640.]

WILLS, Construction of in Equity.—Equity will not entertain jurisdiction of a suit brought solely for the purpose of construing a will without further relief, and will never exercise the power to interpret a will which only deals with legal estates and interests and makes no attempt to create a trust relation. (pp. 77, 78.)

EQUITY.—Consent cannot Give a Court of Equity Jurisdiction to Construe a Will where otherwise it is without such jurisdiction. (p. 78.)

John Gatling, for the appellants.

Wm. M. Randolph, for the appellees.

¹ **HILL, C. J.** John F. Frank was a resident of Memphis, Tennessee, and died there on October 6, 1904, leaving a will containing six paragraphs. The first paragraph provides for the payment of his debts; the second is a devise of his residence to two of his daughters and one of his sons; the third provides a legacy of one thousand dollars for a grandson. The fourth is as follows: "I hereby give, devise and bequeath to my seven children and legal heirs, to wit: Chas. F., Robt. B., John L., Walter A., Clara M., Elizabeth G. and Leonora F. Frank, now Mrs. S. A. Bowen, all my property, real, personal and mixed wheresoever situated, not already disposed of, which I now own or may hereafter acquire and of which I may die seised and possessed, absolutely and in fee simple and in equal shares. The division shall be made by three commissioners to be appointed by my said children, and the lots and parcels of land so divided shall be drawn for by them, and any difference in the valuation be settled among themselves. The property of my daughters, however, shall be held and owned by them for their sole and separate use and enjoyment,² free from the debts and contracts of any husbands, for and during their natural lives, with remainder in fee to their

children, and, in default of children surviving either of them, then to my children who shall then be living, their heirs and assigns forever; and, should any of my sons die without issue, his or their shares shall also revert to my children then living, their heirs and assigns forever." The fifth paragraph is a provision that no lawyers' fees or court costs whatever be charged to his estate, and any heir desiring to employ an attorney should do so at his own individual expense. The sixth appointed three executors, and made provision for choosing their successors.

Mr. Frank owned large tracts of land in Lee, Crittenden and St. Francis counties, Arkansas. He left seven children surviving him; the children were all adults, and there were eight grandchildren, all of whom were minors. His children filed suit in the chancery court of St. Francis county against the grandchildren and the executors, seeking a construction of the will. They set forth the ownership of the land in said county and other counties in Arkansas by Mr. Frank at his death, the execution of his will and its due probate in Shelby county, Tennessee, the names and residences of his children and grandchildren, and of the executors of the will, and that duly authenticated copies of the will had been filed with the clerk of each of said counties and had been duly admitted to probate by the probate courts of Lee, Crittenden and St. Francis counties; and set forth that the executors had duly qualified in the state of Tennessee, and are proceeding with the administration of said estate in the state of Tennessee, and have paid or will pay all of the debts and liabilities of every character, and have ample personal assets for that purpose, so that the said executors have not qualified, and will not qualify, in the state of Arkansas, as there is no occasion for their doing so. And they further alleged that the legacy given by the said will to the grandson had been paid or would be paid by the executors in Tennessee; and there is no necessity or occasion for taking such legacy into account for the purposes of this suit.

They further alleged that a suit had been brought and is now pending in the chancery court of Shelby county, Tennessee, for a construction of the will of said John F. Frank, and that such court has jurisdiction of the subject matter and the executors³ named in said will, and that the children of said Frank are the plaintiffs and his grandchildren are the defendants therein, and that said suit will be finally settled and determined with reference to the real estate located in the state of Tennessee, and all the personal property where-

soever situated; but that said court has no jurisdiction to establish the title to the lands in Arkansas; and for that reason this suit was brought for the purpose of obtaining a construction and interpretation of the titles derived by the parties to the suit to the lands devised by the fourth paragraph of the will.

The plaintiffs alleged that, by a proper construction and interpretation of the said fourth paragraph the testator had attempted to limit a remainder in the lands upon a previous gift or devise thereof to the plaintiffs, respectively, in fee simple and equally; and charged that under the laws of Arkansas it was not lawful to dispose of the fee in said lands and then to create and limit a remainder upon such fee, and then to control and circumscribe the disposition of the fee, as was attempted in the will; and they allege that the plaintiffs take an absolute fee simple title, and that the remainders and cross-remainders to the children of the testator, or his grandchildren or descendants, as therein provided, are void and without effect. But they allege that, in consequence of the probate of the will, and because it disposes of all the said lands and contains provisions as above stated, it is necessary, in order that the titles of the plaintiffs may not be encumbered and embarrassed, and that they may be able to hold, use, enjoy and dispose of their lands according to their title and rights under the laws, that the court should put a construction and an interpretation upon the fourth paragraph of said will, and ascertain and declare and decree the legal effect thereof, so that the titles and rights of the parties may be fixed and established, and that it may be known just what they are and just what can be relied upon by all persons having occasion to deal with the same.

It was prayed that the defendants be brought in under proper process, and guardians ad litem appointed for the minors, they having no regular guardians; and that the court put a proper construction and interpretation upon every part of the will, particularly the fourth paragraph; ascertain and fix the rights ⁴ of the plaintiffs and defendants in the lands, which were described at length in the complaint, and their shares therein; and that the same be declared vested in the plaintiffs in fee, equally, share and share alike, and not subject to the remainders and provisions of the said fourth clause of the will limiting their titles and rights and restricting and circumscribing their powers of disposition: and that such provisions be declared and decreed to be of no force and effect.

The minor defendants were all brought properly into court, and filed answer through their guardian ad litem, taking issue with the construction which the plaintiffs placed upon the will and denying that the plaintiffs became seised in the fee simple of the real estate; and asserted that the proper construction of the fourth paragraph of the will was to devise the real estate to the plaintiffs for their natural lives, with a remainder in fee to the children of said plaintiffs; and they asked that the court place such construction upon the will.

The defendants also filed a demurrer to the complaint, on the ground that it did not state a cause of action. This demurrer does not appear to have been acted upon by the court.

Testimony was taken, which only went to prove the children and grandchildren left by Mr. Frank at the time of his death, and of the pendency of the suit in Tennessee, and other matters of fact alleged in the complaint. It was proved that all of the indebtedness of the estate had been discharged. The executors made no answer to the complaint, and accepted service of notice to take depositions. The case was heard on the complaint and its exhibits, and the answer of the infant defendants by their guardian ad litem, the evidence of service showing that the nonresident defendants were properly summoned, and the will and the depositions. The court construed the will as prayed in the complaint. The infant defendants by their guardian ad litem excepted to the same, and took an appeal.

As will be seen by reference to the statement of facts, this is a bill brought by the children of John F. Frank to obtain a construction of the fourth ⁵ paragraph of his will; the children maintaining that thereunder they obtained a fee simple title to the lands devised in said paragraph, and the answer of the guardian ad litem of the grandchildren maintaining that the children obtained a life estate with a vested remainder in the grandchildren. There is no trust involved, no trust estate is created, and the executors are not seeking aid or instruction in the discharge of their duties. The indebtedness of the estate has been paid. The sole question sought to be determined is the title conveyed to the respective parties to this suit under the fourth clause of the will. No controversy has arisen over it. The object of the suit appears to be to prevent rather than to settle a controversy. There are no equitable titles or trusts created by the will. The titles conferred by the fourth paragraph—whatever they may be—are purely legal and capable of assertion in a court of law. Has a chancery court jurisdiction to entertain this suit?

Mr. Pomeroy says: "Although there is not an entire uniformity in the decisions by courts of different states upon this particular subject, yet the doctrine which seems to be both in harmony with principle and sustained by the weight of authority is that the special equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated": 3 Pomeroy's Equity Jurisprudence, 3d ed., sec. 1156.

This statement is quoted and followed in *Head v. Phillips*, 70 Ark. 432, 68 S. W. 872, and an examination of the authorities proves it to be sound.

The same principle is thus stated in the *Encyclopedia of Pleading and Practice*: "In fact, by the great preponderance of authority, the power of courts of equity to construe wills is simply an incident of their general jurisdiction over trusts; and while such power will be exercised liberally on behalf of executors, trustees or other persons interested in trusts created by wills, suits brought solely for the construction of wills, where no ⁶ trust is involved, will not be entertained": 22 *Ency. of Pl. & Pr.* 1191.

The court of appeals of New York said: "It is by reason of the jurisdiction of the court of chancery over trusts that courts having equity powers, as an incident of that jurisdiction, take cognizance of, and pass upon, the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, or when only legal rights are in controversy": *Chipman v. Montgomery*, 63 N. Y. 221.

In *Bailey v. Briggs*, 56 N. Y. 407, it is thus expressed: "It is when the court is moved in behalf of an executor, trustee or cestui que trust, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts."

The Illinois court said: "Where no trust is created, the law, as we understand it, is that neither the executor nor the heir, or the devisee who claims only a legal title in the estate, will be permitted to come into a court of equity for the purpose of obtaining a judicial construction of the provisions of the

will": *Strubher v. Belsey*, 79 Ill. 397. This case was followed and reiterated in *Harrison v. Owsley*, 172 Ill. 629, 50 N. E. 227. *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497, is strikingly similar to the case at bar. The lower court had given judgment on titles derived from a will at the instance of an heir, where no trust was involved, and the supreme court declined to pass upon the will and dismissed the action for want of jurisdiction, although the jurisdiction had not been questioned.

The following cases have also been examined and found to contain the same principle, in many of which there are reviews of the authorities on the subject: *Woodlief v. Merritt*, 96 N. C. 226, 2 S. E. 350; *Dill v. Wisner*, 88 N. Y. 153; *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Fahy v. Fahy*, 58 N. J. Eq. 210, 42 Atl. 726; *Kelley v. Kelley*, 80 Wis. 486, 50 N. W. 334; *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497; *Miller v. Drane*, 100 Wis. 1, 75 N. W. 713.

A demurrer was interposed in the chancery court which does not seem to have been passed upon, but it raised the question of jurisdiction: *Kelley v. Kelley*, 80 Wis. 486, 50 N. W. 334. Even without ⁷ the demurrer, however, the court should have declined to pass upon the issue tendered, as it is not the subject matter of jurisdiction of the chancery court; and consent cannot give such jurisdiction: *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497; *Richards v. Lake Shore & M. S. Ry. Co.*, 124 Ill. 516, 16 N. E. 909.

In view of these authorities, and many more which may be found cited by the text-writers and reviewed in the cases mentioned, it was unquestionably the duty of the chancery court to refuse to entertain the bill; and, for the error in entertaining it and rendering a decree construing the will, the decree is reversed, and the cause remanded with instructions to dismiss the bill without prejudice to any future litigation which may arise between the parties.

WHERE EQUITY WILL ENTERTAIN JURISDICTION TO CON- STRUE A WILL.

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I. Origin and History of the Jurisdiction of Equity to Construe Wills.

The power of the court of chancery of England over the administration of estates does not seem to have been thoroughly established until near the close of the reign of Charles II. The ground upon which the chancery courts took jurisdiction in England in probate cases was that the spiritual courts were not able, from their constitution, to afford adequate and complete relief: *Rosenberg v. Frank*, 58 Cal. 387. But there is no inherent power in a court of equity to construe wills. It is generally done as incidental to its jurisdiction over trusts, or under code provisions in some states: *Voshall v. Clark*, 123 App. Div. 136, 108 N. Y. Supp. 313. The jurisdiction of the court of equity to construe wills undoubtedly grew out of its general control over trusts and trustees. It can take jurisdiction only where trusts are involved or where devises and legacies are so blended and dependent on each other as to make it necessary to construe the whole in order to ascertain the legacies: *Haywood v. Wachovia Loan & Trust Co.*, 149 N. C. 208, 62 S. E. 915. The jurisdiction in such cases being regarded as incidental to the general jurisdiction over trusts, it is exercised in order to insure a correct administration of a power or trust conferred by the will: *Poll v. Cash*, 234 Ill. 53, 84 N. E. 719. In the leading American case on the subject of the power of equity courts to construe wills (*Bowers v. Smith*, 10 Paige, 193), Chancellor Walworth said: "The bill in this case appears to have been filed upon the supposition that it is a part of the established jurisdiction of the court of chancery to settle all questions which arise as to the construction and validity of the provisions of a will of real estate, as well as of personal property. This court has jurisdiction in cases of trust. And the executor always takes the legal title to the personal estate of the testator as a trustee. For so far as the provisions of the will are valid, he holds the property in the character of trustee for the persons to whom it is bequeathed. And if there is any part of such property, or any interest therein, which is not legally and effectually disposed of by the will, he holds it as trustee for those who are entitled to it under the statute of distributions. Any person claiming

an interest in the personal estate of the testator, therefore, either as a legatee under the will or as entitled to it under the statute of distributions, may file a bill against the executors, to settle the construction and ascertain the validity of the provisions of the will, so far as the complainant's interest is concerned; and to enable him to obtain from the executors such portions of the estate as he is either legally or equitably entitled to. So, also, if the real estate of the testator is devised to a trustee upon distinct and independent trusts, some of which trusts are valid and others invalid, there is a resulting trust in favor of the heir at law as to so much of the property as is not legally and effectually disposed of by the will; where the interest of each is not turned into a legal estate by the provisions of the Revised Statutes. The cestui que trust in such cases, also, may file a bill in this court to have his rights as cestui que trust in the estate settled and ascertained; and to have the trusts of the will carried into effect so far as they are valid and effectual. And where there is a mixed trust of real and personal estate, it frequently becomes necessary for the court to settle questions as to the validity and effect of contingent limitations, in a will, to persons who are not in esse; in order to make a final decree in the suit, and to give the proper instructions and directions to the executors and trustees in relation to the execution of the trust: *Lorillard v. Coster*, 5 Paige's Rep. 215; *Hawley v. James*, *idem*, 442. But I am not aware of any case in which an heir at law of a testator, or a devisee, who claims a mere legal estate in the real property, where there was no trust, has been allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will. On the contrary, the decision of such legal questions belongs exclusively to the courts of law, except where they arise incidentally in this court in the exercise of its legitimate powers; or where the court has obtained jurisdiction of the case for some other purpose."

II. General Rules Governing the Right of Courts of Equity to Construe Wills.

a. In General.—The exercise of the jurisdiction to construe a will is a matter of discretion with the court: *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394; *Horton v. Upham*, 72 Conn. 29, 43 Atl. 492; *Carr v. St. Paul's Parish*, 71 N. H. 231, 51 Atl. 920; *Powell v. Demming*, 22 Hun, 235. A court of equity cannot be called upon to construe a will until the will has been established as a testamentary instrument in a court of probate: *Whitfield v. Hurst*, 38 N. C. 242. Consent cannot give a court of equity jurisdiction to construe a will where otherwise it is without such jurisdiction: *Frank v. Frank*, 88 Ark. 1, ante, p. 73, 113 S. W. 640. A legatee cannot, however, be deprived of right to have the will construed by a declaration in the will that the executors are to define its provisions: *In re Reilly's Estate*, 200 Pa. 288, 49 Atl. 939. So, also, a provision in a will that the executors probate the will and return an inventory of the property, and that "no further action be had in the county court," does not deprive a court of the power to

annul some of its provisions: *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543. The court may, however, avail itself of a provision in the will expressly invoking the jurisdiction of the court to construe its provisions: *Longwith v. Riggs*, 123 Ill. 258, 14 N. E. 840. Where jurisdiction to construe a will otherwise exists, the suit may be maintained in the federal courts on a proper showing of diverse citizenship: *Toms v. Owen*, 52 Fed. 417; *Wood v. Paine*, 66 Fed. 807; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32 L. ed. 138. A bill in equity to construe a will and recover property held by several persons by titles derived under the will has been allowed where the title of the parties depends upon the construction to be given to the will, in order to prevent a multiplicity of suits: *Withers Admr. v. Sims*, 80 Va. 651.

b. Rule Where the Construction of the Will is the Sole Purpose of the Suit.—The general rule is that a court of equity will not entertain jurisdiction of a suit brought for the sole purpose of construing a will without seeking any other relief: *Frank v. Frank*, 88 Ark. 1, ante, p. 73, 113 S. W. 640; *Siddall v. Harrison*, 73 Cal. 560, 15 Pac. 130; *Hughes v. Hughes*, 30 Ind. App. 591, 66 N. E. 763; *Bevans v. Bevans*, 69 N. J. Eq. 1, 59 Atl. 896; *Emmons v. Cairns*, 2 Sand. Ch. 369; *Hobart College v. Fitzhugh*, 27 N. Y. 130; *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 388; *Corry v. Fleming*, 29 Ohio St. 147; *Bowen v. Bowen*, 38 Ohio St. 426; *Bussy v. McKie*, 2 McCord Eq. 23, 16 Am. Dec. 628; *Snyder v. Grandstaff*, 96 Va. 473, 70 Am. St. Rep. 863, 31 S. E. 647. In *Martin v. Martin*, 52 W. Va. 381, 44 S. E. 198, the court said: "A suit can never be entertained for the sole purpose of construing a will. There must be an actual litigation in respects to matters which are proper subjects of equity jurisdiction, such as relief on behalf of an executor, trustee, cestui que trust, or legatee. It is a special and limited jurisdiction incident to general equity jurisdiction over trusts and administrations: *Pomeroy's Equity Jurisprudence*, secs. 1156, 1157. This being true, the court cannot be called upon to interpret the will, further than is necessary to determine whether the person is entitled to the relief sought by his will. It is true that equity has jurisdiction for compulsory partition; but, if it clearly appears that the plaintiff is not entitled to have it, he cannot require the court to say whether he may at some future time be in a position to demand it."

But in Texas a different rule prevails. Thus, in *Crosson v. Dwyer*, 9 Tex. Civ. 482, 30 S. W. 929, it was said: "The petition in this case, while alleging mismanagement and waste of the estate, prays for nothing but a construction of the will, and is in fact a suit brought for no other purpose than to obtain a construction of the will, and a determination of plaintiff's relation to it. It has been held in a number of states that the special equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts, and that a court of equity will not entertain jurisdiction of a suit brought for no other purpose than to obtain a construction of a will without a

prayer for any other relief. The trust relation, either express or implied, is held by this line of cases, essential to jurisdiction: 3 *Pomeroy's Equity Jurisprudence*, sec. 156. In Texas, however, a broader and more comprehensive view is taken of the matter of jurisdiction, and the existence of a trust, expressed or implied, is not made the test of jurisdiction: *Parker v. Parker*, 10 Tex. 83; *Smith v. Smith*, 11 Tex. 102; *Purvis v. Sherrod*, 12 Tex. 140; *Howze v. Howze*, 14 Tex. 232; *Little v. Birdwell*, 21 Tex. 598, 73 Am. Dec. 242; *Becton v. Alexander*, 27 Tex. 659; *Howes v. Foote*, 64 Tex. 22; *Groesbeck v. Groesbeck*, 78 Tex. 668, 14 S. W. 792. In the case we are considering, it is alleged that plaintiffs are entitled to a share in the estate; that the executrix denied their right, and was, with the proceeds of the estate, buying other property, taking the title in her own name; and they pray for a construction of the will, and that their status be fixed in relation thereto. The terms of the will show the existence of a trust; and whether we take the position taken by some of the states that the existence of a trust must be shown to obtain jurisdiction, or the Texas view, which is sustained by the supreme judicial tribunals of a number of states, that the existence of a trust is not essential to give courts jurisdiction to construe a will, the district court of Bexar county had jurisdiction of the case."

c. Necessity for the Construction to be in Respect to a Trust Created by the Will.—"There is no inherent power vested in courts of equity in the construction of devises, as a distinct and independent branch of jurisdiction, but it exercises this jurisdiction only as incident to its jurisdiction over trusts: *Bowers v. Smith*, 10 Paige, 193; *Monarque v. Monarque*, 80 N. Y. 321; *Wagner v. Wagner*, 89 N. Y. 161. The validity of devises and limitations in wills, or of a power conferred thereby, depends upon, and is determinable by, legal rules, and their determination must ordinarily await an occasion when, in a legal action or proceeding, a right under the devise or limitation, or the execution of the power, is asserted by one party, or denied by the other. The will in question in this case created legal estates only in the land devised, unaccompanied by any trust. The power of sale given to the executor, while it was in a sense a trust power, did not create any trust in the land devised, and while it might warrant the executor, upon a question arising, to apply to the court for instructions, the mere fact of the existence of the power did not make a case for invoking in behalf of a devisee, or the grantee of a devisee, the equitable jurisdiction of the court in the construction of wills within the principles established in this state": *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925.

The general rule laid down by the courts is that a court of equity will not entertain jurisdiction of a suit to construe a will unless a trust is created by the terms of the will. The jurisdiction is incidental to the court's jurisdiction over trusts. An executor or trustee of a will is entitled to the aid and advice of a court of equity in the management or execution of the trust: *Whitman v. Fisher*, 74 Ill. 147; *Strubber v. Belsey*, 79 Ill. 307; *Longwith v. Riggs*, 123 Ill. 258, 14

N. E. 840; *Harrison v. Owsley*, 172 Ill. 629, 50 N. E. 227; *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606; *Primm v. Primm*, 111 Ill. App. 244; *Hughes v. Hughes*, 30 Ind. App. 591, 66 N. E. 763; *Parker v. Parker*, 119 Mass. 478; *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244; *Chase v. Ladd*, 155 Mass. 417, 29 N. E. 637; *Draper v. Brown*, 153 Mich. 120, 117 N. W. 213; *Graham v. Allison*, 24 Mo. App. 516; *Clark v. Carter*, 200 Mo. 515, 98 S. W. 594; *Andersen v. Andersen*, 69 Neb. 565, 96 S. W. 276; *Wheeler v. Perry*, 18 N. H. 307; *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Bowers v. Smith*, 10 Paige, 193; *Walrath v. Handy*, 24 How. Pr. 353; *Mellen v. Banning*, 60 Hun, 151, 14 N. Y. Supp. 665; *Dill v. Wisner*, 88 N. Y. 153; *Wager v. Wager*, 89 N. Y. 161; *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 388; *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917; *Tayloe v. Bond*, 45 N. C. 5; *Cozart v. Lyon*, 91 N. C. 282; *Woodlief v. Merritt*, 96 N. C. 226, 2 S. E. 350; *Collins v. Collins*, 19 Ohio St. 468; *Edgar v. Edgar*, 26 Or. 65, 37 Pac. 73; *Hart v. Darter*, 107 Va. 310, 58 S. E. 590, 15 L. R. A., N. S., 599.

In *Miller v. Drane*, 100 Wis. 1, 75 N. W. 413, the court, in discussing this subject, said: "The jurisdiction of courts of equity for the construction of wills and giving directions in respect to the execution of them has long been established and well understood, and devolves upon the circuit court, in all proper cases, as a part of its proper constitutional jurisdiction, particularly in cases of trust. It is said that the jurisdiction of equity over trusts gives it authority to construe wills whenever necessary to guide or control the action of a trustee, and any person interested in a trust may apply to the court for a construction of the will, and direction as to the trust. It is by reason of the jurisdiction of the court of chancery over trusts that courts having equity powers, as incident to that jurisdiction, take cognizance of, and pass upon, the interpretation of wills: 1 *Beach on Equity Jurisprudence*, sec. 210. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, and when only legal rights are in controversy. As said by *Folger, J.*, in the case of *Bailey v. Briggs*, 56 N. Y. 413: 'It is when the court is moved in behalf of an executor, trustee, or cestui que trust, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts.' In 2 *Story's Equity Jurisprudence*, section 1058, it is said: 'In whatever way, or for whatever purpose, or in whatever form, trusts arise under wills, they are exclusively within the jurisdiction of courts of equity. Indeed, so many arrangements, modifications, restraints, and intermediate directions are indispensable to the due administration of these trusts that, without the interpretation of courts of equity, there would in many cases be a total failure of justice.' Mr. *Pomeroy*, in treating of the construction and enforcement of wills (3 *Pomeroy's Equity Jurisprudence*, section 1156), says: 'Under its general jurisdiction over trusts, a court of equity has also the power to construe and enforce wills of real as well as

of personal property, so far as they create, or their dispositions involve, the creation of trusts.' In *Catlin v. Wheeler*, 49 Wis. 520, 5 N. W. 935, speaking of an objection to the jurisdiction of the court in a somewhat similar case, this court said: 'As to the jurisdiction of the circuit court in equity in such a case, the statute and its various provisions relating to the jurisdiction and settlement of estates of deceased persons need not be specially recited and particularly considered; but, once for all, it may be said that the statute, in any of its provisions, will not bear any such construction as to divest the circuit court, as a court of equity, of jurisdiction of a suit of this nature. The jurisdiction of a court of chancery of the execution of trusts, and the payment of legacies which are in the nature of trusts, has been too long exercised to be now questioned; and no court, except one of plenary and general jurisdiction in equity, and governed by the established rules and practice of such courts, can so well and so fully exercise it in such a case, to the end sought. It has already been decided by this court that the county courts have jurisdiction in such matters concurrent with the circuit court or court of chancery proper, by force of the statute; but it will require the strongest, clearest, and most unequivocal language of the statute to make such a jurisdiction of the county courts in probate exclusive, and no such language is found in the present statute': *Brook v. Chappell*, 34 Wis. 405; *Heiss v. Murphey*, 43 Wis. 47. The same jurisdiction was exercised in *Van Steenwyck v. Washburn*, 59 Wis. 483, 48 Am. Rep. 532, 17 N. W. 289."

d. Rule Where the Construction is Sought as Incidental to Equitable Relief.—Where the construction is merely incidental to some equitable relief which may be afforded by a final decree, the court may construe the will in disposing of the case: *Evins v. Cawthon*, 132 Ala. 184, 31 South. 441; *Whitman v. Fisher*, 74 Ill. 147; *King v. King*, 215 Ill. 100, 74 N. E. 89; *Bevans v. Bevans*, 69 N. J. Eq. 1, 59 Atl. 896; *Hiles v. Garrison*, 70 N. J. Eq. 605, 62 Atl. 865; *Kellogg v. Burnett* (N. J. Ch.), 69 Atl. 196; *Hobart College v. Fitzhugh*, 27 N. Y. 130; *Cozart v. Lyon*, 91 N. C. 282. The court may, under its general equity jurisdiction, construe wills and other writings in determining whether the particular relief sought by the bill is proper to be given: *Hoagland v. Cooper*, 65 N. J. Eq. 407, 56 Atl. 705. Hence it will construe a will in a suit for the partition of the lands devised: *Osburn v. McCartney*, 121 Ill. 408, 12 N. E. 72; *McKeon v. Kearney*, 57 How. Pr. 349; *Hotaling v. Marsh*, 55 Hun, 325, 8 N. Y. Supp. 690; *Martin v. Martin*, 52 W. Va. 381, 44 S. E. 198. Likewise in a suit to quiet title or for an accounting: *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325; *Gough v. Manning*, 26 Md. 347; *Bird v. Hawkins*, 58 N. J. Eq. 229, 42 Atl. 588.

In *Cozart v. Lyon*, 91 N. C. 282, a much cited case, the court in discussing the jurisdiction of equity courts, after referring to some of the cases which announced the rule that a trust must be involved, said: "The principle announced by these authorities is with reference to the advisory jurisdiction of the courts of equity. But there are

cases where the courts of equity will put a construction upon wills and deeds where questions of that kind incidentally arise in actions or proceedings pending in them, under some of the heads of their acknowledged jurisdiction. It was so held in the case of *Simmons v. Hendricks*, 8 Ired. Eq. 84, 55 Am. Dec. 439, in which the court say: 'A court of equity will not take jurisdiction simply to put a construction on a deed or devise, because that is a pure legal question. There is a plain remedy at law, and such an assumption on the part of a court of equity would break down all distinction between the two jurisdictions. But where a case is properly in a court of equity, under some of its known and accustomed heads of jurisdiction, and a question of construction incidentally arises, the court will determine it, it being necessary to do so in order to decide the cause.' That was a bill in equity filed for partition, of which the court had concurrent jurisdiction with the courts of law, and a construction was there given to a devise which was necessary to decide the cause. But in our case the action is not instituted under any known head of equity jurisdiction, but is brought solely for the purpose of obtaining the construction of the court upon a devise contained in the will."

e. Rule Where the Relief Sought by the Construction may be had in a Court of Law.—Where no trust is created by the terms of the will, and construction is sought to determine merely legal titles, equity will not assume jurisdiction to construe the will, but will remit the parties to their remedy at law: *Miles v. Strong*, 62 Conn. 95, 25 Atl. 459; *Jacobs v. Button*, 79 Conn. 360, 65 Atl. 150; *Whitman v. Fisher*, 74 Ill. 147; *Minkler v. Simons*, 172 Ill. 323, 50 N. E. 176; *Harrison v. Owsley*, 172 Ill. 629, 50 N. E. 227; *Hughes v. Hughes*, 30 Ind. App. 591, 66 N. E. 763; *In re Nickerson*, 181 Mass. 571, 64 N. E. 408; *Warren v. Warren*, 151 Mich. 95, 114 N. W. 867; *Andersen v. Andersen*, 69 Neb. 565, 96 N. W. 276; *Greeley v. Nashua*, 62 N. H. 166; *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Steen v. Steen*, 68 N. J. Eq. 472, 59 Atl. 675; *Beard v. Beard* (N. J. Ch.), 63 Atl. 25; *Marlett v. Marlett*, 14 Hun, 313; *Avery v. Mabey*, 62 Hun, 619, 16 N. Y. Supp. 607; *Crouse v. Wilson*, 73 Hun, 353, 26 N. Y. Supp. 923; *McKinlay v. Van Dusen*, 76 App. Div. 200, 78 N. Y. Supp. 377; *Bowers v. Smith*, 10 Paige, 193; *Onderdonk v. Mott*, 34 Barb. 106; *Weed v. Weed*, 94 N. Y. 243; *Ferrand v. Howard*, 38 N. C. 381; *Alsbrook v. Reid*, 89 N. C. 151; *Cozart v. Lyon*, 91 N. C. 282. In *Chipman v. Montgomery*, 63 N. Y. 221, the court said: "A court of equity has an incidental jurisdiction in respect to wills, and does not take jurisdiction of an action brought merely for the construction of a will or other instrument at the instance of every person who claims to be directly or indirectly interested in the subject matter of the instrument. The rule is, that to put a court of equity in motion, there must be an actual litigation in respect to matters which are the proper subjects of the jurisdiction of that court, as distinguished from a court of law. Although the distinction between actions at law and suits in equity is abolished, the distinguishing features of

the two classes of remedies, legal and equitable, are as clearly marked and rigidly observed as they ever were, and this is essential to the administration of justice in an orderly manner and the preservation of the substantial rights of suitors. This results not from any necessary difference in the forms of pleadings and of actions, but the substantial difference between legal and equitable rights. Hence one who claims real property must bring his action of ejectment or other proper action for its recovery, and he who had a right to personalty or to any debt or duty, which is the subject of an action at common law, must resort to the appropriate remedy by action for the specific property, debt or duty, or damages for the infringement of his right. It is by reason of the jurisdiction of the court of chancery over trusts that courts having equity powers as an incident of their jurisdiction take cognizance of, and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, or when only legal rights are in controversy."

f. Rule Where the Construction Affects Only Bequests of Personal Property.—"The jurisdiction of a court of equity to entertain an action in behalf of the next of kin of a testator for the construction of a will disposing of personal estate, where the disposition made by the testator is claimed to be invalid or inoperative for any cause, was asserted by the chancellor in *Bowers v. Smith*, 10 Paige, 193, and was maintained in *Wager v. Wager*, 89 N. Y. 161, and in *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, 16 N. E. 305. It is true that in such cases the next of kin claim in hostility to the will, but the executors, in case the disposition made by the testator is invalid or cannot take effect, hold the personalty upon a resulting trust for those entitled under the statute of distributions; and thereby the jurisdiction to bring an equitable action for construction, and to have the resulting trust declared by the court, attaches as incident to the jurisdiction of equity over trusts. The Code of Civil Procedure (section 1866) has extended the remedy so as to include suits for construction of devises in behalf of heirs claiming adversely to the will, and it would not be consistent with the spirit of this legislation to narrow the jurisdiction in cases of bequests of personalty. The case of *Chipman v. Montgomery*, 63 N. Y. 221, contains expressions which, considered independently of the facts of the case, may seem adverse to this view; but, as was said by Rapallo, J., in *Wager v. Wager*, 89 N. Y. 161, 'the plaintiffs there had in their own showing no present interest in the property, and might never have any.' The case of *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. 546, was one also where the plaintiff had no interest in the ultimate disposition of the estate by the provisions of the will which was assailed, even if held invalid, and the court decided that she could not maintain the action": *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, 26 N. E. 730.

And in *Wager v. Wager*, 89 N. Y. 161, the court said: "There is no more common instance of the interposition of the court of chancery

in England to construe wills of personal estate and declare an executor to hold as trustee, than the very case now before us; that is, where an executor claims to take the residuary estate in his own right, in hostility to the claims of the next of kin. By the English law executors take beneficially as well as nominally all the personal estate not effectually disposed of by the will, where there is nothing in the will to the contrary, but courts of equity lay hold of any circumstances which may rebut the presumption of such a gift to the executor, and the books are full of cases where equity has interposed to construe the will in this respect, many of which cases are very analogous to the present one. . . . The rule is different in respect to real estate. An heir at law or devisee who claims a mere legal estate in real property, where there is no trust, cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will and thus determining the title to the real estate; for the decision of such legal questions belongs exclusively to courts of law, unless a court of equity has obtained jurisdiction of the case for some other purpose: *Bowers v. Smith*, 10 Paige, 193; *Post v. Hover*, 33 N. Y. 602. If the court has obtained jurisdiction for the purpose of establishing the equitable right of the next of kin to the personal estate, that carries with it jurisdiction to adjust the whole controversy: 10 Paige, 200."

g. Statutory Provisions Relative to the Jurisdiction to Construe Wills.—The jurisdiction of courts of equity to construe wills has been recognized by statute in some states, while in other states the jurisdiction has been concurrently given by statute to courts of probate, whether acting in the strict capacity of probate courts or as probate courts with equity powers: *Burroughs v. Cutter*, 98 Me. 178, 99 Am. St. Rep. 392, 56 Atl. 649; *Haseltine v. Shepherd*, 99 Me. 495, 59 Atl. 1025; *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560; *Ludwig v. Bungart*, 48 App. Div. 613, 63 N. Y. Supp. 91; *Matter of Mount's Will*, 185 N. Y. 162, 77 N. E. 999; *In re John*, 30 Or. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; *Allen v. Barnes*, 5 Utah, 105, 12 Pac. 912; *Blair v. Johnson's Heirs*, 64 Vt. 598, 24 Atl. 764; *Hall v. Lawton*, 80 Vt. 535, 68 Atl. 657; *Miller v. Drane*, 100 Wis. 1, 75 N. W. 413; *Stephenson v. Norris*, 128 Wis. 242, 107 N. W. 343; *Sherman v. American Congregational Assn.*, 113 Fed. 609, 51 C. C. A. 329. In Minnesota, under the constitution, it is held that probate courts have the exclusive power to construe wills: *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301. In California, where the same court is invested with equity jurisdiction and also full jurisdiction in matters of probate, it is held that an independent suit cannot be maintained in equity to construe a will: *Toland v. Earl*, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914. While in Nebraska a distinction is observed between suits for advice and instructions and the construction of the will in proceedings for the settlement of the estate. The probate courts have exclusive jurisdiction in the latter proceedings: *Reischick v. Rieger*, 68 Neb. 348, 94 N. W. 156; *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700. In some states under statutory provisions

the validity of any gift, devise or trust under a will, whether admitted to probate or not, may be tested in an action to quiet title or similar proceeding: Cal. Code Civ. Proc., sec. 738; *Woodruff v. Cook*, 47 Barb. 304; *Adams v. Adams*, 55 Hun, 604, 8 N. Y. Supp. 260; *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. 546; *Anderson v. Anderson*, 112 N. Y. 104, 19 N. E. 427, 2 L. R. A. 175; *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925; *Heptinstall v. Newsom*, 146 N. C. 503, 60 S. E. 416.

III. Who may Seek the Construction of a Will.

"There is nothing unusual in courts of equity entertaining jurisdiction of suits to construe wills, for it is a part of the ancient and well-defined jurisdiction of the courts of chancery to construe wills and declare the trust created thereby, but this by no means is to be construed as authorizing any person, regardless of the relation in which they stand to the will, to maintain such a proceeding. Where an executor or trustee named in a will has any doubt as to the proper construction of the terms of the instrument they are required to enforce and carry out, they may very appropriately institute a proceeding to have the will properly construed, and the executor or trustee defined by the decree of the court, or where devisees or legatees are entitled to certain rights and claims under the provisions of a will, and the executors or trustees named in the will refuse or fail to execute and carry out the provisions of the will as contemplated by the testator, courts of equity may entertain suits instituted by such legatees or devisees for the purpose of construing and as well enforcing the provisions of the will as construed by the court": *Clark v. Carter*, 200 Mo. 515, 98 S. W. 594.

It is when there is some continuing duty, some trust which requires, and will require, action for some time to come, that an executor or trustee may bring an action to obtain the construction of a will: *Powell v. Demming*, 22 Hun, 235. The duties of the executor must be active ones: *Eldred v. Meek*, 183 Ill. 26, 75 Am. St. Rep. 86, 55 N. E. 536. An executor should apply to the court for instructions as to the manner of administration in matters of doubtful construction: *Thornton v. Zea* (Tex. Civ. App.), 39 S. W. 595. The right, however, is limited to questions of doubt or of conflicting clauses where the advice is necessary for his protection in the distribution of the trust funds: *Carr v. St. Paul's Parish*, 71 N. H. 231, 51 Atl. 920. In other words, he is entitled to the advice and aid of a court of equity in the performance of his trust duties in cases of doubt as to his duties: *Trotter v. Blocker*, 6 Port. 269; *Cowles v. Poillard*, 51 Ala. 445; *Hughes v. Fitzgerald*, 78 Conn. 4, 60 Atl. 694. But an executor is not entitled to ask construction as to devises with which he has nothing to do, or as to matters of which he is not invested with any trust: *Dill v. Wisner*, 88 N. Y. 153; *Adams v. Jones*, 59 N. C. 221. Nor can he maintain a bill in equity for instructions as to the management of a trust where it is not certain that any estate will remain after the payment of the debts of the estate: *Proctor v.*

Heyer, 122 Mass. 525. A court will not construe a will while proceedings are pending for a re-examination of the probate, since it may develop that he may have no trust duties to perform: Gebhard v. Lenox Library, 74 N. H. 416, 68 Atl. 540. The same rules apply to an administrator with the will annexed: Stoff v. McGinn, 178 Ill. 46, 52 N. E. 1048; Norris v. Beardsley (N. J. Ch.), 62 Atl. 425; Osborne v. Taylor's Admr., 12 Gratt. 117. Hence it may be stated in a general way that executors and administrators with the will annexed are entitled to maintain suits to obtain the construction of a will where they are in doubt as to the proper performance of their duties under the terms of the trust created by the will: Sellers v. Sellers, 35 Ala. 235; Belfield v. Booth, 63 Conn. 299, 27 Atl. 585; Clark v. Clark, 17 Ga. 485; Stoff v. McGinn, 178 Ill. 46, 52 N. E. 1048; Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520; Fraser's Exr. v. Page, 82 Ky. 73; Ladd v. Chase, 155 Mass. 417, 29 N. E. 637; Clark v. Carter, 200 Mo. 515, 98 S. W. 594; Carr v. St. Paul's Parish, 71 N. H. 231, 51 Atl. 920; Drake v. True, 72 N. H. 322, 56 Atl. 749; Stevens v. Dewey, 55 N. J. Eq. 232, 36 Atl. 825; Norris v. Beardsley (N. J. Ch.), 62 Atl. 425; Garlock v. Vandervort, 128 N. Y. 374, 28 N. E. 599; Pitman v. Ashley, 90 N. C. 612; Rothgeb v. Mauck, 35 Ohio St. 503; Meacham v. Graham, 98 Tenn. 190, 39 S. W. 12; Thornton v. Zea (Tex. Civ. App.), 39 S. W. 595; Osborne v. Taylor's Admr., 12 Gratt. 117; Rexwood v. Wells, 13 W. Va. 812; Sawtelle v. Ripley, 85 Wis. 75, 55 N. W. 156.

But, as a general rule, where a trust is created by the will and a question of doubt arises as to the true meaning of the will, any person interested in the property held in trust may invoke the aid of a court of equity to construe the will: Minkler v. Simons, 172 Ill. 323, 50 N. E. 176; Wintermute v. Heinly, 81 Iowa, 169, 47 N. W. 66; Annin's Exrs. v. Vandoren's Admr., 14 N. J. Eq. 135; Walruth v. Handy, 24 How. Pr. 353; Keteltas v. Keteltas, 53 How. Pr. 65; Wager v. Wager, 89 N. Y. 161. A party claiming to be the beneficiary intended by a will may maintain a suit for its construction: First Baptist Church v. Robberson, 71 Mo. 326. And where a devise is made to a town to provide books for the public schools, and the will provides that a suitable person shall be chosen by the town to take charge of the fund, such person may maintain a suit for the construction of the will: Davis v. Inhabitants of Barnstable, 154 Mass. 224, 28 N. E. 165.

A cestui que trust, being a person who has a vital interest in the trust provisions of the will, naturally has a right to have its provisions construed in a proper case: McRee's Admr. v. Means, 34 Ala. 349; Woman's Union Missionary Soc. v. Mead, 131 Ill. 33, 23 N. E. 603; Draper v. Brown, 153 Mich. 120, 117 N. W. 213; Gillen v. Hadley, 72 N. J. Eq. 505, 66 Atl. 1087; Bowers v. Smith, 10 Paige, 193; Wead v. Cantwell, 36 Hun, 528; Marrow v. Marrow, 45 N. C. 148; Colton v. Colton, 127 U. S. 300, 84 Sup. Ct. Rep. 1164, 32 L. ed. 138. A person who would take as a cestui que trust under the will if a trust is created by the terms of the will must contend that a

trust is created in order to give the court jurisdiction to construe the will: *Edgar v. Edgar*, 26 Or. 65, 37 Pac. 73. Creditors who lent money to the cestui que trust during his minority, taking an assignment of his share in the estate as security, cannot, while maintaining a suit at law to recover the money, maintain a suit to construe the will: *Page v. Marston*, 94 Me. 342, 47 Atl. 529. A judgment creditor of a beneficiary under the will cannot sue to determine the estate of the beneficiary under the statute authorizing an action to determine the validity, construction or effect of a testamentary disposition of real property: *Higgins v. Downs*, 101 App. Div. 119, 91 N. Y. Supp. 937.

Where the will in bequeathing personalty to legatees creates a trust in respect thereto, the legatees have an undoubted right to have the will construed where its provisions are ambiguous or doubtful: *Kennedy v. Merrick*, 46 Neb. 260, 64 N. W. 960; *Allen v. Barnes*, 5 Utah, 100; 12 Pac. 912; *Miller v. Drane*, 100 Wis. 1, 75 N. W. 413. Sometimes the jurisdiction to construe a will disposing of personalty is assumed on the theory that if the disposition attempted by the will is invalid, the executors will hold the personalty upon a resulting trust for those entitled to distribution: *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, 26 N. E. 730.

Where no trust is created by the will, neither a devisee, heir at law or next of kin can, in the absence of a statute authorizing a construction, come into a court of equity to obtain a judicial construction of the will, and in that manner determine the title to real estate. The reason is that the determination of such questions is purely legal and a matter for courts of law, since courts of equity will not determine legal titles unless jurisdiction has been acquired for some other purpose: *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Bowers v. Smith*, 10 Paige, 193; *Cozart v. Lyon*, 91 N. C. 282; *Heptinstall v. Newsom*, 146 N. C. 503, 60 S. E. 416; *Collins v. Collins*, 19 Ohio St. 468; *Edgar v. Edgar*, 26 Or. 65, 37 Pac. 73; *Bussey v. McKie*, 2 McCord Eq. 23, 16 Am. Dec. 628; *Hart v. Darter*, 107 Va. 310, 58 S. E. 590, 15 L. R. A., N. S., 599; *Kelley v. Kelley*, 80 Wis. 486, 50 N. W. 334; *Sherman v. American Congregational Assn.*, 113 Fed. 609, 51 C. C. A. 329.

Ordinarily, one claiming in hostility to the will cannot maintain a suit for its construction: *St. John v. Andrews Institute*, 192 N. Y. 382, 85 N. E. 143. But the fact that an executor also claims the property as an individual will not preclude him from seeking a construction of the will in his official capacity: *Hughes v. Hughes*, 30 Ind. App. 591, 66 N. E. 763; *In re Batchelder*, 147 Mass. 465, 18 N. E. 225; *Cresap v. Cresap*, 54 W. Va. 481, 46 S. E. 582. But where the sole purpose of the proceeding is not to enforce the trust, but to overthrow it as violating the statute against perpetuities, the suit will not be entertained: *Tonnele v. Wetmore*, 124 App. Div. 686, 109 N. Y. Supp. 349; affirmed in 192 N. Y. 583, 85 N. E. 1116. And in an issue of *devisavit vel non*, the court will not ordinarily construe the will, since in such a proceeding the court exercises powers of the

nature of a court of probate, and its jurisdiction is exhausted upon pronouncing upon the validity of the will: *Mears v. Mears*, 15 Ohio St. 90; *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; contra, *Harper v. Harper*, 148 N. C. 543, 62 S. E. 553

IV. Necessity for the Clause or Portion of the Will to be Construed to Affect Subsisting Substantial Rights.

The jurisdiction to construe wills is exercised for the purpose of insuring a correct administration of a power or trust conferred by will. Hence, the court will refuse to decide questions which could not be attended by any present practical results: *Poll v. Cash*, 234 Ill. 53, 84 N. E. 719; *Scales v. Scales*, 59 N. C. 163.

"A court of equity deals with definite, concrete, and substantial controversies affecting the rights of property, and genuine litigation, and is not a general adviser for executors": *Voshall v. Clark*, 123 App. Div. 136, 108 N. Y. Supp. 313. The person seeking the construction of a will must have an official duty to perform under the portion of the will to be construed, or have an interest in the property affected thereby. If the property affected by the clause of the will to be construed will in any event not go to the petitioner, he has no such interest in the controversy as will sustain a suit for the construction of the clause: *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; *Major v. Esneault*, 7 La. Ann. 51; *Burgess v. Shepherd*, 97 Me. 522, 55 Atl. 415; *Barkley v. Donnelly*, 112 Mo. 561, 19 S. W. 305; *Kennedy v. Merrick*, 46 Neb. 260, 64 N. W. 960; *Lord v. Lord*, 44 Misc. Rep. 530, 90 N. Y. Supp. 143; *Tyson v. Tyson*, 100 N. C. 360, 6 S. E. 707; *Rexroad v. Wells*, 13 W. Va. 812; *Sawtelle v. Ripley*, 85 Wis. 72, 55 N. W. 156. A trustee who seeks the advice of the court as to the disposition of property or the distribution of a fund must, as a rule, have it in his possession, so that the order of the court may be carried out: *Perkins v. Caldwell*, 77 N. C. 433; *Balsley v. Balsley*, 116 N. C. 472, 21 S. E. 954. An executor may sue for the construction of a will under which his testatrix received property which is claimed by others: *Leggett v. Stevens*, 185 N. Y. 70, 77 N. E. 874.

V. Necessity for the Construction to be of Present Need and not Remote, Contingent or in Respect to Past Acts.

The right to have a will construed does not exist where there is no practical or present controversy to be determined. The jurisdiction in matters of construction are limited to such as are necessary for the present action of the court, and on which it may enter a decree, or direction in the nature of a decree. The court will not construe questions that are remote and may never arise or are contingent. Nor will a court of equity decide mere hypothetical case relating to the construction of the will: *Hughes v. Hughes* (Ind. App.), 63 N. E. 250; *Wahl v. Brewer*, 80 Md. 237, 30 Atl. 654; *Wilbur v. Maxam*, 133 Mass. 541; *Bullard v. Attorney General*, 153 Mass. 249, 26 N. E. 691;

Peverly v. Peverly, 173 Mass. 203, 53 N. E. 395; *State v. Prewett*, 20 Mo. 165; *Bailey v. McIntire*, 71 N. H. 329, 52 Atl. 446; *Stewart v. Stewart*, 61 N. J. Eq. 25, 47 Atl. 633; *Norris v. Beardsley* (N. J. Ch.), 62 Atl. 425; *Ogden v. McLane* (N. J. Ch.), 67 Atl. 695; *Kellogg v. Burnett* (N. J. Ch.), 69 Atl. 196; *Tiers v. Tiers*, 32 Hun, 184; *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. 546; *Cochrane v. Schell*, 64 Hun, 576, 19 N. Y. Supp. 424, affirmed in 140 N. Y. 516, 35 N. E. 971; *Tayloe v. Bond*, 45 N. C. 5; *Adams v. Jones*, 59 N. C. 221; *Heptinstall v. Newsom*, 146 N. C. 503, 60 S. E. 416; *Goddard v. Brown*, 12 R. I. 31; *Morse v. Lyman*, 64 Vt. 167, 24 Atl. 763; *Blair v. Johnson's Heirs*, 64 Vt. 598, 24 Atl. 764; *Rexroad v. Wells*, 13 W. Va. 812; *Cross v. De Valle*, 1 Wall. 1, 17 L. ed. 515. But jurisdiction has been entertained where all the parties joined in the application, even though the question was in respect to the future rights of remaindermen: *Meacham v. Graham*, 98 Tenn. 190, 39 S. W. 12. In speaking of the questions as to which the court will advise the trustee, the court in *Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. 867, said: "This right does not, however, extend to the solution of propositions which do not present themselves as requiring any action by the trustee, or where the events which must control the rights of parties, and the duties of the trustee, have not transpired, and are yet uncertain, or which should properly be submitted to some other tribunal, or which are so clear as to admit of no question. The court should be called on to decide and direct, not to counsel and advise: *Merlin v. Blagrove*, 25 Beav. 139; *Vanness' Exrs. v. Jacobus*, 17 N. J. Eq. 153."

Nor will the court construe a will in respect to matters relating to acts on the part of the executor or trustee which have occurred: *Miles v. Strong*, 60 Conn. 393, 22 Atl. 959; *Sohier v. Burr*, 127 Mass. 221; *Clark v. Carter*, 200 Mo. 515, 98 S. W. 594.

VI. Necessity for the Clause to be Construed to be Debatable, Doubtful or Disputed.

Where the terms of a will are ambiguous, uncertain or disputed, and the proper construction thereof is a matter of doubt, a court of equity will construe it where a trust is involved in the will: *Carroll v. Richardson*, 87 Ala. 605, 6 South. 342; *Clark v. Clark*, 17 Ga. 485; *Longwith v. Riggs*, 123 Ill. 258, 14 N. E. 840; *Haseltine v. Shepherd*, 99 Me. 495, 59 Atl. 1025; *Morse v. Stearns*, 131 Mass. 389; *Wilbur v. Maxam*, 133 Mass. 541; *Bullard v. Attorney General*, 153 Mass. 249, 26 N. E. 691; *Goodhue v. Clark*, 37 N. H. 525; *Benham v. Hendrickson*, 32 N. J. Eq. 441; *Traphagen v. Levy*, 45 N. J. Eq. 448, 18 Atl. 222; *Kilburn v. Dodd* (N. J. Ch.), 30 Atl. 868; *Stevens v. Dewey*, 55 N. J. Eq. 232, 36 Atl. 825; *Bailey v. Briggs*, 56 N. Y. 407; *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. 546; *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925; *Hough v. Martin*, 22 N. C. 379, 34 Am. Dec. 403; *Thornton v. Zea* (Tex. Civ. App.), 39 S. W. 595; *Clark v. Peck's Exrs.*, 79 Vt. 275, 65 Atl. 14. The court will not entertain jurisdiction of a bill for the construction if the will is free from doubt:

Baxter v. Baxter, 43 N. J. Eq. 82, 10 Atl. 814. "It is a rule of common sense as well as law not to attempt to construe that which needs no construction": *Reck's Appeal*, 78 Pa. 432.

In order to give a court of equity jurisdiction to construe or interpret a will, there must be an actual litigation in respect to a matter which is the proper subject of jurisdiction of a court of equity as distinguished from a court of law: *Chipman v. Montgomery*, 63 N. Y. 221; *Hart v. Darter*, 107 Va. 310, 58 S. E. 590, 15 L. R. A., N. S., 599. In *Stephenson v. Norris*, 128 Wis. 242, 107 N. W. 343, it was, however, said: "The plenary jurisdiction which the circuit court possesses, as the legitimate successor of the ancient court of chancery, over actions for the construction of wills, especially where trust powers are involved, is so well established that it is not open to doubt or discussion: *Heiss v. Murphy*, 40 Wis. 276; 43 Wis. 45; *Miller v. Doane*, 100 Wis. 3, 75 N. W. 413. Nor in such cases is it necessary that there should be an actual litigation begun or contest pending to justify the court in entertaining the action. A trustee is entitled to the protection of the court in the execution of his trusts, and, where, real and serious doubts confront him as to his duty, is entitled to the advice of the court to guide him. This court has said that in such a case 'it is not the mere right, it is almost the duty, of the executor, to take the opinion of the court upon the construction of the will and the validity of the disposition which it purports to make of the testator's property: *Heiss v. Murphey*, 43 Wis. 45.'"

EL DORADO AND BASTROP RAILROAD COMPANY *v.* WHATLEY.

[88 Ark. 20, 114 S. W. 234.]

JURY TRIAL—Error in Submitting a Question of Fact Where the Evidence is not Contradicted.—It is error to submit to the jury the question whether an employé had been warned of the danger of riding on the pilot of an engine when there is uncontradicted evidence that he was so warned. (p. 97.)

JURY TRIAL—Error in Submitting Uncontested Questions.—It is error to submit as issues to the jury matters of which there is no dispute, or questions upon which there is no evidence. (p. 98.)

RULES OF A CORPORATION, Violation of is Negligence Though Known to Its Officers.—An employé of a railroad corporation is guilty of negligence in riding on the pilot of a locomotive, though the superior officers knew of the custom to so ride, and permitted it to continue, if the dangers of so riding are so imminent and obvious that no prudent man, under the circumstances, would have undertaken it. (p. 98.)

CUSTOM OF DISOBEYING RULES of a Railway, Effect of on the Question of Contributory Negligence.—If it is the custom of the employés of a railroad, with the knowledge of their superiors, to violate a rule forbidding them to ride on the pilot of a locomotive, such custom may be considered in connection with other evidence in determining whether one so riding and injured while doing so was

guilty of contributory negligence, but the court must not declare, as a matter of law, that such custom relieves him or does not relieve him of the charge of such negligence. (p. 98.)

JURY TRIAL—Negligence on the Part of the Defendant, Instruction Ignoring the Question of.—An instruction that the jury should find for the plaintiff if he used ordinary care is erroneously misleading, where it was also necessary for them to find negligence on the part of the defendant before he could be subjected to an action for damages. (p. 99.)

JURY TRIAL—Instruction, Modifying so as to Make It Contradictory and Meaningless.—If, in an instruction in a suit to recover for negligence, the court states the circumstances and conditions under which the plaintiff is entitled to recover, but adds, provided the defendant by using ordinary care could have prevented the injury, this modification destroys the effect which should be given to contributory negligence, renders the whole instruction contradictory and meaningless, and is erroneously prejudicial. (p. 100.)

T. M. Mehaffy and J. E. Williams, for the appellant.

21 WOOD, J. David Rufus, a youth about sixteen years old, was in the employ of appellant as brakeman about its yards in the town of El Dorado, Arkansas. On the morning of his fatal injury he was riding on the pilot of the engine. The engine and tender were going north on the sidetrack, and young Rufus was going to make a coupling on the pilot. He was standing on a board or step on the right-hand side of the pilot. There was "a piece on the side of the pilot, put there for people to stand on who go there to fix the knuckle" of the coupler. The piece was put there to keep the feet of those who go there to open the knuckle from slipping off. There was a place on the engine for the brakeman to ride who opened the knuckle, so they did not have to get on the pilot. He was opening a knuckle, when the engine ran over one rail that was higher than the other at the joint between them, making a spring that caused the pilot to tilt and throw him off between the rails, his right leg being across the rail. The engine and tender passed over him, crushing his leg, which was soon after amputated. He was conscious after his injury, and suffered extremely from Saturday morning until Monday morning, when he died. Appellee, as the administrator, sued for the benefit of the estate, for the benefit of his father as next of kin **22** and for the loss of services to the father. The negligence alleged was the failure of appellant to give proper warning of the dangers to which Rufus was exposed, and the negligent construction and maintenance of its track, in that the rails were not properly joined together, and consequently one was lower than the other, causing the rebound of the front part of the engine and tilt of the pilot which threw young Rufus to the track, etc.

All the material allegations of the complaint were denied, and the defense of contributory negligence was set up. There was evidence sufficient to sustain the verdict on the issue of the negligence of appellant in maintaining its track in a defective condition. On the issue of contributory negligence, the evidence showed that it was against the rules of the company to ride on the pilot of the engine; that it was dangerous to do so, and the engineer so informed Rufus. The conductor whose duty it was to warn Rufus of the danger of riding on the pilot said that he "told every new man to keep off the pilot, and the head negro brakeman looked after that order, too." The brakeman testified that he told Rufus "a good many times" before, and told him "that same morning," that "it was against the rules of the company" to ride on the pilot, and "if he was caught it would be at his own risk." This was all the testimony on the subject of the warning that was given Rufus. There was evidence to warrant the conclusion that "it was customary for brakemen to board the pilot and be transferred from one part of the yard to the other," and that the conductor had knowledge of this custom. Among many instructions the court gave the following prayers for instructions at the instance of appellee:

"5. The jury are instructed that if they believe from the evidence that David Rufus, the deceased, was a minor, and was employed by the defendant upon one of its trains to perform dangerous and hazardous services, and that he was injured while in the discharge of the duties of his employment, a recovery cannot be defeated on the ground of contributory negligence, unless they further find from the evidence that the deceased was warned and instructed by the defendant against the dangers incident to the duties of his employment, and, after being so warned, the deceased failed in the exercise of ordinary care and prudence."

"7. The jury are instructed that if they believe from the ²³ evidence that the deceased was in the employment of the defendant upon one of its trains to perform dangerous and hazardous services, and that he was at the time a minor, and on account of his youth and inexperience he did not know or appreciate the dangers incident to the services he was so employed to do, and that the defendant failed to warn him of such dangers, or to instruct him how to avoid it so far as it could be avoided, before exposing him to such danger, and that deceased was injured while in the discharge of the duties of his employment, and suffered great pain of body and mental anguish, and came to his death on account of the

defendant's failure to so warn and instruct him, the defendant is liable for any damages the jury may find, from the evidence, directly resulting from said injuries; and they may find for the plaintiff under one or all three counts laid in the complaint, as they may believe from the evidence he is entitled to recover."

"9. The jury are instructed that if they find from the evidence that the deceased was an employé of the defendant, he was not bound by the rule of said defendant which they believe from the evidence was not brought to his attention, or was habitually violated with the knowledge of his superior officers without any effort on their part to enforce it. And if the jury believe from the evidence that the defendant had a rule that employés should not board the pilot of the engine in performing the services of their employment, and that said rule was not brought to the attention of the deceased, or that it was habitually violated with the knowledge of his superior officers without any effort on their part to enforce it, and which, they believe from the evidence, tended to mislead deceased in the violation of such rules, then they will find that there was no such breach of duty on the part of the deceased in boarding the said pilot, and that such act on his part does not amount to such contributory negligence as would excuse the defendant from such liabilities for injuries caused by defects in railroad tracks which it was its duty to discover and repair, and which might have been discovered and repaired by the exercise of ordinary care and diligence on the part of the defendant.

"10. The jury are instructed that if they believe from the evidence in this case that the deceased was, on the sixth day of ²⁴ May, 1905, in the employment of the defendant on one of its trains, and was a minor, and that the coupling and uncoupling of its cars was a part of the duties of his employment, and that the deceased took the pilot of the engine of the defendant to be transferred from one part of the railroad yards, at its depot in El Dorado, Union county, Arkansas, to another part thereof, in the performance of said duty, and that it was permissible by its superior officers and not unusual for employés of defendant in performing such services to be thus transferred from one part of its railroad yards to another, with the knowledge of their superior officers; and if they further find from the evidence that, while being so transferred, the deceased was thrown from the pilot in front of the engine, and was run over by said engine, bruised, mashed and mangled, and that from said injuries he suffered

great pain of body and anguish of mind for the space of about two days, and died, and that said injuries, suffering, pain and death of the deceased were the direct results of the carelessness and negligence of the servants and agents of the defendant in not keeping said railroad track in a reasonably safe condition, then they will find for the plaintiff such damages as they may believe from the evidence he is entitled to recover under any one or all three counts sued on."

Appellant asked but the court refused the following:

"1. The court instructs the jury to find for the defendant."

"7. The court instructs the jury that one who is injured by the negligence of another cannot recover any compensation for his injury if he by his own negligence and willful wrong contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; and in this case if the jury believe from the evidence that the deceased, David Rufus, had been warned and was informed that it was against the rules and regulations of the company to ride on the front of the engine, and that in disregard of this warning he got up on the engine in front, on what is known as the pilot, slipped, and was run over and injured, and that he would not have been injured had it not been for the position he was in, then your verdict should be for the defendant."

The court modified prayer number 7 by adding at its conclusion ²⁵ the words, "provided you find that the defendant by using ordinary care could have prevented the injury."

The court on its own motion gave the following instruction over appellant's objection: "If you find from the evidence in this case that the plaintiff used ordinary care, you will find for the plaintiff."

The verdict and judgment were for five hundred dollars. This appeal has been duly prosecuted.

The court erred in submitting to the jury the question as to whether David Rufus had been warned by appellant of the danger of riding on the pilot. The uncontroverted evidence is that he was warned of ²⁶ the danger of so riding. The evidence is consistent in itself, and, there being no evidence to the contrary, the court should not have submitted the matter to the jury as if it were a disputed proposition. It is error to submit as issues to the jury matters about which there is no dispute, or to submit questions upon which there is no evidence: *Maddox v. Reynolds*, 72 Ark. 440, 81 S. W. 603; *St. Louis etc. Ry. Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 387;

Pacific Mut. Life Ins. Co. v. Walker, 67 Ark. 147, 53 S. W. 675; St. Louis etc. Ry. Co. v. Denty, 63 Ark. 177, 37 S. W. 719; St. Louis etc. Ry. Co. v. Sweet, 63 Ark. 563, 40 S. W. 463; St. Louis etc. Ry. Co. v. Woodward, 70 Ark. 441, 69 S. W. 55; St. Louis etc. Ry. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74, 66 S. W. 661; Fordyce v. Key, 74 Ark. 19, 84 S. W. 797; Davis v. Richardson, 76 Ark. 348, 89 S. W. 318; Frank v. Dungan, 76 Ark. 599, 90 S. W. 17; St. Louis S. W. Ry. Co. v. Knight, 77 Ark. 20, 88 S. W. 1035; St. Louis etc. Ry. Co. v. Fambro, 88 Ark. 12, 114 S. W. 1230.

A failure to warn was one of the grounds of negligence charged, and submitting it as a question for the jury when there was no evidence to support it, and when the evidence was all to the contrary, was misleading and prejudicial: See cases *supra*.

In prayers numbered 9 and 10, given at the instance of appellee, the court in effect told the jury that if it was the custom for employes of appellant to ride the pilot in violation of the rules of the company, and the superior officers of the appellant knew of such custom and permitted it, then David Rufus was not guilty of contributory negligence in also riding the pilot. That is not the law. Although it may have been the custom of other employes of appellant to ride the pilot, of which custom appellant was cognizant, still that would not relieve David Rufus of the charge of contributory negligence in riding the pilot, if the danger of doing so was so imminent and obvious that no prudent man, under the circumstances, would undertake it. If the danger were of that character, it could not excuse Rufus from the consequences of his negligent act because forsooth other employes were as imprudent as he. It is proper to consider the custom in connection with the other evidence in determining the question of the contributory negligence of Rufus, but not to make that custom a criterion of his conduct, and declare as a matter of law that, because it was the custom for other employes to ride the pilot with the knowledge of appellant's ²⁷ superior agents in charge, he might do so too without being subject to the charge of contributory negligence.

The supreme court of Alabama says: "Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself, but only by relation to the rule violated; and so, when an act may be done in two or more ways, a resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a

particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent": Citing authorities; *Warden v. Louisville etc. R. Co.*, 94 Ala. 227, 10 South. 276, 14 L. R. A. 552.

Appellant's counsel have cited several cases where, under the circumstances peculiar to those cases, it was declared, as matter of law, to be contributory negligence for the employé to ride the pilot or in other place of obvious danger. We have examined the cases, and it could serve no useful purpose to review them here. Suffice it to say that the facts in those cases distinguish them from this. Here a boy about sixteen years of age is employed about the yards of appellant company as a brakeman, and was engaged at the time of the accident in switching cars, making up the train. The engine upon which he was riding at the time was going slowly, but faster than a man walks. He was riding on a piece of board on the side of the pilot that was placed there to keep the feet from slipping while employés stood there to open the knuckle to the coupler. It was there for the employés to stand upon while doing that work. It seems that the "piece" or board was a continuation of the steps on the side of the engine. Other brakemen, while engaged in the same work and while being transferred about the yards, rode in this place on the pilot, and did so constantly, and the superior agents of appellant in charge knew that they did so. Under these circumstances, we do not think that it should be held, as matter of law, that the act of young Rufus in so riding was contributory negligence, notwithstanding he was told that it ²⁸ was against the rules of the company and was warned that it was dangerous. The habitual violation of the rules by other employés with the apparent acquiescence of appellant was well calculated to lead young Rufus to conclude that the rules upon the subject were not considered of sufficient importance to be enforced, and that neither the brakeman nor the superior servants of appellant regarded riding the pilot as dangerous.

Upon the facts of this case reasonable minds might reach different conclusions as to whether the danger of riding the pilot was such an imminent and obvious one that no prudent man would undertake it.

We are of the opinion that both the questions of the negligence of appellant and the contributory negligence of David

Rufus were those of fact to be submitted to the jury under proper instructions.

The court did not err, therefore, in refusing appellant's first prayer for instructions.

The court erred in instructing the jury on its own motion to find for the plaintiff if it found that he used ordinary care. This instruction, standing alone, was well calculated to cause the jury to believe that only plaintiff's conduct was under consideration, whereas it was necessary to find negligence on the part of appellant before the contributory negligence could be inquired into or operate as a defense. The instruction was incomplete, misleading and prejudicial. The court also erred in giving appellant's seventh prayer as modified. The modification destroyed the effect that should be given to contributory negligence, if found, and rendered the whole instruction contradictory and meaningless. For the errors indicated the judgment is reversed, and the cause is remanded for new trial.

The Promulgation and Enforcement of Rules for the Safety of His Employé's is one of the positive duties of an employer when the nature of the work requires it: *Merrill v. Oregon Short Line R. R. Co.*, 29 Utah, 264, 110 Am. St. Rep. 695. As to the effect of a disobedience, habitual or otherwise, of rules after they have been promulgated, see *St. Louis etc. Ry. Co. v. Dupree*, 84 Ark. 377, 120 Am. St. Rep. 74; *Merrill v. Oregon Short Line R. R. Co.*, 29 Utah, 264, 110 Am. St. Rep. 695.

PARTRIDGE v. STATE.

[88 Ark. 267, 114 S. W. 214.]

INTOXICATING LIQUORS, Sale of by Agent, When does not Render His Principal Guilty.—If one conducting a stand for the sale of nonintoxicating beverages employs a salesman, who, without the knowledge or consent of his employer, takes possession of and sells some intoxicating liquors which were not intended for sale, the principal is not guilty of selling such liquors. (p. 101.)

John E. Bradley, for the appellant.

William F. Kirby, attorney general, and Daniel Taylor, assistant, for the appellee.

267 McCULLOCH, J. Appellant was tried upon an indictment charging him with unlawfully selling intoxicating liquor without license, and the court gave to the jury a peremptory instruction to find him guilty as charged.

²⁶⁸ The following is the state of the testimony: Appellant was conducting a stand at a picnic in Clark county for the sale of lemonade, soda-pop, candy, etc., and employed a salesman named Worley. A witness named Palmer went to the stand in appellant's absence and called for a drink of hop ale, whereupon Worley handed him out a bottle of beer, for which he paid Worley the sum of twenty-five cents. Worley testified that he did not know the bottle sold to Palmer contained beer, and that appellant had employed him to sell for him, but did not give him particular instructions what to sell. Appellant testified that he kept no intoxicating liquor for sale; that he put four bottles of beer in a box at the stand to keep for his own private use, and did not authorize anyone to sell it; that the bottles of beer were not put in the ice-box where other cold drinks were kept for sale, and that he intended, when he got ready to drink it, to shave ice in it to cool it. He also testified that Worley and the other salesman in the stand were grown men, and that he supposed they knew better than to sell the beer.

If appellant's statement of the facts was true, he was not guilty of any offense, and he had the right to have the jury pass upon the question. It was error to take the case from the jury.

If appellant kept the beer at his place of business solely for his own consumption, and gave no authority, either express or implied, for its sale, the fact that his clerk sold it by mistake would not render him guilty of the unlawful sale.

The statute under which appellant stands accused provides that it shall be an offense for any person to "sell, either for himself or another, or be interested in the sale" of the prohibited liquors, without license: Kirby's Digest, sec. 5112. This court held that, under a statute making it a criminal offense for anyone to sell or to be interested in the sale of intoxicating liquor to a minor, a sale by one partner, in the absence and without the knowledge, consent or connivance of his copartner, rendered both liable criminally for the unlawful act: Robinson v. State, 38 Ark. 641. The court, speaking through Chief Justice English, in giving a reason for a departure from the well-established rule that a person who is not a party to the commission of a criminal offense cannot be adjudged guilty of the offense, said: "The law ²⁶⁹ says to persons wishing to engage in selling spirituous liquors, or be interested in the sales thereof, you must be careful in the selection of your partners, or servants, and watchful of their conduct in your business; for, if they make forbidden sales,

you are responsible. You must see that sales, in which you are interested, are not made without license, nor made to minors, without proper permission from their parents or guardians. If you are not willing to engage, or be interested in the business, on these terms, there is no compulsion on you to do so."

There cannot be, we think, any application of this rule to a person not engaged nor interested at all in the liquor traffic, whose employé inadvertently or without authority from him makes a sale of liquor at his place of business. In that case he is not interested in an unauthorized sale and does not come within the statute. The case should have been submitted to the jury upon the question whether the sale was made by mistake and without authority from appellant, or whether it was a mere subterfuge to cover an unlawful sale of liquor.

The attorney general confesses error, and we think his views of the case are correct.

Reversed and remanded for a new trial.

A Keeper of a Saloon is Guilty of Selling Liquor to a Minor, although the sale is made by his barkeepers while he is away, and he has no knowledge of the sale: *State v. Constantine*, 43 Wash. 102, 117 Am. St. Rep. 1043.

The Liability of a Principal for the Unauthorized Acts of His Agent is the subject of a note to *Franklin Fire Ins. Co. v. Bradford*, 88 Am. St. Rep. 779.

PRYOR v. PRYOR.

[88 Ark. 302, 114 S. W. 700.]

DIVORCE—Alimony to Guilty Wife.—The court has power to allow alimony to a wife against whom a decree of divorce has been granted for her misconduct. (p. 106.)

DIVORCE—Alimony, Altering Decree for.—The court has power at any time to alter alimony awarded by a decree of divorce. (p. 107.)

DIVORCE—Alimony, Altering When Fixed by an Agreement.—The fact that the alimony awarded to a wife in a decree of divorce was based on an agreement of the parties does not deprive the court of power to afterward alter it. (pp. 107, 108.)

DIVORCE—Alimony, Validity of Agreement Fixing.—An independent agreement between a husband and wife, made in anticipation of a divorce and fixing the amount to be paid her as alimony, is valid, and is not avoided by the subsequent decree of divorce. (p. 108.)

DIVORCE—Alimony Fixed by Contract will not be Altered by the Court.—Where a husband and wife enter into an agreement, in contemplation of their divorce, fixing the amount to be paid to her as

alimony and for the support of their children, and a decree is subsequently entered reciting such agreement, awarding alimony accordingly, and providing for the terms of payment and the method of enforcement, the court will not, in effect, set aside or modify such agreement by setting aside or modifying the provisions relating to alimony contained in the decree of divorce. (p. 108.)

DIVORCE—Alimony Founded upon an Agreement, Enforcement of.—Where a decree of divorce recites an agreement between the parties for the payment of alimony and for the support of the children of the marriage, and declares a method by which such payments may be enforced, the court may, instead of requiring the wife to maintain an independent proceeding to recover the amount due under the decree, award execution against him for such amount. (p. 109.)

Vaughan & Vaughan, for the appellant.

Ratliffe, Fletcher & Ratcliffe, for the appellee.

303 McCULLOCH, J. In the year 1906, appellant, James F. Pryor, a resident of Pulaski county, Arkansas, instituted in the chancery court of that county a suit against his wife, appellee, Laura E. Pryor, for divorce on the ground of willful desertion. It appears that they had been living separate and apart from each other for several years, appellee having resided in Indianapolis, Indiana, since she deserted her husband.

On April 21, 1906, during the pendency of the suit for divorce, they entered into the following agreement, which was reduced to writing and signed by both parties:

"This agreement between James F. Pryor and Laura E. Pryor, his wife, witnesseth:

"That for the purpose of mutually settling the property rights between the parties hereto as involved in the case of said J. F. Pryor v. Laura E. Pryor, in the Pulaski Chancery Court, wherein the said James F. Pryor is seeking a divorce from Laura E. Pryor, it is hereby agreed:

304 "First. That the said James F. Pryor shall execute to the said Laura E. Pryor, a warranty deed to the property now occupied by her in the city of Indianapolis, State of Indiana, said property to be conveyed in fee to her.

"Second. That the said James F. Pryor shall pay the dues and expense charges upon one thousand dollars of the stock of the Argenta Building & Loan Association, now standing in the name of the said Laura E. Pryor, until the said stock is fully matured in accordance with the charter and by-laws of the said building and loan association, at which time the full amount of said stock shall be drawn by the said Laura E. Pryor from the said building and loan association.

"Third. That the said James F. Pryor shall pay the said Laura E. Pryor the sum of five hundred dollars (\$500.00) in

cash; that he will also pay the fees of Ratcliffe & Fletcher to the amount of one hundred dollars (\$100) and the fees of J. H. Harper to the amount of fifty dollars (\$50), as the attorneys of said Laura E. Pryor in said matter.

"Fourth. That the said James F. Pryor shall also pay the said Laura E. Pryor the sum of sixty dollars (\$60) per month, on the first day of each and every month after this date, so long as she may live, unless she shall again marry, in which event the payment of the said sixty dollars (\$60) per month shall cease; but nothing except the remarriage of the said Laura E. Pryor shall excuse or relieve the said James F. Pryor from the payment of the said sixty dollars (\$60) per month; and in case of his death prior to the death of said Laura E. Pryor the said sixty dollars (\$60) per month shall remain and continue an obligation against his estate and a lien upon the property hereinafter mentioned, to wit: lots one (1), two (2), and three (3), and fractional lots ten (10), eleven (11), and twelve (12), in block forty-one (41), in the city of Argenta, Pulaski County, Arkansas.

"Fifth. That the said James F. Pryor will pay towards the support of the three children of the said James F. and Laura E. Pryor the sum of fifteen dollars (\$15) per month, each, until they shall respectively arrive at the age of twenty-one (21) years. If said children, or either of them, shall be living with the said Laura E. Pryor, the amount for the support of such child or ³⁰⁵ children as may be living with her shall be paid to her on the first day of each and every month.

"Sixth. That, in order to secure the faithful and prompt performance of the obligations herein contained on the part of the said James F. Pryor, to wit, the payment of the said building and loan association dues and expenses, the payment of the said sum of sixty dollars (\$60) per month to the said Laura E. Pryor, and the payment of the said sums of fifteen dollars (\$15) per month for the benefit of each of the children aforesaid, the said James F. Pryor shall execute to the said Laura E. Pryor a mortgage upon the Argenta property as aforesaid; and it shall also be specified in any decree of divorce that may be rendered in the cause aforesaid that the performance of the agreements of the said James F. Pryor, as aforesaid, shall be a charge and a lien upon the property aforesaid, and that on failure to pay said amount, or either thereof, an execution may issue as at law against the said James F. Pryor, and may be enforced against the property aforesaid or any other property of the said James F. Pryor, and the lien of said mortgage and of said decree shall remain

upon the property as aforesaid until the agreements as aforesaid shall be fully complied with in accordance with the terms as aforesaid, such execution to issue at the end of twenty (20) days thereafter from any default as may be directed by the said Laura E. Pryor.

"Seventh. That the said James F. Pryor shall pay all the costs in the case aforesaid, and shall pay the costs of recording the mortgage aforesaid."

On April 23, 1906, a decree was entered by the Pulaski chancery court granting a divorce to appellant from his wife and awarding the custody of the three children to the wife. The decree recites the execution of the aforesaid agreement, copying it in full, and proceeds as follows:

"It is considered and ordered that the said agreement be and is hereby made a part of the decree of this court in this case. That said Laura E. Pryor have and recover of and from the said James F. Pryor the several amounts mentioned in accordance with the terms thereof. That, for the purpose of securing the full and complete performance of said agreement, the same is hereby declared a lien upon the property mentioned therein prior ³⁰⁶ to all other liens or claims; and, in default of payment of said amounts or either thereof for twenty days at any one time, then execution shall issue as at law for the amount or amounts that may be due, which may be enforced against said property, or any part thereof, or any other property which may belong to the said James F. Pryor.

"It is further ordered that said James F. Pryor promptly pay all taxes and assessments that may be levied upon or assessed against said property as the same may become due in accordance with the laws of the state of Arkansas, and in case of failure to do so execution may issue therefor, as hereinbefore provided in case of failure to comply with other terms of said agreement."

Pursuant to said agreement and the decree of court, appellant on April 24, 1906, executed to appellee a mortgage on the Argenta property to secure payment of the amounts named in the agreement. He paid the dues on the building and loan association stock until it was matured and the face value, one thousand dollars, was paid over to appellee; and he paid to appellee the sum allowed for support for herself and sons up to August, 1907, and thereafter paid her only the sum of sixty-five dollars per month.

He then filed his petition in the Pulaski chancery court, praying for an alteration of the allowance to appellee by reducing it to fifty dollars per month for herself, alleging that

his property in Argenta, which was all he owned, was unproductive, and that he was earning one hundred and twenty-five dollars per month in his work as railroad conductor, and was financially unable to continue the payment of one hundred and five dollars per month to his wife and children. He further alleged that the two eldest boys, then seventeen and twenty years old, respectively, were earning reasonably good salaries sufficient for their living expenses, and that the youngest boy belonged to the United States navy.

Appellee appeared by her solicitors, and resisted the alteration of the decree, and asked that the court order execution for the unpaid amount due in accordance with the terms of the agreement and decree.

The court denied the prayer of the petition on the ground that the original decree fixing the amount of alimony and settling the property rights of the parties by their consent and agreement in writing was "a complete and final settlement of all matters as ³⁰⁷ to said divorce, and binding upon the parties, and this court has no power to alter or amend the same for any of the causes in said petition." And the court awarded execution against appellant for the sum of three hundred and seventy dollars, found to be due and unpaid under the provisions of the decree.

The first question presented is whether or not the chancery court had jurisdiction to decree an allowance of alimony to a guilty wife against whom a decree for divorce was granted, for, if the court could not award such an allowance, the decree itself was void, and any contract between the parties to accomplish the same result was void for want of consideration. The agreement purports to relate to a settlement of property rights between the parties, but the court and the parties have manifestly treated the provision now under consideration as one for continuing alimony.

"According to ecclesiastical practice," says Mr. Nelson, "the guilty wife received no alimony, although there may have been some mitigating circumstances in her favor, and she might have brought a considerable dowry to her husband. Her offense relieved her husband from all duty of support. But the severity of this rule soon became manifest, and it was customary to make some provision for the wife when a divorce was granted by parliament to the husband. The divorce court now has discretionary power to grant her alimony, but will ordinarily refuse to do so": 2 Nelson on Divorce and Separation, sec. 907. The same author says in another place that while courts have power to allow alimony to a guilty wife,

it is error to do so when there are no mitigating circumstances in her favor.

A statute of this state provides that "when a decree (for divorce) shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable": Kirby's Digest, sec. 2681. Similar statutes in other states have been construed to have enlarged the powers of courts in divorce cases so as to empower them to allow alimony in any case, even to a guilty wife: Spitler v. Spitler, 108 Ill. 120; Luthe v. Luthe, 12 Colo. 421, 21 Pac. 467.

So, whether dependent upon enlarged powers conferred by the statute or not, we think it is settled that a court has the power ³⁰⁸ to allow alimony to a wife against whom a decree for divorce is granted on account of her misconduct. If error is committed by the court in making the allowance under the particular circumstances of the case, it must be corrected by appeal. The decree is not void.

The statutes of this state also contain the following provision: "The court, upon application of either party, may make such alterations from time to time, as to the allowance of alimony and maintenance, as may be proper, and may order any reasonable sum to be paid for the support of the wife during the pending of her bill for divorce": Kirby's Digest, sec. 2683.

The court, therefore, has the undoubted power to alter an allowance of alimony at any time: Kurtz v. Kurtz, 38 Ark. 119.

Does the fact that the allowance is based on an agreement entered into between the parties hamper the power of the court to subsequently alter it? We think not, so far as the dependence of the allowance on the decree of the court is concerned. The statute gives the court the power to alter any of its decrees allowing alimony. The court is not, in the first instance, bound by the agreement of the parties concerning the amount of alimony to be allowed to the wife (2 Nelson on Divorce and Separation, sec. 915; Calame v. Calame, 25 N. J. Eq. 548); and, a fortiori, the agreement cannot, in the face of the statute, hinder the court in altering its own decree of allowance. The decree is not entirely dependent upon the agreement, and therefore the power to subsequently alter cannot be controlled by it: Parsons v. Parsons (Ky.), 80 S. W. 1187. The agreement of these parties was not merely one as to the amount the court by its decree should fix as alimony,

but it was manifestly intended to be an independent agreement, in contemplation of divorce, for the payment of alimony.

The question then arises whether or not such a contract is valid, and, if it is, whether or not a court of equity can alter or modify it. We have already said that the court, when it comes to fix the amount of alimony to be allowed a wife, is not bound by the agreement of the parties. This is so because the court is moved to action by principles of justice and equity, and is not bound to follow the agreement of the parties against what appears ³⁰⁹ to be the justice of the case. But the question of the power of the court to subsequently alter or modify an agreement relating to alimony is different from that of the power or duty of the court to follow the agreement in fixing the amount of alimony. The last-named power may exist without the former if the agreement is valid. The difference arises in the fact that one is a question of enforcement of an agreement relating to alimony and the other is a question of fixing by decree of court the amount of alimony to be allowed. Was the independent agreement for payment of alimony, made in contemplation of immediate divorce, valid as such? We say that it was. Husband and wife may, when separation has already taken place or is to immediately take place, contract with each other for the payment by him of a sum or sums of money for her support: *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399; *Walker v. Walker*, 9 Wall. 743, 19 L. ed. 814; *Randall v. Randall*, 37 Mich. 563; *Chapman v. Gray*, 8 Ga. 341; *Fox v. Davis*, 113 Mass. 255, 18 Am. Rep. 476; *Hutton v. Hutton's Admr.*, 3 Pa. 100; *Scott's Estate*, 147 Pa. 102, 23 Atl. 214.

A decree of divorce granted subsequently does not annul the contract: *Carpenter v. Osborn*, 102 N. Y. 552, 7 N. E. 823; *Galusha v. Galusha*, 116 N. Y. 635, 15 Am. St. Rep. 453, 22 N. E. 1114, 6 L. R. A. 487.

Why, then, should not they be permitted to contract for the payment of alimony in contemplation of an immediate divorce? It violates no rule of public policy, for the husband is liable for the wife's support during the continuance of the marriage relation, and it is within the power of the court to grant alimony payable after the relation is dissolved. The agreement was, in effect, contemporaneous with the decree granting the divorce, and we see no sound reason nor policy which forbids the making of such a contract. The contract relating to the amount to be paid for support of the

wife survived the decree for divorce, and when it has been fairly entered into a court of equity should not alter or set it aside: *Carpenter v. Osborn*, 102 N. Y. 552, 7 N. E. 823.

The parties voluntarily caused this contract to be made a part of the court's decree, instead of waiting to have it enforced by an independent action after payments, according to its terms, should be refused. We are therefore of the opinion that the court cannot alter or modify the decree, in so far as it is based on the contract of the parties, for a modification of the decree ³¹⁰ would be no less than a modification of the contract itself.

We are not confronted with the question whether or not the court should, by the exercise of its extraordinary powers in inflicting punishment for contempt for failure to comply with the decree, lend its aid to the enforcement of an obligation which, by reason of changed financial condition of appellant, has become harsh and unjust.

No such remedy for the enforcement of the decree has been asked or granted. If it follows from what we have said with respect to the force and effect of the decree that, so far as concerns its enforcement by the extraordinary powers of the court, it depends, not upon the contract between the parties, but upon the equitable principles which underlie all decrees for alimony, and that it may be altered to the extent of adjusting such extraordinary remedies to the enforcement only of an allowance of alimony which is found from time to time to be just and equitable.

The issuance of execution of collection of monthly allowance fixed by the contract and by the order of the court, being only such a remedy, as would be afforded as a matter of right for enforcement of the contract if an independent action should be brought upon it, is not an extraordinary remedy, and it was not inequitable for the court to grant it, instead of remitting appellee to an action on the contract to recover the amount in excess of what now appears to be a just and fair allowance of alimony. We must not be understood as holding that individuals have the right to contract for a certain remedy for the enforcement of contractual or other rights. It is the decree of the court which affords a foundation for issuance of process for its enforcement, and not the contract itself. That portion of the contract concerning the issuance of execution must be treated as surplusage.

Nothing in the chancellor's ruling conflicts with the views here expressed, and his decree is therefore affirmed.

Separation Agreements Between Husband and Wife are discussed in the notes to *Baum v. Baum*, 83 Am. St. Rep. 859; *Stephenson v. Osborne*, 90 Am. Dec. 367. See, also, the subsequent cases of *Sawyer v. Churchill*, 77 Vt. 273, 107 Am. St. Rep. 762; *Hill v. Hill*, 74 N. H. 288, 124 Am. St. Rep. 966.

Courts Usually have Power to Modify Decrees for Alimony after they have been rendered: *Cole v. Cole*, 142 Ill. 19, 34 Am. St. Rep. 56; *Howell v. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70; *Wetmore v. Wetmore*, 149 N. Y. 520, 52 Am. St. Rep. 752; *Bassett v. Bassett*, 99 Wis. 344, 67 Am. St. Rep. 863; *Harding v. Harding*, 16 S. D. 406, 102 Am. St. Rep. 694; *Van Horn v. Van Horn*, 48 Wash. 388, 125 Am. St. Rep. 940. But it has been held that when a husband and wife have separated by reason of his misconduct, a contract whereby he agreed to pay her a certain amount each month for her maintenance, if embodied in a subsequent decree of divorce, becomes forever binding, and is not subject to revocation or modification except by the consent of the parties thereto: *Henderson v. Henderson*, 37 Or. 141, 82 Am. St. Rep. 741.

MAIN v. OLIVER.

[88 Ark. 383, 114 S. W. 917.]

EVIDENCE, PAROL, to Show that a Writing was to be Altered Before Delivery.—One sued upon a contract signed by him is entitled to prove by parol evidence that it was delivered to an agent of the principal under a parol agreement that it was to be altered in certain respects before delivery to the agent's principal. (p. 111.)

Appellant pro se.

R. J. Wilson, for the appellee.

384 McCULLOCH, J. Appellant sued appellee at law to recover the price of a lot of jewelry shipped to the latter by the former under a written contract of sale. Appellee answered, stating in substance that appellant's agent had agreed with him to ship the jewelry for sale on commission, that he signed the written contract of sale at his place of business in Fayetteville, Arkansas, upon an express agreement with appellant's agent that the latter would change the form and substance of the writing before it was mailed to appellant at his place of business in Chicago, Illinois, so as to make it conform to their verbal agreement for a shipment for sale on commission, but that said agent had wrongfully and fraudulently sent the written contract to appellant without 385 changing it. He also alleged that as soon as he discovered that fact he repudiated the written contract and returned the goods to appellant without opening the packages containing the same.

The case was, by agreement of parties, transferred to the chancery court, where it was heard on the evidence, and a decree was rendered dismissing the complaint for want of equity. The statements of the answer are fully sustained by the evidence, and the only question for our determination is whether or not these facts will defeat a recovery on the written contract of sale.

The effort of appellee is not to vary or contradict the terms of a written contract by parol evidence, but it is to show by such evidence that no written contract was entered into of the kind set forth by appellant as the basis of his action. The distinction is pointed out by the court in the following cases: *Graham v. Remmel*, 76 Ark. 140, 88 S. W. 899; *Barton-Parker Mfg. Co. v. Taylor*, 78 Ark. 586, 94 S. W. 713; *Barr Cash & Package Co. v. Brooks-Ozan Mer. Co.*, 82 Ark. 219, 101 S. W. 408.

The design of appellee's testimony was not to establish a contemporaneous or antecedent verbal contract, but to show that certain changes were to be made in the writing in order for it to evidence the real agreement of the parties, before it should be delivered as his contract. He did not deny that he signed the paper, nor that he was aware of its contents, but he claimed it was to be altered before its delivery to appellant, the other contracting party.

In *Barton-Parker Mfg. Co. v. Taylor*, 78 Ark. 586, 94 S. W. 713, we said: "The purpose of the evidence was not to vary or contradict the terms of the contract, but to identify the particular contract which defendant in fact executed. The paper signed by the defendant did not in fact become his contract until the salesman attached the slip containing the clause as agreed upon between them, and it was competent for him to prove this by parol testimony."

So in the present case the paper signed by appellee was not to become his contract until the changes should be made which were agreed to be made before delivery.

Decree affirmed.

Parol Evidence is Admissible to Show that a Note was not Delivered: *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111; and to show the nonperformance of a condition upon which the note was given: *McCormick Harvesting Machine Co. v. Faulkner*, 7 S. D. 363, 58 Am. St. Rep. 839. Parol evidence is also admissible to prove an agreement collateral to a promissory note: *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743; *Citizens' Bank v. Millet*, 103 Ky. 1, 82 Am. St. Rep. 546; *Sloan v. Gibbs*, 56 S. C. 480, 76 Am. St. Rep. 559. As between the original parties, the delivery of a written instrument which is in form a complete contract will not exclude parol evidence that such delivery was conditional, and that it was not to become a

binding obligation upon the maker until the performance or discharge of such condition precedent: *McNight v. Parsons*, 136 Iowa, 390, 125 Am. St. Rep. 265. See, further, the note to *Hughes v. Crooker*, 148 N. C. 318, 128 Am. St. Rep. 606.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. HAWKINS.

[88 Ark. 548, 115 S. W. 175.]

THE NEGLIGENCE of the Master may be Assumed, whether committed directly or through a fellow-servant. (p. 113.)

MASTER AND SERVANT—Risks, Assumption of, When a Question for the Court and When for the Jury.—Ordinarily, the question of assumption of risk is one of fact for the jury, unless the facts are inconsistent and present a situation so plain that intelligent men would not draw different conclusions. Then the court may declare, as a matter of law, that the risk was assumed. (p. 113.)

MASTER AND SERVANT—Risk, When not Assumed by Servant Where He had Complained of a Fellow-servant.—If a servant complains that a fellow-servant is in the habit of violating a rule intended for the safety of the employés, and knows that his complaint has been laid before the vice-principal, and returns to work while the fellow-servant is still on duty, he has a right to assume that the offending servant will obey the rule, and does not assume the risk of his not so doing. (p. 113.)

Lovick P. Miles, for the appellant.

Sam R. Chew, for the appellee.

549 HILL, C. J. Elsey Hawkins was employed by the appellant company as a cinder shoveler, working in a cinder pit in its yards in Van Buren. His testimony tended to prove: That while intent upon his work an engine was backed into the cinder pit, without the usual signals of approach, and he was injured by it. The day before this occurred he had complained to his foreman of the hostler operating this engine having taken engines into the cinder pit without signals, and threatened to quit his employment unless the required signals were given of the approach of engines to the pit. His foreman promised to speak to his superior, and that night told him he had reported it to his (the foreman's) superior, but he did not know what he (the vice-principal) had done about it. The next morning Hawkins returned to work and knew that the same hostler of whom he had complained was handling engines. He was injured about 8 o'clock, after the hostler had taken three or four engines into the cinder pit.

From a judgment in plaintiff's favor the railroad company has appealed, and says that the trial court should have given a peremptory instruction for the defendant on the ground that his evidence showed that he had assumed the negligence of the company by reason of which he suffered his injury. This occurrence took place subsequent to the passage of the act of March 8, 1907, charging the master with fellow-servant's negligence.

Unquestionably the negligence of the master, whether committed directly or through a fellow-servant, may be assumed: Choctaw etc. R. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244, 4 L. R. A., N. S., 837; Choctaw etc. R. R. Co. v. Craig, 79 Ark. 53, 95 S. W. 168; St. Louis etc. Ry. Co. v. Mangan, 86 Ark. 508, 112 S. W. 168; Pettus v. Kerr, 87 Ark. 396, 112 S. W. 886.

Ordinarily, the question of assumption of risk is one of fact for the jury to answer, unless the facts are undisputed and present a situation so plain that the minds of intelligent men could not draw different conclusions as to the effect thereof. Then, and then only, should the court declare as a matter of law that the risk was assumed: Choctaw etc. R. R. Co. v. Craig, 79 Ark. 53, 95 S. W. 168; Pettus v. Kerr, 87 Ark. 396; Schlemmer v. Buffalo etc. Ry. Co., 205 U. S. 1, 27 Sup. Ct. Rep. 407, 51 L. ed. 681.

The evidence here shows that the hostler violated the rules of the company made for the safety of the cinder shovelers by ⁵⁵⁰ taking engines into the pit without signals, that complaint was duly made of this to the vice-principal, and the next morning, after knowledge that his complaint had been properly lodged, Hawkins returned to his work, knowing that the servant complained of was still on duty. He had every right to assume, for a reasonable time, that his just complaint would be heeded, and that the master would require the offending servant to obey this simple and necessary rule to protect the life and limb of his fellow-laborers.

The court would have erred had it declared as a matter of law that the risk was assumed. No other question is presented.

Judgment affirmed.

The Rule that an Employer Assumes the Risk of the negligence of his fellow-servants implies that the employer has exercised due care in selecting and retaining in his service competent employés: First Nat. Bank v. Chandler, 144 Ala. 286, 113 Am. St. Rep. 39; Jensen v. Great Northern Ry. Co., 72 Minn. 175, 71 Am. St. Rep. 475; Chicago etc. R. R. Co. v. Champion, 9 Ind. App. 510, 53 Am. St. Rep. 357; Hamsey

v. Daly Min. Co., 15 Utah, 189, 62 Am. St. Rep. 916. Generally, when an incompetent employé is retained after notice of his incompetency, his coemployés do not assume the risk of his negligence: Hughes v. Baltimore etc. R. R., 164 Pa. 178, 44 Am. St. Rep. 597; Evansville etc. R. R. Co. v. Guyton, 115 Ind. 450, 7 Am. St. Rep. 458.

BOLAND v. STANLEY.

[88 Ark. 562, 115 S. W. 163.]

JURY TRIAL—Instruction, Error in Charging One Person with the Acts of Another.—Where two persons are sued for alienating a wife's affections and carrying her away from her husband, and the evidence shows that when she was so taken away, one of such parties was not present, it is error to give an instruction which will permit the jury to find both persons liable, if either was present aiding or abetting the parties who were acting in such taking. (p. 118.)

JURY TRIAL—An Instruction Assuming that there was a conspiracy to do the acts complained of by the plaintiff is erroneous if the existence of such conspiracy is not admitted. (p. 118.)

ALIENATION OF WIFE'S AFFECTION, Basis of Actions for.—The loss of consortium, or, in other words, of society, companionship, conjugal affection, fellowship and assistance of a wife, is the principal basis of the action for alienating her affections. (p. 119.)

ALIENATION OF WIFE'S AFFECTIONS, Liability for, When and Against Whom Exists.—Whoever invades the precincts of a home, and without justifiable cause, by any means whatsoever, severs the tie that binds husband and wife, alienating her affection from him and depriving him of the aid, comfort and happiness of a loyal union between them, is liable in civil damages therefor. (p. 119.)

ALIENATING WIFE'S AFFECTIONS.—Malevolence or Improper Motive is not Always Necessary to sustain an action for alienating a wife's affections. (p. 119.)

ALIENATING WIFE'S AFFECTIONS—Burden of Proof.—If a Stranger Interferes between husband and wife, and by advice or inducement causes her to leave him, or takes her away with or without her consent, and encourages her to remain from him, or harbors or protects her while away, he does so at his peril, and must assume the burden of proving good cause and good faith for his conduct. (p. 119.)

ALIENATING WIFE'S AFFECTIONS—Burden of Proof in Action Against Father.—Bad or improper motives on the part of a father in taking his daughter from her husband or in permitting her to return to the father's home cannot be presumed, but the burden of proving them must be assumed by the husband in an action against the father for alienating the wife's affections. (p. 120.)

ALIENATING WIFE'S AFFECTIONS, Liability for, When not Shown.—If no enticements are held out to a wife to leave her husband or to cease to live with him, and nothing is said or done by a third party to cause her to abandon him, her act being of her own accord and for reasons best known to herself, no action can be sustained for alienating her affections. (p. 120.)

ALIENATING WIFE'S AFFECTIONS—Evidence.—Statements of a Wife After Returning to her father's home are not admissible in

an action for alienating her affections, brought against him and a third person. (pp. 120, 121.)

APPEAL AND ERROR—Error in Excluding Evidence, When not Shown.—If evidence is offered in an action for alienating a wife's affections of statements made by her after she left her husband and returned to her father's home, and the offer does not show what such statements were, it cannot be seen whether they were relevant or not, and error in excluding them is not presumed. (p. 121.)

Stevens & Stevens, for the appellant.

J. T. Cowling and B. J. Stewart, for the appellee.

563 WOOD, J. The appellee sued appellants, J. T. Boland and W. H. Robinson, alleging: "That Era Stanley is and at all the times hereinafter mentioned was the wife of this plaintiff. That on or about the seventh day of November, 1906, while the plaintiff was living, cohabiting with and supporting her at Winthrop, and while they were living together happily as man and wife, the defendants, wrongfully contriving and intending to injure the plaintiff and to deprive him of her comfort, society and assistance, maliciously, willfully and wickedly induced her away from the plaintiff's and her then residence in the town of Winthrop, in Little River county, Arkansas, and, after so inducing her away from her and plaintiff's residence, forcibly seized her and by force carried her to the residence of the defendant, J. T. Boland, in Little River county, and have ever since said date forcibly detained plaintiff's said wife and harbored her against the consent of this plaintiff, and have alienated the affection of plaintiff's said ⁵⁶⁴ wife from him and caused her to become dissatisfied with her married state. That by reason of said acts the plaintiff has been and still is wrongfully deprived by the defendants of the comfort, society and aid of his said wife, and has suffered great distress of both mind and body in consequence thereof, and great discomfort, inconvenience and anxiety, and will continue to so suffer, all to his damage in the sum of ten thousand dollars. And the plaintiff says that by reason of said willful, malicious and wicked acts this plaintiff is entitled to ten thousand dollars as exemplary or punitive damages against said defendant."

The answer of appellant denied all the material allegations of the complaint, and set up that plaintiff's wife, of her own free will and accord, left plaintiff on the seventh day of November, 1906, and came to her father's house, J. T. Boland, where she has since resided and made her home, and that no one has persuaded her or induced plaintiff's wife to live sep-

arate and apart from him, and that no one has alienated or attempted to alienate her affections from him.

The evidence on behalf of appellee tended to show that appellee on the 4th of November, 1906, married Era Boland, the daughter of appellant, J. T. Boland. Appellee married at his father's house about 11 o'clock Sunday night. He remained with his wife at his father's house for a few days. The next day after the marriage he and his wife went to the house of one Grider, a neighbor. While there, appellant Boland came and said to his daughter: "Era, I have come to bring you a letter from your dear old father, the last one you will ever get from him. You are laughing on one side of your face to-day, but you will be laughing on the other side to-morrow." He gave the letter to his daughter, and said to appellee: "Young man, don't say anything to me; don't say a word. I could eat three like you before night." He remained about five minutes. After he left appellee read the letter. Its contents were as follows: "Era, you have played hell with your ducks—you are laughing on one side of your face to-day, but you will be laughing on the other side to-morrow. I don't want you to ever come inside of my yard again, not even in sickness or death. Don't you ever speak to your sisters or your brothers again. You have disgraced yourself, and you are no more your father's child."

565 The day after the marriage appellant Robinson went to a near neighbor of Boland, and asked him what he thought of Era's marriage, and said something about Miss Era disgracing herself by taking Stanley. He said Mr. Boland would try to get her back, and that he was going to do all he could to help him. Robinson often went to Boland's house. They were musicians, and made music together. Robinson was at Boland's house Tuesday night after the marriage. Wednesday morning he went back to Boland's. Robinson and Boland's wife, oldest daughter and little boy went in Boland's wagon over to Stanley's, where appellee lived. Boland was at home when they left to go to Stanley's and he was there when they returned. When they reached Stanley's they stopped the wagon at the gate about fifty yards from his house. Robinson went into the house, and told appellee's wife that her mother was out there and wanted to see her. Mrs. Stanley went out to the wagon and talked to her mother and sister and Mr. Robinson. Then they carried her back into the house. Robinson had her by one arm and her sister by the other. Robinson was holding her up. When she got into the house she lay on the bed crying. Her mother and sister

gathered up her things in the house. Then Robinson raised her up off the bed and took her off. They took her by the arms and led her out to the wagon. She got in the wagon. When Robinson took her up to carry her to the wagon, she did not resist in any way or act like she did not want to go. She sat on the back seat in the wagon between her mother and sister. The little brother and Robinson sat on the front seat, and drove the wagon. Just as the wagon was leaving, Stanley came up. They met him fifteen or twenty steps from the gate. As they drove away, Stanley's wife hallooed back to him, and said she was going home to get her things.

A witness who saw them pass the house in the wagon going toward Boland's stated that Mrs. Stanley looked like she had been crying; that her appearance, conduct and words indicated that she was sad and dejected. The appellee testified that his wife lived with him from Sunday night, when they were married, till Wednesday, when they came and took her away; that she seemed to be as happy as she could be. She was that way Wednesday morning when he left the home for his work, making ties. ⁵⁶⁶ They had talked about keeping house on Tuesday night, and the next day he was going to get a house-keeping outfit and move to themselves. He returned from his work Wednesday morning between 11 and 12 o'clock and saw, as he came up, his wife going off in the wagon with Robinson and the Boland folks. He understood from what she said to him as they drove off that she was going home after her things. When he went into the house he found that the few things she had there were gone. Then he first discovered that she was leaving him. He went to a neighbor's and asked him to go over there. He did not get her to come back. He didn't go over to Boland's himself, because he was warned several times not to go over there. He tried several times to get some one to go with him, but they would not go. He had not seen his wife since that time to speak to her; had seen her with her father and sisters but never alone. Appellee was twenty years old when he married. He loved his wife, and he says she seemed to love him. He sent some of his relations over to Boland's to get his wife to come back. He wanted to talk to his wife after she left, but could not get the chance.

On behalf of appellants, appellant Boland testified that he had done nothing to induce the wife of Stanley to return to his (Boland's) house, or to induce her to stay there. After his daughter ran away, he went up there and gave her a letter and talked to her, and told her never to come back home any more, and told her under no circumstances would he ever

forgive her for doing like she did. He never spoke to her about coming home at any time. Since she came home, she had been just like she always was—occupied the same room, and everything just like she was before. When he saw his daughter return he was surprised. “It was like a clap of thunder from a clear sky.” “She came back home on her own consent.” The young man, Stanley, had never said anything to him about the girl coming back.

Appellant Boland was asked the following question: “Did she [meaning his daughter] make any statement to you after she returned to your house as to why she returned?” Appellee objected, and the court sustained the objection, and excluded all statements of plaintiff’s wife after she returned to the home of her father. Appellants duly excepted to this ruling of the court.

⁵⁶⁷ The verdict and judgment were in favor of appellee against the appellants in the sum of six hundred and thirteen dollars. This appeal has been duly prosecuted.

⁵⁶⁸ We find no error in the rulings of the court in giving and refusing prayers for instructions, except in adding the modification to appellants’ prayer number 9. The instruction as modified and given is as follows: “The court instructs the jury that the acts, conduct and words of Mrs. J. T. Boland and daughter in enticing and inducing plaintiff’s wife to abandon him, if you find that said persons did anything to entice plaintiff’s said wife from him, would not bind the defendants unless you further find from the evidence that said Mrs. J. T. Boland and daughter acted under and by instructions of defendants, J. T. Boland and W. H. Robinson; and the burden of proving such fact is on the plaintiff, unless you further find that either of the defendants was present aiding or abetting said parties in said acts.”

The last paragraph was added as a modification.

The effect of this instruction was to tell the jury that if either defendant Robinson or Boland was present aiding or abetting Mrs. J. T. Boland and daughter in enticing appellee’s wife to abandon him, if they did entice her to do so, this would render Robinson and Boland both liable. The uncontroverted proof showed that defendant Boland was not present aiding and abetting Mrs. Boland and her daughter in whatever may have been done by them, if anything, in enticing or taking away appellee’s wife from her home. The undisputed evidence shows that Robinson alone was present on that occasion, and Boland, unless there was a conspiracy between him and Robinson to entice or take away appellee’s wife, could

not be held liable for the conduct of Robinson which took place in Boland's absence. The court, by giving the instruction, virtually assumed that there was such a conspiracy. But that was a question of fact for the jury to determine. The added amendment was also well calculated to mislead the jury as to the burden of proof. For adding the amendment told the jury, in effect, that if either of the defendants was present aiding Mrs. Boland and her daughter, then the burden was on both of the defendants to show that Mrs. Boland and her daughter did not act under and by their instructions. It is suggested by learned counsel for appellee that the ninth instruction is not copied as amended, and that it is impossible to tell how it read after it was amended. We have copied the ⁵⁶⁹ prayer as it appears in the bill of exceptions. Then follows the recital: "The court refused to give this instruction, but added an amendment to the same, which amendment reads as follows:" Then the amendment as set out above is copied. The reasonable construction of this language is that the amendment was added at the conclusion of the prayer. But whether so added or inserted anywhere in the prayer, the amendment so qualified the other language of the first paragraph as to render it misleading and prejudicial as to Boland. The prayer as asked was correct, but the amendment was error.

The loss of what is termed in law "consortium"—that is, the society, companionship, conjugal affections, fellowship, and assistance of the wife—is the principal basis for actions of this kind: *Tiffany's Persons and Domestic Relations*, p. 75, and authorities cited in note; 15 *Am. & Eng. Ency. of Law*, 2d ed., 862 (b), note 6. Whoever invades the hallowed precincts of a home, and, without justifiable cause, by any means whatsoever severs the sacred tie that binds husband and wife, alienating her affections from him, and depriving him of the aid, comfort and happiness of a loyal union between them, is liable in civil damages for his wrongful conduct: *Rodgers on Domestic Relations*, sec. 177; *Schouler on Domestic Relations*, sec. 41; *Tiffany's Persons and Domestic Relations*, p. 74; 15 *Am. & Eng. Ency. of Law*, 862. In such cases, whether or not there were malevolent or improper motives is always a material consideration. In case of a stranger in blood the causes must be extreme that will warrant him in interfering with the relation of husband and wife. If he by advice or enticement induces a wife to leave her husband, or takes her away with or without her consent, and encourages her to remain from him, or harbors and protects her while away from him, he does these things at his peril, and the

burden is on him to show good cause and good faith for his conduct. As is said by Mr. Rodgers: "It would seem upon principle to be rare, indeed, if the motive by a stranger in breaking up a family could be a good one": Rodgers on Domestic Relations, sec. 176; 1 Jaggard on Torts, 467; Tiffany's Persons and Domestic Relations, p. 76; Schouler on Domestic Relations, sec. 41, and cases cited by these. But the rule is different in case of a parent. In *Hutcheson v. Peck*, 5 Johns, 196, where a father harbored his daughter, Chancellor Kent says: "A father's house is always open to his children, and, whether they be married ⁵⁷⁰ or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum. . . . I should require, therefore, more proof to sustain the action against the father than against the stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed": See *Burnett v. Burkhead*, 21 Ark. 77, 76 Am. Dec. 358; *Trumbull v. Trumbull*, 71 Neb. 186, 98 N. W. 683; *Payne v. Williams*, 4 Baxt. (Tenn.) 585; and other cases cited in Tiffany's Persons and Domestic Relations, p. 77, note 116; *Brown v. Brown*, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085, and cases cited. Parents will not be protected under the above doctrine unless they acted from proper motives: *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791. In actions of this character "the term 'malice' does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions the injury. If the conduct was unjustifiable, and actually caused the injury complained of, malice in law would be implied." The terms "malice" and "improper motives," as here used, mean the same thing: *Brown v. Brown*, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; Tiffany's Persons and Domestic Relations, p. 76. If no enticements are held out to the wife to leave her husband or to cease to love him, and nothing is said or done by a third party to cause her to abandon him, her act being of her own accord and for reasons best known to herself, then there is no cause of action for civil damages against anyone for alienation of affections. For in such case the estrangement would be voluntary, and not the

fault of any third party: Rodgers on Domestic Relations, p. 134, and cases cited. Instructions presenting these principles of the law were given by the court, and the charge upon the whole, except in the particular wherein the error has been pointed out, correctly submitted the issues to the jury.

The court did not err in excluding all statements of the plaintiff's wife after she returned to the home of her father. In cases where parents are defendants alone, and the alienation not a single act of removal from her home, but a continuing one after such ⁵⁷¹ removal to her parents' home, declarations of the wife of plaintiff, after taking up her residence with her parents, are generally admitted, as such evidence is regarded as explanatory of the causes for her residence with them, and is the only means of showing such relations except calling her as a witness, and that is not permissible: 3 Elliott on Evidence, sec. 1648, and cases cited. However, such declarations are admitted in suits against the parents as an exception to the general rule which excludes them as hearsay: 3 Elliott on Evidence, sec. 1648.

But here another is sued as joint tort-feasor with the parent. Moreover, appellants did not offer to show what the statements of appellee's wife were. In the absence of such offer it could not be seen that the evidence was competent or relevant, and hence no error is discovered in its exclusion: 1 Thompson on Trials, secs. 703, 704. See, also, Meisenheimer v. State, 73 Ark. 407, 84 S. W. 494.

For the error indicated reverse and remand for new trial, as to appellant Boland. As to appellant Robinson the instruction was not prejudicial error, and the judgment as to him is affirmed.

Actions for Alienation of a Wife's Affection are discussed in the note to *Fratini v. Caslini*, 44 Am. St. Rep. 845. The liability of a parent for advising or inducing his married child to separate from or abandon his or her husband or wife is discussed in *Oakman v. Belden*, 94 Me. 280, 80 Am. St. Rep. 396; *Gernerdt v. Gernerdt*, 185 Pa. 233, 64 Am. St. Rep. 646; *Price v. Price*, 91 Iowa, 693, 51 Am. St. Rep. 360. It is said that before a parent can be held liable in damages for advising his married child to abandon his wife, or her husband, the conduct of the parent should be alleged and proved to be malicious: *Brown v. Brown*, 124 N. C. 19, 70 Am. St. Rep. 574. One guilty of alienating from a husband the affections of his wife, or of causing her to so conduct herself that the comfort of the married life is destroyed, must respond in damages to the husband, although there is no proof of adulterous relations between her and the guilty person: *Callis v. Merrieweather*, 98 Md. 361, 103 Am. St. Rep. 404.

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

IN RE COLLINS.

[151 Cal. 340, 90 Pac. 827, 91 Pac. 397.]

HABEAS CORPUS.—The Burden of Proving New Matter is on the petitioner, when the traverse alleges matter tending to invalidate the apparent effect of the process. (p. 123.)

HABEAS CORPUS—Proceedings and Pleadings on the Part of the Respondent.—Though the petition is sometimes treated as a traverse, this does not require the respondent to file, in addition to a return, a pleading specifically denying affirmative allegations of the petition, nor does it shift the burden of proof as to such allegations from the petitioner to the respondent. (pp. 123, 124.)

HABEAS CORPUS—Office of Proceedings and Pleadings.—To adopt the analogy of pleading in civil actions, the return is the complaint, the traverse is the answer; new matter set up in the traverse is deemed denied, and must be proved by the party alleging it. (p. 124.)

EXTRADITION—Right to Try the Accused for Another Crime. As a general rule of international extradition, the state, after procuring the surrender of a fugitive on a specific indictment, has no right to try him upon any other charge until his trial on the original charge has been brought to a final conclusion, and he has been given a reasonable time to return to the country whence he was extradited. (p. 125.)

EXTRADITION—Trying the Accused for a Crime Committed After His Return.—If one extradited from a foreign country upon a specific indictment after his return commits a new crime, as where he perjures himself, on the trial of such indictment he may be accused, tried and convicted of such new crime without first affording him an opportunity to return to the country whence he was extradited. (p. 127.)

EXTRADITION.—The Immunity of an Extradited Prisoner from Prosecution for an offense other than the one for which he was extradited rests not upon his absolute right to have an asylum in the land in which he took refuge, but primarily upon the rights of the sovereignty which surrendered him pursuant to a treaty. (pp. 127, 128.)

EXTRADITION—Treaty Between the United States and Great Britain—Prosecution for a Subsequent Crime.—Under the extradition convention between the United States and Great Britain in 1858, the person surrendered is secured from trial for any pre-existing crime other than that upon which he was extradited, but this immunity does not extend to crimes subsequently committed. (p. 128.)

EXTRADITION—Prisoner Surrendered Without Exactng Agreement not to Try Him for Another Offense.—Assuming a foreign

country or province has the right to refuse to surrender a fugitive from justice without first receiving a stipulation that he should not be tried on any other offense than that on which he was extradited, still, if it does so surrender him without such stipulation, he may be tried for a subsequent offense. (p. 130.)

HABEAS CORPUS—Questions not Going to the Jurisdiction of the Court.—If a prisoner surrendered under a specific indictment on the trial thereof swears to matters forming the basis of the charge under which he was surrendered, and is indicted for perjury for so doing, assuming that a verdict of acquittal or conviction on the first charge will prevent a conviction on the second, still this is a matter of defense not going to the jurisdiction of the court, and does not entitle him to a discharge on habeas corpus. (p. 131.)

HABEAS CORPUS—Admission to Bail After Denial of.—If, after a hearing on proceedings by habeas corpus, the prisoner is remanded and prosecutes a writ of error to the supreme court of the United States, there remains any proceeding to be stayed pending a review of the order so remanding him, the power to admit him to bail belongs exclusively to such officer, if any, as had power to admit him to bail independent of the habeas corpus proceeding, and he must make application for bail in the usual manner as provided by the laws of the state. (p. 132.)

George D. Collins, in pro. per., for the petitioner.

William Hoff Cook and Hiram T. Johnson, for the respondent.

³⁴² **SLOSS, J.** A writ of habeas corpus was issued on the application of George D. Collins, who claimed to be unlawfully restrained of his liberty by the sheriff of the city and county of San Francisco. A return was made and a hearing had.

Before proceeding to a consideration of the merits of the application, it may be well to here repeat what was orally stated at the hearing regarding the practice of this court on habeas corpus. The function of the petition is to secure the issuance of the writ, and, when the writ is issued, the petition has accomplished its purpose. The writ requires a return by the officer or other person having the custody of the prisoner. To such return the petitioner may present exceptions, raising questions of law, or a traverse, raising issues of fact, or both. Where the return is not subject to exception—that is, where it sets forth process which on its face shows good ground for holding the prisoner, such process being produced at the hearing (Penal Code, sec. 1480), and the traverse alleges matter tending to invalidate the apparent effect of such process—the burden of proving such new matter is on the petitioner. The remarks in *Re Smith*, 143 Cal. 368, 77 Pac. 180, are to be taken as referring only to the case where, by agreement of the parties and the consent of the court, the petition is treated as a traverse to the return, and its averments are not dis-

puted. The course of treating the petition as a traverse has frequently been followed in this court, but where it is followed it does not require the respondent to file, in addition to the ³⁴³ return, a pleading specifically denying the affirmative allegations of the petition (treated as a traverse), nor does it shift the burden of proof as to such allegations from the petitioner to the respondent. To adopt the analogy of pleadings in civil actions, the return is the complaint, the traverse is the answer; new matter set up in the traverse is deemed denied, and must be proved by the party alleging it.

In this case the petitioner filed exceptions to the return, which were overruled. He then filed a traverse. Evidence was taken, and the substantial facts disclosed are the following:

On the thirteenth day of July, 1905, an indictment charging the petitioner with the crime of perjury alleged to have been committed in the city and county of San Francisco on the thirtieth day of June, 1905, was found by the grand jury and filed in the superior court of the city and county of San Francisco. Said indictment was designated in said superior court by number 16,130. After the alleged commission of said crime and prior to the finding of the indictment Collins had departed from the jurisdiction of said court and gone to the city of Victoria, in the province of British Columbia, Dominion of Canada. Steps were duly taken to demand his surrender pursuant to the extradition treaty between the United States of America and Great Britain, and on the twenty-seventh day of October, 1905, Collins was surrendered and extradited, and removed from the city of Victoria to the city and county of San Francisco. Being there arraigned upon said indictment, he pleaded not guilty, and the case went to trial. Such trial resulted in a disagreement of the jury in the month of December, 1905, and a second trial has not since been had.

In the course of said trial the defendant became a witness and testified in his own behalf, making certain statements under oath which were, after the disagreement of said trial jury, made the basis of a second indictment for perjury found on the twenty-ninth day of December, 1905. This second indictment filed in the superior court, and numbered 16,415, charged Collins with having committed perjury in giving his testimony in his own defense on the twelfth day of December, 1905. The district attorney proceeded to trial upon the second indictment against the objection of Collins, and such trial ³⁴⁴ resulted in a verdict of conviction; whereupon judg-

ment was pronounced. An appeal from the judgment was taken and is now pending in the district court of appeal.

The principal contention of the petitioner is that inasmuch as he was extradited from the Dominion of Canada upon a specific indictment, No. 16,130, the state of California could not try him upon any other charge until his trial upon the original charge had first been brought to a final conclusion, and he had been given a reasonable time within which to return to the country from which he had been extradited. So far as relates to international as distinguished from interstate extradition, this is undoubtedly the general rule: *Commonwealth v. Hawes*, 13 Bush, 697, 26 Am. Rep. 242; *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431. The subject was very fully considered by the supreme court of the United States in the leading case of *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425, where the court, after considering all of the authorities then existing, reached the conclusion that under a treaty of extradition providing for the surrender of persons accused of specific crimes, taken together with sections 5272 and 5275 of the Revised Statutes (U. S. Comp. Stats. 1901, pp. 3595, 3596), "a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

In the *Rauscher* case, as well as in every other case that has been called to our attention, the crime for which it was sought to try the extradited prisoner was one alleged to have been committed prior to his extradition. In the present case, on the contrary, the crime with which Collins was charged and of which he was convicted was committed after his surrender by the authorities of the country in which he had sought a refuge, and after his return to the state of California.

The question is whether the immunity against prosecution for another offense, declared in *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425, and similar cases, extends to an offense committed subsequent to ³⁴⁵ the extradition. No doubt there is language in *United States v. Rauscher*, general in its terms, which, taken without regard to the facts before the court, would lend countenance to the

view that the prisoner is, until the conclusion of his trial for the offense on which he was extradited and for a reasonable time thereafter, absolutely immune from prosecution on any other charge. It is an elementary doctrine, however, that expressions in judicial opinions are to be read in the light of the facts before the court, and it is necessary, therefore, to consider the grounds upon which the decision in this class of cases went in order to determine whether those grounds are applicable to the case of a crime committed after the extradition.

The reasoning of *United States v. Rauscher* is substantially this: That in the absence of treaty there is no obligation upon any country to surrender to another persons who are charged with crime in the latter country. That, as a matter of comity, such surrender might be made, but that if made in pursuance of a demand or request for the surrender of a person accused of a specific crime, there is an implied undertaking on the part of the country receiving the surrender that such surrender is asked and received for the purpose of putting the accused on trial for that crime and for no other purpose. When a treaty is adopted, providing for the surrender of persons accused of specific crimes, the same implied obligation exists, more particularly in view of the provision generally found in treaties of extradition that before any surrender shall be made there must be some proof of the commission of the offense. To permit a country to seek the extradition of a person found in another country upon the ground that he is charged with the commission of a specific offense covered by an extradition treaty, and then, when his surrender has been granted upon that ground, to try him for some other offense would make it possible to evade the provisions of the treaty, and to use it as a pretense for securing possession of the person of a prisoner whom it was not designed to try for the charge upon which his extradition was nominally sought, but for some other offense which might or might not be in itself extraditable. In the language of the court in the case under consideration, "it is impossible to conceive of the exercise of jurisdiction in such a case for any other ³⁴⁶ purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition."

The doctrine, then, seems to rest ultimately upon the view that the treaty of extradition is intended to provide for the

surrender of persons who may have fled from one country to another after committing one of a number of designated crimes, and that it would be a breach of international faith to use the provisions of this treaty for any other purpose than the one which is stated in the demand for the surrender—namely, that the prisoner may be put upon his trial for the specific offense designated in the proceedings. In the absence of this limitation, it would be possible to make up a fictitious case coming nominally within the terms of the treaty, and, having secured possession of the prisoner, to then disregard the charge upon which he was extradited, and proceed to try him upon some other offense which could not have been made the basis of extradition, because not covered by the treaty, or a charge on which extradition, even if the crime charged was named in the treaty, might have been refused.

But no such considerations apply to the case of an offense committed after the surrender and return of the accused. While it may be the policy of a country in which a person has taken refuge to grant him the right of asylum except as against a specific charge of a crime covered by a treaty of extradition, such country, after it has once extradited him, cannot be concerned in securing for him immunity for new crimes committed after his return to the demanding country. The obligation assumed by the country demanding the surrender is that such surrender will not be used for the purpose of putting the prisoner on trial for any other offense which he may be claimed to have committed before he sought the asylum of the foreign country, but we cannot see that there would be any breach of international faith in compelling him, in common with other persons within the jurisdiction, to assume responsibility for any offense which he may commit after his return. In such case there is no possibility of the extradition proceedings being used as a subterfuge to pursue the accused for an offense other than the one for³⁴⁷ which he was extradited. In the absence of any authority compelling such conclusion, we are not prepared to hold that a person extradited under a treaty may, after his return, and pending his trial upon the extradition charge, commit any crime, however atrocious, with absolute security against prosecution until he shall have had an opportunity to return to the country from which he was taken.

The immunity of an extradited prisoner from prosecution for any offense other than the one for which he was extradited rests not upon any absolute right in him to have an asylum in the land in which he has taken refuge, but primarily upon

the rights of the sovereignty which has surrendered him, and has done so pursuant to a treaty. This is illustrated by the many cases holding that where an accused is forcibly seized in another country and transferred by violence, force or fraud to this country, without resort to any extradition treaty, he cannot rely on the circumstances of his removal to defeat his prosecution and trial when here: *Ex parte Scott*, 9 Barn. & C. 446; *Lopez & Sattler's Cases*, 1 Dears. & B. C. C. 525; *State v. Smith*, 1 Bail. (S. C.) 283, 19 Am. Dec. 679; *State v. Brewster*, 7 Vt. 118; *In re Dow*, 18 Pa. 37; *State v. Ross*, 21 Iowa, 467; *The Richmond v. United States*, 9 Cranch, 102, 3 L. ed. 670. See, also, *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. Rep. 225, 30 L. ed. 421; *In re Mahon*, 34 Fed. 525.

"The fundamental principle upon which the doctrine of these cases rests, is this: The criminal himself never acquires a personal right of asylum or refuge from the consequences of his crime anywhere. The government of the state or country to which he flees may insist that he shall not be extradited from there unless by its consent and under such conditions as it shall assent to": *Hawley on International Extradition*, 15.

In the *Rauscher* case (119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425) itself there are one or two expressions indicating that the court intended to limit the doctrine declared to cases of offenses committed prior to the extradition. In speaking of the right of the accused, the court says: "That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up; and that if not tried for that, or after trial and acquittal, he shall have a⁴⁸ reasonable time to leave the country before he is arrested upon the charge of any other crime *committed previous to his extradition.*"

And at another place the opinion refers to the immunity from arrest, trial and conviction for a crime "not enumerated in the extradition treaty *and committed before his removal.*" (The italics are ours.)

Much force is added to the view that the accused is not protected from prosecution for crimes committed subsequent to his extradition by a consideration of the terms of the treaty under which Collins was surrendered.

The treaty involved in the *Rauscher* case was that of 1812 with Great Britain. That treaty merely provided for the surrender by the respective contracting governments of persons charged with certain enumerated crimes, the surrender to be

made upon such evidence of criminality as would justify arrest and commitment for trial in the country which was asked to surrender the accused. There was no express limitation as to the crimes for which the accused might be tried after surrender. Such limitation was held by the court to be implied in the nature of the treaty itself, and there was no occasion to define its precise extent.

In 1889 the United States of America and Great Britain concluded an extradition convention which, after referring to the treaty of 1842, made certain further provisions. Article 3 of the treaty of 1889 (26 Stats. 1509) reads as follows: "No person surrendered by or to either of the high contracting parties shall be triable or tried for any crime or offense committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered." By this provision the contracting governments reduced to an express and definite agreement the exemption which had been before implied. It seems clear that in limiting the exemption to crimes committed prior to extradition, the contracting parties indicated their intent that persons surrendered should not be exempt from prosecution for crimes subsequently committed. If under the former treaty there was any exemption for such subsequent crimes (which, as we have said, was not in our opinion the case), such exemption was removed by the new treaty.

³⁴⁹ It is urged that the effect of article 3 of the treaty with Great Britain is modified by the provisions of article 6 of the same treaty, providing that "The extradition of fugitives under the provisions of this convention and of the said tenth article (of the treaty of 1842) (8 Fed. Stats. Ann., p. 576), shall be carried out in the United States and her majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering state." We are not furnished with any copies of the laws of the Dominion of Canada and none are at the present time accessible to us. On the hearing the petitioner, after qualifying as a witness regarding the laws of Canada, testified that the extradition act of Canada provided that, "This act shall not authorize the issue of a warrant for the extradition of any person under the provisions of this statute, to any state or country in which, by the law in force in such state or country, such person may be tried after such extradition for any other offense than that for which he was extradited, unless an assurance shall first have been given by the

executive authority of such state or country that the person whose extradition has been claimed shall not be tried for any other offense than that on account of which such extradition has been claimed."

For the reasons already stated we do not think that this statute was intended to protect persons surrendered from trial for subsequent offenses, but if it was, its only effect was to lay down a rule for the government of officials of the Dominion of Canada. They may, under this act, have had the right to refuse to surrender the accused without receiving the assurance referred to in the act. If they did surrender him without such assurance, the rights of the United States and of the state of California after receiving the prisoner were limited only by the provisions of the treaty, and that treaty, as we have seen, did not prevent trial for a subsequent offense.

In this connection it may be observed that the petition for the writ of habeas corpus alleged as a fact that the warrant of extradition issued by the Canadian government, and upon which the prisoner was returned to this country, contained an express provision that the petitioner "should not be tried or triable for or on account of any other offense than the one ²⁵⁰ upon which such extradition shall be granted . . . until after the final conclusion of his trial for said offense and until his final discharge from custody or imprisonment for or on account of such offense, and thereafter, until he has had a reasonable opportunity of returning to the country from which he was taken on said extradition." The original warrant was destroyed in the conflagration of April 18, 1906. Without deciding that the language quoted, if inserted in the warrant, would affect the right of the state to try the accused on the second indictment, it is sufficient to say that the evidence taken on the hearing absolutely negatives the claim of the petitioner, and shows conclusively that no such language was inserted in the warrant.

There is, in our opinion, nothing in the provisions of section 5275 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 3596) which conflicts with the views herein expressed.

It is further contended by petitioner that the perjury with which he was charged in the second indictment consisted in swearing to some of the same matters which formed the basis of the charge of perjury in the first indictment. From this it is argued that a verdict of acquittal on the first charge would be conclusive in favor of the defendant on any subse-

quent trial: *United States v. Butler*, 38 Fed. 498; *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. Rep. 437, 29 L. ed. 684; *Cooper v. Commonwealth*, 106 Ky. 909, 90 Am. St. Rep. 275, 50 S. W. 524, 51 S. W. 789, 45 L. R. A. 216. Similarly, it is claimed, a verdict of conviction on the first charge would preclude a conviction on the other. We need not decide whether the principle invoked has any application to the facts here presented. In any event such acquittal or conviction in one trial is matter of defense to be relied on in the other. It does not go to the jurisdiction, and affords no ground for release on habeas corpus.

For these reasons we are satisfied that the state of California did not violate any treaty obligation of the United States, or any right of the accused, in putting him to trial upon the second indictment, and that he is properly held in custody by the sheriff pursuant to the judgment of conviction.

The sheriff also claims to hold the petitioner by virtue of a bench-warrant issued upon the first indictment—namely, the one which was the basis of the extradition proceedings. As ²⁵¹ to this the petitioner claims to have been released on bail. The destruction of the public records of the city and county of San Francisco in the conflagration of April, 1906, makes it difficult to determine the truth of this claim. The evidence upon it is conflicting. We have reached the conclusion that the weight of evidence is to the effect that the prisoner, after having given bail upon this charge, voluntarily surrendered himself into custody, and that he has not since given bail.

Nor has he offered any evidence in support of his allegation that his trial on this charge has been unreasonably postponed against his objection, and that the prosecution has no bona fide intention of putting him to trial on this indictment. He is therefore properly in custody of the sheriff on the bench-warrant issued under the indictment in case 16,430, and the extradition proceedings thereon, as well as the judgment of conviction in case 16,415.

Petitioner is remanded to the custody of the sheriff to be held in pursuance of process in both cases.

Henshaw, J., McFarland, J., Shaw, J., Angellotti, J., Lorigan, J., and Beatty, C. J., concurred.

The petitioner subsequently applied for a writ of error to enable him to secure a review of the record in this proceeding by the supreme court of the United States. In allowing the writ the chief justice rendered the following opinion on the twelfth day of June, 1907:

BEATTY, C. J. Having allowed the prisoner a writ of error to enable him to secure a review of the record in this proceeding by the supreme court of the United States, and having been requested to order that the writ operate as a supersedeas, I desire to state my reason for specially limiting the operation of the order.

In certain cases of recent origin in this state in which prisoners in custody under process of the superior court have been remanded after a hearing upon habeas corpus in another court, or before a different judge, upon the ground that the imprisonment was lawful, the judge making the order of remand has allowed a writ of error and ordered a supersedeas which he has construed as empowering him to admit the 352 prisoner to bail. The order which I make in this case is not to be understood by any judge to whom an application for bail may be made as having such effect. When after a hearing upon his petition for a writ of habeas corpus a prisoner has been remanded to the custody from whence he came, there is ordinarily no proceeding to be stayed pending a review of that order. The prisoner is not thereafter held by virtue of the order of remand, but by virtue of the warrant or other process upon which he was held at the time the writ of habeas corpus was issued, and the power to admit him to bail belongs exclusively to such officer, if any, as had the power to admit him to bail independent of the habeas corpus proceeding, and he must make his application for bail in the usual manner as provided by the laws of this state.

The Principal Case was Affirmed by the Supreme Court of the United States in *Collins v. O'Neil*, 214 U. S. 113, 29 Sup. Ct. Rep. 573, 53 L. ed., Mr. Justice Peckham delivering the opinion as follows:—

"In No. 241, the plaintiff in error, being imprisoned in the county jail of San Francisco, in the state of California, by the sheriff, applied to the supreme court of that state in bank for a writ of habeas corpus to obtain his discharge from imprisonment. The writ was granted, and, after hearing, was dismissed, and the petitioner remanded to the custody of the sheriff: 151 Cal. 340, 70 Pac. 827, 91 Pac. 397. A writ of error was then sued out from this court and the case brought here.

"In No. 320, the appellant applied to the circuit court of the United States for the northern district of California for a similar writ, which was issued, and a hearing had, and the writ dismissed by the court: 149 Fed. 573, and see 151 Fed. 358, 154 Fed. 980. From the order of dismissal an appeal was allowed to this court. The two cases have been heard here as one.

"The material facts are these: On July 13, 1905, an indictment was found by the grand jury of San Francisco county, California, against the plaintiff in error, charging him with the crime of perjury, alleged

to have been committed in San Francisco on June 30th of that year. The plaintiff in error, not being found within the state, was subsequently discovered in Victoria, British Columbia, and proper demand, under the treaty between the United States and Great Britain, being made for his surrender upon that indictment for trial, he was, on October 7, 1905, duly surrendered, and removed from Victoria by one Gibson, the agent designated in the Canadian extradition warrant, to San Francisco, where he was placed in the custody of the then sheriff, who also had a bench-warrant issued from the superior court on the perjury indictment against the plaintiff in error.

"His trial upon the indictment upon which he had been extradited began in San Francisco in December, 1905, and resulted in the disagreement of the jury on the 23d of December of that year, and the case was then continued, to be thereafter reset for trial. Upon the trial of the indictment for which plaintiff in error was extradited, he was himself sworn, and testified as a witness, and, on the 29th of December, 1905, after he had given such evidence, he was indicted again by the grand jury of San Francisco county, the indictment charging him with perjury committed on December 12, 1905, while testifying on his own behalf on the trial, as already stated. He was arraigned on this indictment in January, 1906, and after he had made all objections to his being arraigned or placed on trial on this second indictment until the conclusion of the first, and until he had then been afforded opportunity to return to Victoria, he was nevertheless, brought to the bar and the trial proceeded with, resulting in a verdict of guilty on February 27, 1906, upon which judgment was entered that he be imprisoned in the state prison for the term of fourteen years.

"From that judgment he appealed to the district court of appeal of California, where it was affirmed, and thereafter he applied to the state supreme court for a rehearing by that court, which was denied: *People v. Collins*, 6 Cal. App. 492, 92 Pac. 513.

"Thereupon the plaintiff in error, being restrained of his liberty, as well under the judgment of conviction, as otherwise under the extradition warrant, applied to the state supreme court for a writ of habeas corpus, as above stated, contending that his conviction and sentence were void and in excess of the jurisdiction of the state court, as being in contravention of his extradition rights under the treaty between the United States and Great Britain, and section 5275 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 3596), set forth in the margin.*

*"Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safekeeping and protection of the accused."

"The writ was issued and a return made, denying many of the allegations of the petition, and, after hearing, it was finally dismissed, and the plaintiff in error remanded to the custody of the sheriff: 154 Fed. 980.

"The objections which the plaintiff in error urges to his further imprisonment are founded upon what he insists is implied from the provisions of the treaties between the United States and Great Britain, (1842-1889 [8 Stats. at Large, 572, 26 Stats. at Large, 1508]), and he contends that, under those treaties, the state of California has no right or jurisdiction to try him for any offense whatever other than the one for which he was extradited and delivered to the government of the United States for trial, even though he committed an offense subsequently to the extradition; and he further asserts that after a trial has been had for the offense for which he was extradited, he is entitled to be afforded reasonable time and opportunity after his final release on that charge to return to the country of asylum, and that the trial of the crime for which he was extradited must be had within a reasonable time after his extradition, or he is, for that reason, entitled to his discharge. In other words, the plaintiff in error claims immunity, under the treaties, from arrest or detention for any crime committed by him after he had been brought back upon the extradition warrant until he has been allowed a reasonable time to return to the place from which he was taken. He contends that the duty originally resting upon the demanding country to try him only for the offense for which he was extradited, and to then afford him reasonable opportunity to return, is unaffected by the fact that he committed another crime after his extradition.

"The treaty of 1842, August 9 (8 Stats. at Large, 576, sec. 10), is one in regard to which discussions as to its meaning have arisen: *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425. Subsequently to the treaty, Great Britain passed the extradition act of 1870 (32 & 33 Victoria, c. 52), and also in 1873 an act to amend the extradition act of 1870 (36 & 37 Victoria, c. 60). Both these acts are cited as the extradition acts of 1870 and 1873: See 1 Moore on Extradition, 1891, pp. 741, 755. In subdivision 2 of section 3 of the act of 1870, it is provided: '(2) A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to her majesty's dominions, be detained or tried in that foreign state for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded.'

"Article 3 of the treaty or convention of 1889, July 12th, between Great Britain and the United States, is to be found in 26 Stats. at Large, 1508, 1509, and is also, among others, set out in *Johnson v. Browne*, 205 U. S. 309, 27 Sup. Ct. Rep. 539, 51 L. ed. 816, 10 Am. & Eng. Ann. Cas. 636, 638, as follows: 'Article 3. No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense committed prior to his extradition,

other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.' The treatment of the criminal for all acts committed or said to have been committed by him prior to extradition is thus fully provided for.

"The contention of the plaintiff in error that the duty to afford opportunity to return after a trial or other termination of the case upon which he was extradited is unaffected by any subsequent crime he may have committed is not even plausible. Nothing in the Rauscher case (119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425) is authority for any such contention. The duty to afford opportunity to return after trial, as stated, is limited to matters which happened before extradition; and, in the nature of things, such duty cannot be extended by implication so as to cover a totally different state of facts. Because, in some cases in construing the treaty, it has been stated that a person extradited can be tried only for the offense for which he was surrendered for trial until he has had an opportunity of returning, it is assumed by the plaintiff in error that such language prohibits the trial of a person so extradited for any crime committed by him subsequently as well as prior to the surrender, without an opportunity for his return to the other country. The whole question is simply one as to the meaning of the treaty, and we cannot doubt for a single moment what that meaning is.

"Much is said by the plaintiff in error as to his right to an asylum, as if it inhered in himself. The right is, however, simply provided for by treaty, and must be found therein, so far alone as the criminal is concerned.

"The question then is, Does either the treaty or convention, by express provision or by inference, provide for a return of the criminal to the surrendering country after his surrender, and after a subsequent commission of a crime in the country to which he was surrendered? To ask the question is to answer it. The plaintiff in error contends for the treaty right to leave the country, notwithstanding his commission of the subsequent crime. This we cannot assent to. It is impossible to conceive of representatives of two civilized countries solemnly entering into a treaty of extradition, and therein providing that a criminal surrendered according to demand, for a crime that he has committed, if, subsequently to his surrender, he is guilty of murder or treason or other crime, is, nevertheless, to have the right guaranteed to him to return unmolested to the country which surrendered him. We can imagine no country, by treaty, as desirous of exacting such a condition of surrender, or any country as willing to accept it. When a treaty or statute contains a provision that the party surrendered shall be tried for no other offense until he has had an opportunity to leave the country, the meaning of such a provision is perfectly plain, and must receive a reasonable and sensible construction. The party proceeded against must not be tried for any other offense existing at the time when he was extradited (whether, at the time of such extradition, it had or had not been discovered),

until he shall have had a reasonable time to return to the country from which he was taken, after his trial or other termination of the proceeding. That such privilege should be accorded to one who commits a crime after his surrender to a demanding government lacks all semblance of reason or sense.

"Spear, in the second edition of his work on the Law of Extradition, says, at page 84, that the party extradited is not 'protected against trial for any offenses which he may commit against the receiving government subsequently to his extradition, and while in its custody, or after his discharge therefrom.' Such a criminal has no asylum, because he never had an asylum within the jurisdiction of the government delivering him, with regard to the crime which he committed since such delivery: Ibid.

"The contention is also without merit that he has, at any rate, the right to a trial to a conclusion of the case for which he was extradited, before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the state whose laws he has violated since his extradition, and we cannot see that it is a matter of any interest to the surrendering government.

"There is nothing in the section of the United States Revised Statutes, supra, which gives the least countenance to the claims of the plaintiff in error.

"The other objections made by him in regard to the person who now has him in custody under the various warrants and processes, copies of which are returned in the record, we regard as unimportant.

"As soon as the judgments herein are affirmed the plaintiff in error will, of course, pursuant to the judgment entered upon the verdict of conviction against him, be taken to the state prison in California, provided for in the sentence, and there confined according to law. The orders and judgments in the two cases are affirmed."

The Right to Try a Fugitive from Justice for One Offense when he has been extradited for another is discussed in the note to *McLaughlin v. Doane*, 40 Kan. 392, 10 Am. St. Rep. 210. It has been decided in Indiana that a fugitive from justice when lawfully extradited from one state and returned to another to answer a specific crime may be required to answer another and different criminal charge under the law of that state, before being afforded an opportunity to return to the state from which he has been extradited: *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 291, and see cases cited in the cross-reference note thereto.

BRUM v. IVINS.

[154 Cal. 17, 96 Pac. 876.]

PARTY SERVED WITH PROCESS is Bound by It.—If a person bearing the name of the defendant is served with process, and judgment is entered against him, he cannot avoid its effect by proving that he was not the person intended to be sued or served. (p. 138.)

A JUDGMENT IS BINDING on the Person Served with Process Though He may have been Sued or Served by a False or Fictitious Name. If so served, although under a name not his own, he must appear and set up the misnomer and whatever defense he may have. Failing to do this, he is concluded by the judgment. (p. 139.)

JUDGMENT—Presumption that Different Names Designate Different Persons and Its Rebuttal.—Where the person against whom a judgment is sought to be enforced and the defendant bear different names, they are presumed to be different persons, but this presumption may be and is rebutted by proof that the former is the person who was served with process in the action. (p. 139.)

INJUNCTION Against Proceedings Under Execution, Denial of Because They were not a Cloud on Complainant's Title.—If a sheriff is about to sell property on execution against a person other than the complainant, he is not entitled to an injunction against the sale, because it will not cast a cloud on his title. (p. 140.)

INJUNCTION Against Enforcement of a Judgment, Because Complainant was not Correctly Named Therein.—If an action was brought against M. S. de B., but the process served on M. S. B., who, failing to appear, judgment was taken by default, and an execution was levied on property of M. S. B., he is not entitled to enjoin its enforcement on the ground that he was not liable upon the original cause of action, and was not the party intended to be sued or served with process, where it is not shown that his failure to appear was due to any imposition or fraud on the part of the adverse party, nor is there any showing of mistake, surprise or other equitable ground causing his failure to defend. (p. 140.)

Albert Nelson, for the appellants.

William Mallagh and R. V. Bouldin, for the respondent.

18 SLOSS, J. This action was brought in the superior court of San Luis Obispo county to restrain the sheriff of said county and his deputies from levying a certain execution upon plaintiff's real estate.

On October 10, 1904, one Blumenthal commenced an action in the justice's court of the city and county of San Francisco against Manuel S. de Brum to recover sixty dollars with interest, alleged to be due on a promissory note made and delivered by Manuel S. de Brum to Dr. Meyers & Co., or order, and assigned to Blumenthal. The note, as set forth in the complaint, was by its terms payable at San Francisco. Summons was issued and was regularly served on M. S. Brum, the plaintiff in this action. He made no appearance in the suit in the justice's court, and judgment went in that court

by default in favor of Blumenthal, and against the defendant named in the complaint. Thereupon an execution was duly issued to the sheriff of San Luis Obispo county (defendant herein) and placed in his hands with instructions to levy on the real property of plaintiff in this action. The court found, following the allegations of the complaint, that plaintiff had never had any dealings with Dr. Meyers & Co., that he had never executed the promissory note sued on in the justice's court, and that he had never been indebted to Dr. Meyers & Co. It further found that plaintiff's full name is Manuel S. Brum, that he always signs "M. S. Brum," and has never signed his name to any instrument as "Manuel S. de Brum." The findings state that plaintiff did not appear in the action in the justice's court because he "had signed no promissory note in said case or made any contract with Dr. Meyers & Co." On these facts the court gave judgment restraining the defendants from levying execution against the plaintiff's property. The defendants appeal.

The respondent necessarily rests his claim to relief upon the fact that the complaint, summons and judgment in the justice's court named the defendant there as Manuel S. de Brum, while the plaintiff here, whose property is sought to be taken in satisfaction of that judgment, is named Manuel S. Brum. If the action in the justice's court had proceeded against Manuel S. Brum, it would hardly be contended that a person bearing that name could, after being duly served with summons and permitting judgment to go against him by default, maintain a proceeding to enjoin the execution of the judgment upon the mere ground that he was not in fact liable on the obligation which formed the basis of the former judgment. The justice's court had jurisdiction of the subject matter of the action (Code Civ. Proc., sec. 832), and by the service of summons on the defendant named would, in the case supposed, have secured jurisdiction of his person. "A judgment in favor of the plaintiff necessarily establishes his right to the relief given against the person served": Van Fleet on Collateral Attack, sec. 367. While identity of names raises merely a presumption of identity of person, and there may be many persons bearing the name designated as that of the defendant in the proceeding, the only individual of that name who becomes a party to the suit is the one who is served. If he is not liable upon the cause of action set up, he has his opportunity to assert that defense when he is by service brought into the action. Failing to do so, he cannot, after judgment has gone against him, resist its enforcement on the

ground that he, although named in the proceedings and served, was not the party intended to be served. "The cases all agree on this point": Van Fleet on Collateral Attack, sec. 367.

Here the name of the person designated as defendant in the justice's court action differed somewhat from the name of ²⁰ this plaintiff. The weight of authority is to the effect that a judgment is binding upon the party served, even though he may have been sued or served by a false or fictitious name; that a party regularly served with summons, although under a name not his own, must come in and set up the misnomer and whatever defense he may have, or else be held concluded by the judgment: 1 Freeman on Judgments, 4th ed., sec. 50a; Van Fleet on Collateral Attack, sec. 356; Foshier v. Narver, 24 Or. 441, 41 Am. St. Rep. 874, 34 Pac. 21; Bloomfield R. R. Co. v. Burress, 82 Ind. 83; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. ed. 451; Guinard v. Heysinger, 15 Ill. 288. It must be shown by the party relying on the judgment that the person served is the same as the person against whom it is sought to enforce the judgment. The presumption is that different names designate different persons. Thus, it has been held in this court that where the defendant had been sued and served by the name George N. Mott, and had defaulted, the judgment entered could not, on plaintiff's motion and without notice to defendant, be amended by altering the name "George" to "Gordon." The court said that there was no proof in the record that George and Gordon were the same person, and "prima facie, two different names must be held to signify two different persons": McNally v. Mott, 3 Cal. 235. See, also, Sutter v. Cox, 6 Cal. 415; Houghton v. Tibbets, 126 Cal. 57, 58 Pac. 318. But if, on proper proceedings, it is shown that a person was served with process in an action brought against him, the judgment will bind him, although he may have been wrongly named.

The cases last above cited involved substantial differences in names. There are cases of slight errors in spelling, which do not destroy the virtual identity of name (*idem sonans*). Such errors are disregarded entirely. For example, in Seaver v. Fitzgerald, 23 Cal. 85, it was held that a valid judgment against D. C. Seaver could be based on a publication of summons designating the defendant as "D. C. Seavers." "The names," said the court, "are substantially the same."

This case must fall, so far as the variation of names is concerned, in the class of cases like McNally v. Mott, 3 Cal. 235, or in that represented by Seaver v. Fitzgerald, 23 Cal.

85. That is to say, the names "Manuel S. Brum" and "Manuel S. de Brum" must be regarded either as *prima facie* the names of different persons ²¹ or as substantially the same. In either view the respondent was not entitled to the relief here sought and granted.

If the name of the person against whom the judgment and execution ran is not the name of plaintiff, a purchaser under execution sale could not recover possession or establish title against plaintiff without allegation and proof that the plaintiff, although designated by a wrong name in the proceedings leading to the execution, was, in fact, the party who had been sued. If such showing could be made, the plaintiff would be bound by the judgment, and would have no ground for relief against its enforcement. If it could not be, the execution would afford no authority for selling plaintiff's property. On the face of the proceedings, the sale of plaintiff's property would appear to have been made on an execution against another person. Such sale would be *prima facie* void. It would cast no cloud on plaintiff's title, and should not, therefore, be enjoined: *Roman Cath. Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343; *Russ etc. Co. v. Crichton*, 117 Cal. 695, 49 Pac. 1043.

On the other hand, if there be no substantial difference between the names "Manuel S. Brum" and "Manuel S. de Brum," we have the case, hereinabove supposed, of an action by a party regularly sued and served to enjoin the enforcement of a judgment rendered by a court having jurisdiction of the subject matter and of the parties. A court of equity is asked to interfere on behalf of a judgment debtor who claims that he had a meritorious defense to the original action but failed to set up that defense. His neglect to appear in the justice's court and deny the averments of the complaint which had been served upon him was not due to any imposition or fraud on the part of the adverse party, nor is there a showing of mistake, surprise or other equitable ground excusing the failure to defend. Nothing is better settled than the rule that a defendant who, under such circumstances, fails to defend against an action at law, cannot have relief in equity against the judgment in the action, on grounds which would have been a defense to the original suit: 23 Cyc. 1006; *Phelps v. Peabody*, 7 Cal. 50; *Mastick v. Thorp*, 29 Cal. 444; *Agard v. Valencia*, 39 Cal. 292; *Ede v. Hazen*, 61 Cal. 360.

The record discloses no ground for the granting of relief against the execution of the judgment. Upon the facts found, judgment should have gone for the defendants.

²² The judgment is reversed, with directions to the trial court to enter judgment that plaintiff take nothing by the action and that the defendants recover their costs.

Shaw, J., and Angellotti, J., concurred.

Defects in the Service of Process as affecting jurisdiction to render judgment are discussed in the note to Sanford v. Edwards, 61 Am. St. Rep. 485. In Foshier v. Narver, 24 Or. 441, 41 Am. St. Rep. 874, it is affirmed that if a person served with process fails to appear and show that the plaintiff is not entitled to relief against him because he is the wrong party and not liable, the judgment establishes the fact that he is the right party and that the plaintiff is entitled to relief against him. If summons in an action names "John Lynch" as defendant, and is personally served on "John M. Lynch," who is not the person upon whom the summons ought to have been served, a judgment taken against the latter by default, upon his failure to appear, is nevertheless valid until regularly vacated or set aside: Ueland v. Johnson, 77 Minn. 543, 77 Am. St. Rep. 698.

EMERY v. KIPP.

[154 Cal. 83, 97 Pac. 17.]

A COLLATERAL ATTACK on a Judgment cannot be sustained unless it is void on its face. (p. 143.)

JUDGMENT, Collateral Attack upon, What is.—Where, in an action to quiet title to real property, the defendant relies upon a judgment against the plaintiff which the latter seeks to avoid, the attack thus made by him is collateral. (p. 143.)

JUDGMENT Against Married Woman—Misjoinder of Husband. A judgment against a married woman is not void because her husband was not made a party to the action, though the statute required him to be joined. (p. 143.)

A JUDGMENT Against a Married Woman by Her Maiden Name is Valid, especially where upon a contract executed by her in such name. (p. 144.)

A JUDGMENT Against a Married Woman by Her Maiden Name, Though Based on Constructive Service of Process, declaring her to have no title or interest in land claimed by her, is conclusive on her, especially when she acquired such property in her maiden name, and there is nothing of record to show the subsequent change in such name by her marriage. (p. 147.)

Stearns & Sweet, for the appellant.

L. L. Boone, for the respondent.

²³ HENSHAW, J. Plaintiff commenced this action to quiet title to lands situate in the county of San Diego. She obtained judgment, and from that judgment and from the order of the court denying defendant's motion for a new trial he appeals.

Upon the trial the following facts were established without conflict: The maiden name of plaintiff, who is an English-woman ⁸⁴ by birth, is Madeline Louisa Munro. In England she was usually called Louisa. After coming to California she was usually called Madeline by her friends and family, although she was sometimes addressed and spoken of as Louisa. In 1888 one Phipson, the then owner of the land in controversy, executed a deed thereof to this plaintiff, naming her therein as Louisa Munro. In December, 1894, under the name of Madeline L. Munro, she married Alfred A. Emery, and continued to be his wife until the time of his death in 1903. In the marriage license she was named and designated Madeline L. Munro, and in the certificate of the minister who performed the marriage ceremony her name was written Madeline L. Munro. She had never executed any conveyance of the property, and, so far as her title is concerned, since the date of her deed, it has always stood on the records of the recorder's office in San Diego county in the name of Louisa Munro, and not in the name of Madeline Louisa Munro or Madeline L. Munro.

Defendant's title comes by mesne conveyance from a judgment obtained in an action to quiet title to the land in controversy prosecuted by Nellie Rue against Louisa Munro. Proof of plaintiff's title having been made as above outlined, defendant to establish his interest in the land offered the judgment-roll in the action of Nellie Rue v. Louisa Munro, and upon objection of plaintiff, the judgment-roll was refused admission in evidence. The soundness of the court's ruling upon this proffer embodies the questions presented for consideration upon this appeal. Respondent's objections to the admission of the judgment-roll, while couched in different forms, resolve themselves into two: 1. That the judgment is void because of the insufficiency of the facts set forth in the affidavit for publication of summons; and 2. That the court acquired no jurisdiction of this plaintiff by the substituted process and constructive service, she being a married woman and her husband not having been joined with her (Code Civ. Proc., sec. 370); and she not having been sued in her true name, which at the time of the commencement of the action of Rue v. Munro was Madeline L. Emery and not Louisa Munro.

The first objection thus advanced needs little consideration. This plaintiff connected herself with the action of Rue v. Quinn by making a motion therein, after judgment by default ⁸⁵ had been entered against her, to set the judgment aside

upon the ground that it had been entered without any jurisdiction having been obtained over her person. The ground there urged was the same as that here presented, that the facts set forth in the affidavit for the publication of summons were entirely insufficient. The trial court granted her motion, but upon appeal to this court, its order was reversed, it being here held that the affidavit was sufficient: *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. The ruling and determination in *Rue v. Quinn* have subsequently been approved in numerous cases: *Weis v. Cain* (Cal.), 73 Pac. 980; *People v. Wrin*, 143 Cal. 11, 76 Pac. 646; *People v. Norris*, 144 Cal. 422, 77 Pac. 998; *Cargile v. Silsbee*, 148 Cal. 259, 82 Pac. 1014; *Shepard v. Mace*, 148 Cal. 270, 82 Pac. 1046.

The questions presented under the second objection are both more interesting and more important. Preliminarily, it is to be borne in mind that the attack here made upon the judgment in *Rue v. Emery* is collateral, and to be successful, it must be established that the judgment is void on its face: *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Sharp v. Daughney*, 33 Cal. 505; *Galvin v. Palmer*, 134 Cal. 426, 66 Pac. 572; *Van Fleet on Collateral Attack*, secs. 3, 614, 616. That the judgment was not void for nonjoinder of the husband as party defendant is established by the case of *Bogart v. Woodruff*, 96 Cal. 609, 31 Pac. 618. The facts in that case were that a married woman, while a feme sole, had executed a promissory note. Suit was brought upon this promissory note against the maker. She was sued in her maiden name and her husband was not joined. Personal service upon her was had, and judgment went for plaintiff upon her default. The original plaintiff then commenced another action to enforce the judgment against the wife sued under her married name, her husband being joined as defendant. There, as here, a collateral attack was made upon this judgment, it being contended that it was void, (1) because of the misnomer of the married woman defendant; and (2) because, being a married woman, her husband was a necessary party, without whom the court could not obtain jurisdiction of the person of the wife. The trial court took this view, but upon appeal the judgment was reversed by this court holding that when the wife suffered such a judgment to be given against her, either after ⁸⁶ trial on the merits or by default, the objection of the nonjoinder of the husband was waived, and holding further that the judgment was not void because of misnomer in describing her by her maiden name, the name under which she executed the contract, she being sufficiently

identified by the name under which she was sued. The only distinction between the Bogart case and the case at bar is that in the former personal service on the defendant was had, while in the latter substituted service by publication of summons was the mode adopted for acquiring jurisdiction. Whether or not any different conclusion is necessitated by reason of this fact is a matter for later consideration.

The rule laid down in the Bogart case—namely, that a judgment is valid when obtained against a married woman sued as a feme sole and in her maiden name, particularly upon any contract which she has executed in such name—is a rule of general acceptance: 1 Freeman on Judgments, sec. 150; Van Fleet on Collateral Attack, secs. 603, 616; Hartman v. Ogborn, 54 Pa. 120, 93 Am. Dec. 679; Winchester v. Everett, 80 Me. 535, 6 Am. St. Rep. 228, 15 Atl. 596, 1 L. R. A. 425; McCaffrey v. Carrigan, 49 Ind. 175. This is in consonance with the principle of common law that a man may change his name at will and sue or be sued in any name in which he is known and recognized: Linton v. First Nat. Bank, 10 Fed. 894. So a person may adopt any name in which to prosecute business, and may sue or be sued in such a name: Graham v. Eiszner, 28 Ill. App. 269. This principle has been applied in this state, where it is held that if the owner of property convey by any name, the conveyance as between himself and his grantee is valid and will transfer title: Fallon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 347; Wilson v. White, 84 Cal. 239, 24 Pac. 114.

So, when it comes to examining the authorities dealing with actions affecting real estate, this same principle, it will be found, is universally applied. If a man chooses to take the title to real estate in a name other than his true name, so far as that property is concerned, he has assumed the name in which he takes title as his true name, and in suits affecting the property he may be sued by such designation. A leading and well considered case upon this subject is that of Blinn v. Chessman, decided by the supreme court of Minnesota: 49 87 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666. In that case the purchaser was George Chessman. He accepted a deed executed to him in the name of George Cheeseman, and the deed was so recorded. Thereafter an action was brought by one Leonard against George Cheeseman to determine adverse claims to the property. Summons was served by publication and judgment by default was rendered in favor of Leonard that he was the owner of the property. In time plaintiff Blinn succeeded to Leonard's title and brought suit

against George Chessman, and the court stated, the question presented in that case "was whether a judgment against Cheeseman was of effect as to this defendant Chessman as respects his title to the land." The reasoning of the court is full and convincing. It declares the presumption to be that a grantee who personally accepts, retains and records a deed of conveyance, does so with knowledge of its contents. It affirmed the trial court in holding that the Leonard judgment against Cheeseman was binding upon Chessman, who had taken title to the property in the name of Cheeseman, saying: "This conclusion is not based upon the ground of the likeness of the two names, either in spelling or in sound; but upon the ground—upon which also the decision of the court below was placed—that the defendant is to be deemed to have adopted the name of Cheeseman for the purpose of acquiring and holding the title to this land, and he can have no reason to complain that he is so designated in legal proceedings calling in question the validity of the title so acquired and held. From the fact that this was not his true name it does not follow that the court did not acquire jurisdiction. If he had assumed this name, or any other, generally, and for all purposes, and especially if he had come to be known by the name assumed, there would be no doubt that legal proceedings against him in such name would, in general, be sustained. The name is not the person, but only a means of designating the person intended; and where one assumes and comes to be known by another name than that which he properly bears, that name may be effectually employed for the purpose of designating him. . . . In this case it is probably true that the defendant did not intend to change his name, nor to adopt for general purposes the name of Cheeseman, but he did—if he knew the misnomer, as we must assume he did—most effectually assume that name for the ⁸⁸ purpose of taking and holding the title to this land. He not only accepted the conveyance made to himself by that name, but he placed it on record, for the purpose, and with the effect, presumably, of giving notice to the world that the title had been so conveyed and was so held. . . . In proceedings concerning this land it would be at least quite as likely that the name disclosed by the record as the grantee would be used in a summons or notice intended to be addressed to such grantee as that the record should be disregarded, and the true name of the defendant used. Hence, there was as much reason why his attention should be ar-

rested by the name of George Cheeseman in a published summons or notice as there would be if his true name were used. He had passed himself under the necessity of having regard to the former as well as the latter. He cannot well complain that the name in which he took the title, and which he put forth to the world by the records, as the name of the grantee, should be employed in proceedings instituted for an adjudication concerning that title."

The same principle is enunciated by the supreme court of Missouri in *Elting v. Gould*, 96 Mo. 535, 9 S. W. 922. The court was passing upon a judgment obtained in a suit brought against R. O. Elting to enforce a lien for taxes upon his property. Judgment had been given against R. O. Elting and the land was sold and conveyed by sheriff's deed. Upon the records of the county the land stood in the name of R. O. Elting, but Elting's name was Richard O. Elting, and he contended that a judgment rendered against him in the name of R. O. Elting was void. The service as here was by publication. The court upheld the judgment, saying that the patent to the land which was recorded and which was the only conveyance of title on record showed that R. O. Elting owned the land. "It is by this name and description that he is known in his title papers. We think it is sufficient."

Applying the principle of these cases to the facts in the case at bar, it appears that this plaintiff took title to the land in the name of Louisa Munro; that in her recorded certificate of marriage her name was given as Madeline L. Munro; that there was nothing of record to disclose that Louisa Munro was the same person designated as Madeline L. Munro, consequently there was nothing of record to disclose that Louisa⁸⁹ Munro had ever changed her name. So far as the real estate was concerned she held title to it only as Louisa Munro. No steps which a reasonable or prudent person might take would, under our existing laws, serve to give a party desirous of commencing an action any knowledge or information that Louisa Munro had married or had in any other way changed her name. The law does provide that any person in whom the title of real estate is vested who shall from any cause have his or her name changed shall upon any conveyance of real estate set forth the name in which he or she derived title to such real estate: Stats. 1874, p. 45; Civ. Code, sec. 1096. The law, too, might well have provided that when a woman in whose maiden name title to real property stands shall marry, she shall cause recordation of the fact to be made in such manner as to give notice thereof to the world, but the law not having

done this, it may not be said that a plaintiff is in fault who, after exhausting the means of information open to him, commences an action against a person holding such title by the same name in which the title is held. The inconvenience and, indeed, the grave consequences resulting from a different view would render actions to quiet title by substituted process of little or no benefit. In nearly every state there are statutes authorizing the change of a man's name. A nonresident owner of land in California may legally cause his name to be changed in another state, and an adverse claimant in this state, after satisfying the court that after due diligence the nonresident owner cannot be found within the state, may commence an action against the party under the name in which his record title stands. If a judgment so obtained can be collaterally attacked by a showing that the nonresident claimant had legally changed his name, and that, therefore, jurisdiction was not acquired, which is the contention here made, the value of such an action is at an end.

But does the fact that in this case jurisdiction of the defendant was secured by published summons in any respect change the rule? We think not. In every case where service by publication is authorized, if the statutory requirements have been complied with, it is as effective for all purposes as personal service. The only distinction in this state is found in the privilege accorded by section 473 of the Code of Civil Procedure which allows a defendant not personally served, on "such terms as may be just, to appear within a year after the rendition of a judgment by default against him and answer to the merits of the original action. We have here a case where the claimant to the real estate is served by published summons under the name by which she took and recorded her title to the land. In *Blinn v. Chesman*, 49 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666, the service was by publication, and addressing itself to this question, the court there said: "If such a name is employed in legal process or notices, whether served personally or by publication—where such service is authorized—the notice is effectual; the person who has assumed the name is presumed to understand that the process or notice addressed in that name is addressed to him." In *Mosely v. Reily*, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721, the same subject is considered, the court saying: "As has been said, the object of the publication is to give notice of the proceeding to the real person who is interested. The name is only used to identify such person, and may be the only means of identification. But, if the name as used is the same

as the party himself uses and under which he is known, and the facts recited in the notice sufficiently identify the person intended, and advise him that his property is brought before the courts, we think that would be sufficient to give the court jurisdiction to render the judgment. . . . Notice by publication, though only allowable from necessity, is, when authorized, as effective as personal service. Everyone is presumed to have had opportunity to read these publications and to learn from them the nature and objects of the proceedings of which they give notice." In *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4, the supreme court of Minnesota declared that "any notice which would give jurisdiction if personally served upon the party is good when served by publication if that publicity of the pendency of the action which the law intends is thereby given": See, also, *Van Fleet on Collateral Attack*, secs. 361, 367.

As against this reasoning and authority our attention is called to but one conflicting case—that of *Freeman v. Hawkins*, 77 Tex. 498, 19 Am. St. Rep. 769, 14 S. W. 364. In that case land was conveyed to Mary E. Robison. She subsequently married a man by the name of Freeman. Thereafter suit was brought against her in the name of Mary E. Robison to quiet title. The court declared that Mary E. Robison upon marriage ⁹¹ took the surname of her husband, saying: "A citation, whether to be served personally or by publication, must contain the names of the parties to the action. We are of the opinion that a citation by publication, requiring 'Mary E. Robison' to be cited and to appear, was not sufficient to give the court jurisdiction to render a judgment that would bind 'Mary E. Freeman.'" In this brief statement there is no consideration paid to the general rules which we have discussed, nor to the authorities which support them, and we think the conclusion reached by the Texas court is at variance with the otherwise universally accepted doctrine.

For the foregoing reasons the judgment is reversed, with directions to the trial court upon a new trial to admit in evidence the proffered judgment-roll.

Lorigan, J., and Shaw, J., concurred.

If a Married Woman, Interested in Land, shifts about from place to place, and her whereabouts have been unknown to her friends and acquaintances for about thirty-five years, and notice in an action to quiet title to the land is given to her by publication in her former name, by which she was known in the state, it is sufficient, although her husband had died and she had since married, and taken the name

of her second husband: *Jones v. Kohler*, 137 Ind. 528, 45 Am. St. Rep. 215. But in *Freeman v. Hawkins*, 77 Tex. 498, 19 Am. St. Rep. 769, it is affirmed that a citation by publication requiring "Mary E. Robinson," defendant's maiden name, to be cited and to appear in an action is not sufficient to give the court jurisdiction to render a binding judgment against "Mary E. Freeman," the name that defendant acquired by marriage.

STRONG v. BALDWIN.

[154 Cal. 150, 97 Pac. 178.]

RIPARIAN RIGHTS in Lands not Abutting on the Stream.—Lands which do not border on a stream may be entitled to riparian rights therein, as where all the tract having riparian rights, a portion is conveyed by the owner, in which case the part so conveyed, though not contiguous to the stream, may be given riparian rights by the conveyance. (p. 154.)

RIPARIAN RIGHTS, Partition of Lands Which are Entitled to. Where the owner of a parcel of land having riparian rights in a stream conveys portions of such land not contiguous to the stream, and the conveyance purports to convey with the land "the same rights as to the use of the water as appertain to such lands" in the hands of the grantor, such conveyance preserves the riparian rights of the lands conveyed. (p. 155.)

RIPARIAN RIGHTS, Decree of Partition, When Preserves to Lands not Contiguous to the Stream.—Where a decree partitions lands having riparian rights, allots some of the parcels in such a manner as not to abut on the stream, but purports to allot with each parcel the riparian rights and privileges, the allottees become entitled to riparian rights on such stream. (pp. 155, 156.)

PRESCRIPTIVE TITLE to a Ditch and the Waters Thereof.—If a ditch was constructed as early as 1855 for the purpose of conducting water from its point of diversion to a rancho, and was used for that purpose for the succeeding seventeen years continuously, openly and notoriously, with the full knowledge of the owners of the lands whence the water was diverted and through which the ditch was maintained, and without anything to indicate that their consent was obtained or sought, this is sufficient to sustain a finding of prescriptive title. (p. 156.)

PRESCRIPTION, Effect of Statute Imposing Additional Requisites for.—A statute requiring the payment of taxes by a person holding adverse possession, in order to perfect his title by prescription, has no effect when prescription has been fully completed before its enactment. (p. 157.)

ESTOPPEL to Question Lessor's Title, When does not Exist.—One Who Accepted a Lease of Real Property While Himself in Possession, and who at no time obtained possession from his lessor, is not estopped from questioning the latter's title by asserting title in himself. (p. 157.)

ESTOPPEL to Assert Title to Water Rights, When does not Arise from Accepting a Lease.—One Having Title by Prescription to a ditch and the water flowing therein, and in actual possession thereof, is not, by accepting a lease, estopped from asserting his title against his lessor. (p. 159.)

ADVERSE POSSESSION, Continuity of, When not Broken by Cessation in Use.—Persons claiming adverse possession of a ditch and the water flowing therein do not have the continuity of their possession broken by the fact that the ditch was used only during that portion of the year when water was needed for irrigation. (p. 159.)

PRESCRIPTION, Title by not Devested by Admissions.—Where title has already been acquired by prescription, it is not defeated by any admission which may be subsequently made. (p. 159.)

A TITLE Acquired by Prescription is as Effectual as if acquired by conveyance, and continues until conveyed or lost by adverse possession for the required time. (p. 159.)

ONE WHO HAS LOST TITLE by Prescription cannot Regain It by adverse possession for less than the time required to create a new prescriptive title. (p. 159.)

WATERS, Respective Rights of Parties in, When Need not be Determined.—In an action brought to have certain persons declared to have no title in specified waters, it is not error for the court to fail to find the relative rights of all persons in the stream whose waters are in question, when some of such persons are not parties to the action and the evidence offered and received is not sufficient to enable the court to intelligently determine the rights of all parties in interest. (p. 160.)

Works, Lee & Works, for the appellants.

C. L. Batcheller, J. S. Chapman and Ward Chapman, for the respondents.

152 ANGELLOTTI, J. This action was instituted by Harriet W. R. Strong and Julius B. Cohn, the owners of certain parcels of land in the Rancho Paso de Bartolo Viejo, sometimes known and hereinafter designated as the ranchito, in Los Angeles county, against E. J. Baldwin and H. A. Unruh (who is simply an agent of said Baldwin and has no other interest in the subject matter of the litigation), to obtain a decree enjoining them from interfering with plaintiffs in their use and control of a certain water ditch known as the Rincon ditch, connecting with the San Gabriel river at a point on the Rancho la Puente, which is owned by Baldwin, and extending for a distance of about a mile on said Rancho la Puente to and into said ranchito, and used by various property owners in said ranchito for obtaining water for irrigation and domestic purposes, and also enjoining them from interfering with plaintiffs in the diversion of the waters of said river by means of said ditch.

The theory of the complaint was that the plaintiffs and other owners of property in said ranchito and their predecessors in title had acquired by prescription the ownership of said ditch for the purpose of diverting to their lands for irrigation purposes waters of the San Gabriel river to the full capacity of the ditch, alleged to be six hundred inches of

water measured under a four-inch pressure, and the right to divert that amount of water by means of the ditch. Defendants by their answer denied the alleged ownership of plaintiffs ¹⁵³ and other owners of property in the ranchito in either ditch or water, alleging Baldwin to be the sole owner thereof, and that any use by them of such water was had solely by and with his consent and for an annual rental. Baldwin also filed a cross-complaint against plaintiffs and other persons, hereinafter called cross-defendants. In this he alleged his ownership on the Puente rancho and other tracts, that the same border upon and are riparian to the San Gabriel river, and that all of the waters of said river are needed for the proper irrigation of his said land and for domestic purposes; that he is the owner of the Rincon ditch so far as the same is on the Puente rancho; that the plaintiffs and cross-defendants, owners or claimants of real estate near the San Gabriel river but not riparian thereto, claim to be owners of said ditch and the waters diverted thereby, but have no interest therein, and that their claim is wholly without right. He asked that they be required to show by what right they claimed any such interest, and that it be decreed that he is the owner of said ditch and all the waters therein. The plaintiffs and cross-defendants answered this cross-complaint, denying that all of said water was necessary for the irrigation of his lands, and also denying Baldwin's allegations as to the ownership of said ditch and water, admitting that some of them were not owners of land riparian to the stream, but alleging that others of them were owners of such land, without stating which of them owned riparian land and which nonriparian land, and alleging that they were the owners by prescription of said ditch with a right to divert and carry through the same to their lands for purposes of irrigation the waters of the San Gabriel river, to the full capacity of the ditch.

Upon the trial of the issues thus made, the superior court found that the ditch was constructed by the predecessor in title of plaintiffs and cross-defendants more than forty years before the filing of the cross-complaint, and that ever since its construction it had been adversely used by them and their predecessors in title to the extent of its capacity, found to be sufficient to deliver upon their lands four hundred inches of water measured under a four-inch pressure constant flow, for the purpose of diverting to their lands for irrigation purposes the waters of said river, and that they were the owners ¹⁵⁴ by prescription of said ditch and the right to divert there

through, for irrigation and domestic purposes, the waters of said river to the extent aforesaid. Judgment was given accordingly. Upon an appeal to this court by defendants and the cross-complainant, this judgment and an order denying a new trial were reversed. It was held upon the evidence then before the court that unless there was sufficient evidence to support a conclusion that the enjoyment of the easement had ripened into a title thereto by prescription prior to the year 1882, when Baldwin had become the owner of the Puente Rancho, the conclusion of the trial court could not be upheld. Passing the question whether the evidence was sufficient to sustain a conclusion that the ditch had been used prior to 1882 for a length of time sufficient to create a prescriptive right to its use, this court held that the evidence did not sustain a finding that it had been so used, "to an extent sufficient to deliver upon the lands of the respondents four hundred inches of water measured under a four-inch pressure constant flow." For this reason, the judgment and order were reversed: See *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. 288. In view of the disposition of the case on the trial, the question of riparian rights on the part of respondents was not discussed by this court further than to point out, in speaking of a demurrer interposed by Baldwin to the answers to the cross-complaint on the grounds of uncertainty and ambiguity, that a pleading which simply denied that "all of the said parties defendant . . . are owners of tracts of land not riparian to the said stream," and alleged that "many of the said parties are the owners of land through which the said stream flows" was uncertain, in not alleging which of said defendants are the owners of riparian land or the quantity of water required for any of their lands as such riparian owners, and that Baldwin was entitled to have their claims in this regard specifically stated.

Upon the going down of the remittitur, the plaintiffs and cross-defendants filed amended answers to such cross-complaint, for the purpose of conforming to this suggestion of this court. In these answers, in addition to the former allegations, the land of each was specifically described, and it was alleged that each was the owner of land riparian to the stream and entitled to riparian rights, whether their tracts actually **155** bordered upon the stream or not, by reason of the fact further alleged that all such land was a part of the original ranchito through the entire length of which the river has always flowed, and that in the segregation of said rancho, the riparian rights of said rancho were apportioned among the

various tracts of land. They further averred that the waters of said river to the full extent of the capacity of the ditch were necessary for the irrigation of their lands and other lands in said ranchito having such riparian rights, the owners of which had not been made parties.

On the second trial the trial court found in accord with these allegations of the amended answers. The specific facts found as to the riparian rights were that the whole ranchito was riparian to San Gabriel river; that the same was the property of Pio Pico under grant from the Mexican government, that said Pico first conveyed divers tracts of said land to divers parties, and in making said conveyances also conveyed with the lands proportional interests in the waters of the river belonging to said ranchito; that he then sold all the unsold portion of the ranchito, consisting of three thousand seven hundred and eighty-five acres, shown by the evidence to be riparian to said river, to one B. Cohn, who acquired the same in trust for himself and defendants Broderick and Prager, and that said three thousand seven hundred and eighty-five acre tract was subsequently partitioned among the owners thereof in an action brought for that purpose, the decree in such action allotting, as the evidence shows, with each parcel of land "all riparian rights and privileges." The plaintiffs and cross-defendants were found to be the successors in title under said Pico. It was further found that the ditch was capable of carrying four hundred and fifty inches of water measured under a four-inch pressure, and had been adversely used by plaintiffs and cross-defendants and their successors under said deeds of Pico, and their predecessors in title, to the extent of its capacity, for the diversion of the waters of said river for the irrigation of their lands and domestic purposes, for the period of time sufficient to give them title by prescription to such ditch, with the right to take such amount of water therein for such purpose. With respect to the right of the use of the waters of the river as distinguished from the ditch itself, the court found that the use by respondents was not adverse to Baldwin, that all of the parties to the action have rights to the ¹⁵⁶ use of the waters of the San Gabriel river, as riparian owners, but that the evidence before the court was not sufficient to enable the court to make findings as to the relative rights of the plaintiffs and cross-defendants, on the one hand, and of Baldwin on the other. The conclusion of the trial court, as shown by the judgment, was that plaintiffs and the cross-defendants are the owners of said ditch over the land of Baldwin, with the right as

riparian owners to divert the waters of the river by means thereof to the extent of four hundred and fifty inches measured under a four-inch pressure, and to conduct the same through said ditch to their lands and the lands of their co-owners in said ditch, for irrigation and domestic purposes, subject to the limitation that the right to the use of the waters to such extent is not to be construed as a prior or paramount right to the waters of said river, or a prior or paramount right to take the same at the point of diversion, "except when such amount is not in excess of the rights of the owners of said Rincon ditch as riparian proprietors in the waters of the river." It was further expressly adjudged that all the parties, including Baldwin, are riparian owners on said river, and as such entitled to divert waters therefrom for use on their lands, "but nothing herein contained shall be construed as adjudging or determining the quantity to which either of them is entitled, or the proportion of such water which either is entitled to divert or use as against the others."

This is an appeal by defendants from the judgment thus given and from an order denying their motion for a new trial.

1. With respect to the question of riparian rights on the part of plaintiffs and cross-defendants, the findings of the trial court that all of such parties have riparian rights in the waters of the San Gabriel river are attacked as not being supported by the evidence. As we have seen, the land of some of these parties does not border upon the stream, but it does not necessarily follow that such land is without such riparian rights. When a tract of land abuts on a stream and a portion thereof not contiguous to the stream is conveyed by the owner, the riparian right of the portion so conveyed in the stream may also be conveyed with the land, as is fully recognized in the case cited by learned counsel for appellants (*Anaheim etc. Co. v. Fuller*, 150 Cal. 331, 88 Pac 978, 11 L. R. A., N. S., 1062), and when so conveyed ¹⁵⁷ is still a riparian right with all the attributes of such right, and is in strict technical language "parcel of the land" conveyed. The same is necessarily true where a tract of land abutting on a stream is partitioned and in court proceedings among the owners thereof, and appropriate provision for riparian right is made in the decree as to the portions allotted by the decree which do not abut on the stream: See *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. 905; *Verdugo etc. Co. v. Verdugo*, 152 Cal. 655, 93 Pac. 1021. This is not a case, as suggested by appellants, of attempting to make riparian lands which are in fact

riparian, but is simply the preservation of the right which the land has at the time of the conveyance or decree. In the case at bar, the land of some of these plaintiffs and cross-defendants abuts on the stream, and as to such land there is, of course, no question. As to the land of the others, we think it sufficiently appears that the riparian rights were preserved. It is clear upon the record that at least a portion of each of such parcels has always been dependent for irrigation on the waters of said river, and has always been irrigated by means of said waters. All the original deeds of conveyance made by Pico for portions of the ranchito which do not abut on the river contained either one or the other of two provisions regarding water. For instance, the deed of Pico to William R. Standifer and A. H. Dunlap, made May 13, 1875, purported to convey with the land "the same rights to the use of water that appertained to said land in the hands of the party of the first part," and the deed from Pico to plaintiff Harriet W. R. Strong, dated October 18, 1867, conveyed three hundred and twenty acres of land, "together with the water rights and privileges as pertaining to the settlement of Pico, to wit: Sixteen water shares, representing the privileges to water for sixteen times twenty acres, paying for the same as water used in said settlement." In the light of the fact that these lands were then dependent for water on this river, there cannot reasonably be any doubt that it was the intention of each of these provisions to preserve the riparian right of the land conveyed. The effect of such provision in the Pico deeds was, therefore, in each case to make the riparian right "parcel of the land" conveyed, and it passed as such in all subsequent conveyances of such land. As we have seen, the three thousand seven hundred and eighty-five acre tract conveyed by Pico to ¹⁵⁸ B. Cohn and held by him in trust for himself, Broderick, and Prager, abutted on the river, and, therefore, no special provision was necessary to carry the riparian right. So far as we have been able to ascertain from the records, no specific portion of this tract had been segregated by conveyance at the time of the partition decree. As already stated, that decree allotted with each parcel of land "all riparian rights and privileges," thus making the same "parcel of the land," as in the case of the conveyances from Pico. All of the plaintiffs and cross-defendants whose land does not abut on the river hold either under such deeds from Pico or under the partition decree. From what we have said, it follows that

they are all riparian owners as to the San Gabriel river, even though their land does not abut thereon.

2. The findings as to the adverse use of the ditch to the extent of its capacity by plaintiffs, cross-defendants, their co-owners, and their predecessors in title, for a period of time sufficient to give them title thereto for such purpose by prescription, are also assailed on the ground of insufficiency of evidence to support them. It may be assumed that these findings can be sustained only on the theory that the enjoyment of the easement had ripened into a title by prescription prior to the year 1882. As to the ditch itself, there can be no doubt that there was sufficient evidence to sustain such a conclusion. There was substantial evidence that it was constructed as early as the year 1855, and had ever since been used for the purpose of conducting water from the point of diversion to the ranchito, then occupied by Pico and his tenants, for the irrigation of the lands thereof. The trial court found it was in fact constructed by Pico, and while there is no direct evidence to this effect, it is fairly inferable from the location of the ditch and the purpose to which it was devoted that it was so constructed. From that time until the year 1882 the use thereof by Pico and his tenants and successors was continuous, open and notorious, with the full knowledge of the owners of the Puente rancho, at least from the year 1861. Those interested in the ranchito during all this time apparently claimed and treated the ditch as their own property, and there is nothing to indicate that any consent to such use on the part of the owners of the Puente rancho was ever obtained or sought. But it is specially urged that there was no ¹⁵⁹ foundation in the evidence for the conclusion that a prescriptive right to conduct through said ditch four hundred and fifty inches of water measured under a four-inch pressure existed in the year 1882, shortly after Baldwin acquired the Puente rancho. This, it will be remembered, was the matter by reason of which the former judgment was reversed, the superior court then finding an adverse use to an extent sufficient to deliver four hundred and fifty inches of water on the ranchito. Upon the second trial, additional evidence on this matter was presented. Frederick Lamborne, who was on the Puente Rancho as private tutor and manager of the ranch for fourteen years, from 1861 to 1875, and who was very familiar with the ditch, had examined it after the first trial, and testified that it was the same ditch virtually, and that he could not tell that there was any difference in the size. Mr. Rowan, a civil engineer, testified that he measured the

waters therein, on the ranchito, on October 25, 1903, and found flowing therein one hundred and forty-nine and one-half inches, and that the ditch was not more than one-third full. Mr. A. H. Dunlap testified that he knew the ditch from 1873, and that the water had been conducted through it to the extent of six hundred inches from 1873 down, when the water was in the river to get; that in the early spring the ditch was full of water usually, and had six hundred inches of water or over, diminishing as the year advanced; that there had been no general enlargement of the ditch since 1873; that it is just about the same now as when he first knew it. Mrs. Strong testified that the ditch is not quite as large now as it was in the early seventies. In addition to this, all the testimony given on the first trial was read in evidence on the second trial, and this showed from four hundred to five hundred inches running in the ditch in 1896 and 1897. There was in all this sufficient support for a conclusion that the ditch had been continuously used by the occupants of the ranchito during the portions of each year when irrigation was required and the water to be had, up to the year 1882, in conducting water to the extent of its capacity. The findings upon this branch of the case were, therefore, not contrary to the evidence. There is nothing in the opinion on the former appeal, as we read it, that precludes us from so holding.

It appears that this ditch has never been assessed separately from the land, but that the Puente rancho was always assessed ¹⁶⁰ wholly to Baldwin and that he paid the taxes thereon. It is urged, in view of these circumstances, that under section 325 of the Code of Civil Procedure title by prescription could not have been acquired by plaintiffs and cross-defendants. A sufficient answer to this claim is that their title by prescription was complete prior to the amendment of section 325 of the Code of Civil Procedure making the payment of taxes an element of adverse possession, which amendment was enacted in 1878, and that such amendment therefore has no application: *Lucas v. Provines*, 130 Cal. 270, 62 Pac. 509.

From what has been said, it appears that respondent must be held to have had a perfect title by prescription in the year 1882, which was one or two years after Baldwin acquired the Puente rancho.

It is contended, however, that even if such title was so acquired by plaintiffs and cross-defendants, it has been lost by nonuse or abandonment, and also that Baldwin has regained it by adverse user of more than five years. It is admitted that there never has been any cessation in the use

by respondents of either ditch or water. To the extent of the use had prior to 1882 and for all the purposes of said use they have been in possession of the ditch ever since 1882, conducting water therein for the purpose of irrigating their lands and using the same for such irrigation. The claim of abandonment and nonuse on the part of the respondents, as well as the claim that Baldwin has regained the title by adverse possession, is based on the fact that from the year 1882 Baldwin claimed to be the owner of this ditch, and that from the year 1882 to the year 1895 so-called leases of the right to carry water through this ditch were executed by him, one signed by persons using water for irrigation on the ranchito, and others by persons purporting to represent the owners of the land irrigated from said ditch. The first of these leases, that of 1882, was signed by T. F. Borley and W. T. O'Brien, who, so far as appears, were in no way connected with any of the parties to this action, and was for a mere nominal rent. From 1884 to 1889 such leases were executed to and signed by persons purporting to act as water commissioners of the Rincon ranchito district for a mere nominal rental, and for the years 1893, 1894, and 1895, all within five years of the commencement of this action and the filing of the answers to the cross-complaint, ¹⁶¹ they were executed to the Strong Irrigation District, a public corporation organized in 1893 under the laws of this state for the irrigation of the lands supplied by the Rincon ditch, for the specific rental of seven hundred dollars, five hundred dollars, and six hundred and seventy-five dollars. No conveyance of their rights in either ditch or water was ever made to such irrigation district by any of the property owners, but the district, through its officers and for the property owners, for several years managed and controlled the ditch and distributed the waters to the property owners. Leases for the other years between 1882 and 1895 were not introduced in evidence. In the year 1896, the respondents refused to pay further for the privileges, and, Baldwin interfering with their employment of the ditch, this action was commenced.

It is apparent, we think, that there was in all of this no extinguishment of the right of respondents by reason of any of the provisions of section 811 of the Civil Code. So far as relied on by appellants, that section is as follows: "A servitude is extinguished: . . . 3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or 4. When the servitude was acquired by enjoyment, by dis-

use thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment." Manifestly, subdivision 3 has no application whatever, and the disuse mentioned in subdivision 4 means simply the failure to use the thing itself theretofore used. There has been, as we have seen, no cessation whatever in the use by respondents of this ditch. We must, therefore, look elsewhere for a basis for the conclusion that by reason of these leases they have lost their title acquired by prescription. These instruments could not, of course, operate as a transfer of such title to Baldwin, and can be effectual only as admissions against claim of title and by way of estoppel. It is established in this state, however, that the owner of real property who accepts a lease thereof from another claimant, while he himself is in possession, and who has not at any time received the possession from the lessor, is not estopped by the lease from asserting his title as against such lessor (*Pacific Mutual etc. Co. v. Stroup*, 63 Cal. 150; *Baldwin v. Temple*, 101 Cal. 396, 35 Pac. 1008. See, also, 3 *Wood on Limitations*, note p. 614), and this rule has¹⁶² been applied in the case of water rights: See *Oneta v. Restano*, 89 Cal. 63, 26 Pac. 788, and cases there cited. As before stated, it cannot be held that there ever was any change in the possession of this ditch. It was always used exclusively to convey water to the ranchito, to be used thereon for irrigation purposes, and for that purpose was always in the possession of respondents and their predecessors, either personally or through their agents, the water commissioners and the irrigation district. The continuity of the possession was not broken by reason of the fact that the ditch was in fact used for conveying water only during the portion of each season when the water was needed for irrigation purposes: See *Hesperia etc. Co. v. Rogers*, 83 Cal. 10, 17 Am. St. Rep. 209, 23 Pac. 196. The decisions cited above are, therefore, applicable. As admissions against any then claim of title, the effect of the leases might be to prevent the acquirement of a title by prescription, but such admissions could not operate to divest a title already acquired. A title so acquired is as effectual and complete as one obtained by a conveyance, and unless extinguished by virtue of some special statutory provision such as section 811 of the Civil Code, continues until conveyed by the possessor or lost by another adverse possession for the required time: *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205, and cases there cited. See, also, *School District etc. v. Benson*, 31 Me. 381, 52 Am. Dec. 618. In view of what must be held to have been a continuous actual posses-

sion of the ditch by respondents for the purpose stated, we do not see how Baldwin can be held to have regained the title by adverse possession. Respondents were the absolute owners, and in possession of the property at the time of the execution of all these leases, and never entered into possession under Baldwin, and their possession was not, under the circumstances here existing, his possession.

3. Complaint is made of the failure of the court to find and decree the quantity of water the respective parties were entitled to use as riparian owners, and especially its failure to make findings as to the relative rights in such matter of the plaintiffs and cross-defendants, on the one hand, and of Baldwin on the other. The case is manifestly one where the pleading of the party complaining was not presented for the purpose of obtaining an apportionment of certain waters among the ¹⁶³ riparian owners. It was not drawn on any such theory, and does not recognize the cross-defendants as riparian owners at all. The real object was to obtain a decree declaring the other parties to be without any right whatever in such waters. It may be conceded that the allegations of the pleadings were broad enough to have permitted the determination of this matter if sufficient evidence had been presented thereon. The court was not compelled, however, to determine this question in the absence of evidence sufficient to enable it to do so. It was stipulated on the trial that, as alleged in the answers to the cross-complaint, there were as many as nine persons not parties to the action who owned land in the ranchito bordering on the river. The extent of the riparian rights of the parties to this action could not be determined without taking into consideration the rights of these other riparian proprietors, as to which there was no evidence whatever, and concerning which there could, of course, be no binding determination in the absence of such owners. But even if there were no such other owners, our examination of the record has satisfied us that the evidence introduced was not sufficient to enable the court to intelligently determine the relative rights of Baldwin on the one hand, and those of the remaining parties on the other, in the waters of this river. Under such circumstances, the trial court did all that it properly could do, by determining that the various parties were riparian owners and leaving the question of the proportions of the water to which each is entitled to be determined in the future: See *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *Coleman v. Le Franc*, 137 Cal. 214, 69 Pac. 1011.

4. The trial court overruled demurrers interposed by Baldwin to the amended answers to his cross-complaint on the ground of uncertainty. In view of the disposition of the case by the trial court, it is apparent that it is now immaterial whether the allegations of these answers were sufficiently certain as to the extent of the riparian rights of the plaintiffs and cross-defendants in the waters of the river. The findings and judgment do not purport to define the extent of such right as to any part in the action. It was also urged that such answers were uncertain in not showing whether the pleaders claimed to be the owners or entitled to the waters of San Gabriel river as riparian owners or by adverse use. The ¹⁶⁴ answers clearly set forth the facts constituting the basis of the claim of the parties to these waters, which was all that was necessary. According to these allegations they were all riparian owners, entitled as such to divert from the river water to the extent of the capacity of the Rincon ditch, and had been ever since the construction of said ditch so diverting and using such water openly, notoriously, continuously, and under claim of right as against the world. There was no element of uncertainty as to the nature of the claim alleged.

5. Complaint is made that the finding that the Rancho Santa Anita, one of Baldwin's ranches, is not riparian to either the old or the new San Gabriel river is not sustained by the evidence. This finding is important only in so far as it may bar Baldwin, in any future proceedings to determine the extent of the rights of the parties in the waters of the San Gabriel river, from making any claim on account of this ranch. As we understand the evidence given upon this matter, the Santa Anita ranch borders only on the Santa Anita creek by which it is traversed, and which, after running through said ranch, runs over a portion of the San Francisquito ranch. At times of unusually high water or floods, some of the surface water runs into San Gabriel river above the point of diversion by the Rincon ditch, but ordinarily this is not the case. All of the water of the Santa Anita creek available for irrigation purposes is used on the Santa Anita and San Francisquito ranches, and there can be no question as to the rights of the owners thereof to use so much of said water as may be necessary for the irrigation of the lands through which it flows. It could not have been the intention of the trial court to hold otherwise, and we are satisfied that the finding on this question must be construed as not foreclosing the riparian right of the owner of the Santa Anita ranch in the waters of the Santa Anita creek.

The evidence fully sustains the finding that the plaintiffs and cross-defendants never conveyed or transferred any of their rights in either ditch or water to the Strong Irrigation District. So far as that corporation controlled and managed the property, it acted merely as the agent of the owners, and had no interest in the property here involved.

In view of our conclusions upon the matters already discussed, other findings attacked by appellants are immaterial, ¹⁶⁵ and there is no other matter discussed by learned counsel that requires attention.

The judgment and order denying a new trial are affirmed.

Sloss, J., Lorigan, J., Shaw, J., and Henshaw, J., concurred.

Lands Bordering on a Stream are Riparian, if under one ownership, without regard to their extent or area, or the source or time of the acquirement of their title: *Jones v. Conn*, 39 Or. 30, 87 Am. St. Rep. 634, and see cases cited in the cross-reference note thereto. But it has been held that riparian rights to a reasonable use of the water of a stream cannot be enlarged or extended by the acquisition of the title to lands contiguous to the riparian land, nor can a riparian owner, as such, rightfully divert to nonriparian lands water which he has a right to use on riparian land, but which he does not use: *Crawford Co. v. Hathaway*, 67 Neb. 325, 108 Am. St. Rep. 647. See, too, *Watkins Land Co. v. Clements*, 98 Tex. 578, 107 Am. St. Rep. 653.

Prescriptive Title to Water is the subject of a note to Oregon etc. Co. v. Allen Ditch Co., 93 Am. St. Rep. 711. Recent cases on this question are *Alabama Cons. Coal etc. Co. v. Turner*, 145 Ala. 639, 117 Am. St. Rep. 61; *Pew v. Johnson*, 35 Mont. 173, 119 Am. St. Rep. 852.

Title Acquired by Adverse Possession is as perfect as that acquired by deed: See the note to *Menzel v. Hinton*, 95 Am. St. Rep. 672. See also the recent cases of *Martin v. Martin*, 76 Neb. 335, 124 Am. St. Rep. 815; *Dyson v. Knight*, 130 Ga. 573, 124 Am. St. Rep. 179.

NORTON v. BASSETT.

[154 Cal. 411, 97 Pac. 894.]

LIMITATION OF ACTIONS—Voluntary and Involuntary Trustees.—The rule as to when the statute of limitations begins to run is entirely different in the case of voluntary and of involuntary trustees. (p. 166.)

LIMITATIONS OF ACTIONS.—As Long as a Voluntary Trustee does not Repudiate the Trust, but continues to act under and in harmony with it, the beneficiaries have no right of action against him, and the statute of limitations must remain inoperative. (p. 166.)

TRUST, INVOLUNTARY, When Arises on the Death of a Trustee.—Where one who has purchased property for the benefit of himself and others under an agreement that they shall share in the proceeds, and who has, therefore, become, as to such property, a

voluntary trustee, dies, and his title descends to his heir at law, the latter becomes an involuntary and not a voluntary trustee, and the statute of limitations, as to actions against him to establish and enforce the trust, commences to run at once, without any demand being made on him, or, in case he is a minor, on his guardian, or any repudiation of the trust either by him or such guardian, or the administrator of the estate of the original trustee. (pp. 166-169.)

STATUTE OF LIMITATIONS—Trustees.—No Repudiation of an Implied or Constructive Trust is Necessary to set the statute of limitations in operation. (p. 167.)

LIMITATIONS—Involuntary Trust—Promise or Recognition by Minor Trustee or His Guardian.—Where a minor becomes by operation of law, through the death of his father, who was a voluntary trustee, the involuntary trustee of the same property, no recognition or oral promise by such minor or his guardian can make the trust voluntary or prevent the running of the statute of limitations against any and all actions by the beneficiaries for the recognition or enforcement of the trust, or an accounting of its proceeds. (p. 169.)

Flint & Barker, Barker & Bowen and Gray, Barker & Bowen, for the appellant.

Tanner, Taft & Odell and W. R. Bacon, for the respondents.

412 LORIGAN, J. This cause was originally decided on appeal by the district court of appeals for the second appellate district. The judgment of the superior court was there affirmed, and on petition of appellant the case was ordered to this court to be reheard.

The action was brought to have a trust declared and for an accounting of the rents, issues and profits and the proceeds of sale of a portion of the trust property. Plaintiffs obtained judgment and the defendant Bassett appealed from it and from an order denying his motion for a new trial.

It was alleged in the complaint that in February, 1895, the plaintiffs and one O. T. Bassett, who was the father of the defendant Charles N. Bassett, and the defendant Roll agreed to jointly purchase the Workmen Ranch, consisting of eight hundred and fourteen acres of land in Los Angeles county, for the price of forty-four thousand eight hundred and twelve dollars and thirty-four cents, and that they should purchase and own the said lands in the following proportions, to wit: O. T. Bassett, ten-sixteenths thereof; the plaintiffs, five-sixteenths; and the said Roll one-sixteenth; that O. T. Bassett, in addition to paying his own proportion of the purchase price, would advance and loan to plaintiffs and Roll such amounts of money above what they were able to advance themselves as were necessary to pay their proportionate shares of the purchase price; that the legal title to the prop-

erty was to be taken in the name of O. T. Bassett and held by him in trust to secure the advances to be made by him for plaintiffs and Roll, and for the benefit of said joint owners; that the land was to be subdivided and sold and the proceeds and profits devoted to the payment of the purchase price and expenses of the venture until O. T. Bassett was repaid the advances to be made by him, and the residue was to be divided among the parties in proportion to their interest in the land as above specified; that pursuant to this agreement plaintiffs paid toward the purchase price of their five-sixteenths interest the sum of twelve hundred and fourteen dollars, and the said O. T. Bassett advanced and loaned to plaintiffs and Roll and paid for them to the owners of the property the balance of their proportionate ⁴¹³ share of the purchase price of their respective interests; that upon such payment to the owners the title to the entire property was conveyed to said O. T. Bassett in trust pursuant to the agreement of all the parties; that the land was subdivided and portions thereof sold, and the proceeds, together with the rents and profits of the residue, paid to the said O. T. Bassett until his death on January 1, 1898.

It is then alleged that on the death of said O. T. Bassett, the title to the residue of said land vested in the defendant Charles N. Bassett, his son and only heir at law; that the estate of O. T. Bassett was duly administered on, and by a decree of distribution said lands were distributed to said Charles N. Bassett, who was at the date thereof a minor and whose estate was duly represented by a guardian appointed by the court until he reached his majority; that the administrator and guardian, while they acted as such, and Charles N. Bassett at all times since his father's death, had actual notice of the ownership of plaintiffs of said five-sixteenths interest in said land and the proceeds thereof; that plaintiffs demanded of the administrator and the guardian and Charles N. Bassett an accounting; that the administrator and guardian promised that said C. N. Bassett would fully account for the moneys received for said lands and the lands remaining unsold when he attained his majority, and the said Charles N. Bassett during his minority also promised to do so when he became of age, but upon attaining his majority repudiated his promise and refused to account; that the administrator and guardian, while they acted as such, collected all the rents and profits of said land, and upon attaining his majority the said C. N. Bassett did so, and the latter had also sold certain portions of the property; that by reason of the promises of

the administrator, the guardian, and the said Charles N. Bassett himself that the latter would make an accounting when he became of age, the plaintiffs had not heretofore brought an action to establish their rights in said property.

The prayer was for an accounting and decree declaring a trust in favor of plaintiffs for five-sixteenths interest in the land remaining unsold and for a conveyance thereof from said defendant C. N. Bassett to plaintiffs.

The complaint was filed February 6, 1903. It was subsequently amended, but there was no material change as to ⁴¹⁴ the facts alleged in the original complaint—at least none that affect the question to be particularly considered on this appeal.

A demurrer was interposed by the defendant C. N. Bassett, both to the original complaint and the amendment thereto, under which it was insisted, among other objections to the sufficiency of these pleadings, that the cause of action alleged by plaintiffs was barred by laches on their part, and also by certain provisions of the statute of limitations.

The demurrer was overruled, as was also the demurrer of the defendant Roll, who, however, made no subsequent appearance in the action. The defendant Bassett filed an answer setting up various defenses, and after trial findings were made in harmony with the allegations of the complaint, and amendment thereto. In addition the court found against the claim of laches asserted by defendant and the bar of the statute of limitations.

A decree was entered accordingly, declaring a trust in favor of plaintiffs as to the property in question; that they were the owners of an undivided five-sixteenths interest in certain portions of it which remained undisposed of, and directed a conveyance from defendant Bassett to them of such interest; there was also awarded plaintiffs on the accounting taken in the action a judgment for the sum of nine thousand three hundred and twenty-eight dollars and ninety-five cents.

Various grounds for a reversal are urged on this appeal, it being particularly insisted that as matter of law the court should have sustained the demurrer interposed to the complaint on the ground of laches and the bar of the statute of limitations, and that it should have found in favor of defendant in these particulars as matters of fact.

Without considering the question of laches we are satisfied that the cause of action asserted by plaintiffs was barred by the statute of limitations, and that the demurrer on that ground should have been sustained.

The theory of plaintiffs, accepted by the trial court and by the district court of appeals, was that the same rule as to the time when the statute of limitations would commence to run against plaintiffs as beneficiaries applied in the case of the trust relation which the defendant C. N. Bassett held to the property by devolution upon him of the title to it through the death of his father, as applied to the trust relationship ⁴¹⁵ in which the latter held the property during his lifetime—that the statute would only commence to run in either case upon notice being brought home to plaintiffs of a repudiation of the trust.

This, however, is not the rule as laid down by the decisions in this state. The trust relations of O. T. Bassett and the defendant C. N. Bassett to the trust property were entirely distinct, and the rule as to when the statute of limitations commences to run is essentially different as applied to such distinct relations. The relation which O. T. Bassett bore to the trust property was that of a voluntary trustee; that of the defendant C. N. Bassett as to it that of an involuntary trustee. As far as the elder Bassett was concerned, he was a voluntary trustee, holding title to the property under a resulting trust; a trust which, under the agreement of the parties and as accepted by him, was to be of a continuing character, and he was acting under it and making sales of the property in conformity with his voluntary assumed trusteeship up to the time of his death. Under such circumstances, while the elder Bassett was trustee and as long as he was discharging the duties of such trustee in pursuance of the terms of his trust, the beneficiaries would have no right of action against him, and could have none until he repudiated or disavowed the trust relationship. This, of course, is a familiar rule.

But the relation which the defendant Charles N. Bassett held toward this trust property upon the death of his father was not that of a voluntary trustee, but solely an involuntary one; one which was cast upon him by operation of law—a constructive and implied trust—springing from the devolution on him of the title to the trust property by the death of his ancestor. As to him the trust was neither a voluntary nor continuing one; he owed no duty at all to the beneficiaries to do anything in furtherance of the purposes or objects for which the trust was created; as between him and the plaintiffs there was no contractual relation with reference to it. Upon the death of his father and the vesting of the legal title in him as heir, while the property descended to him impressed with the trust, he took it simply as a “dry, involuntary legal

trustee," upon whom was imposed no duty except to preserve and protect the trust property and to account to the beneficiaries for it and to turn over to them their share of it. As this was ⁴¹⁶ the only duty cast upon the defendant Bassett as an involuntary trustee, the plaintiff's right of action to establish and enforce their claims in the trust property accrued immediately on the death of the voluntary trustee, O. T. Bassett. They were not required to make any demand upon the administrator or the guardian or upon the defendant Bassett as a prerequisite to maintaining an action for that purpose. Nor was any denial or repudiation of the trust by any of these persons necessary in order to set the statute of limitations in motion. As plaintiffs' right of action accrued on the death of the voluntary trustee, the elder Bassett, and the vesting of the title to the trust property in the defendant Bassett as an involuntary or constructive trustee, the statute then commenced to run, and unless an action was brought by the plaintiffs within four years thereafter, their right to maintain it was barred.

It is the settled rule of the authorities in this state that no repudiation of an implied or constructive trust—as an involuntary trust always is—is necessary to set the statute of limitations in operation. A cause of action in favor of the beneficiaries arises immediately that the law creates such a trust.

In *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88, where an implied or constructive trust was involved, the rule was declared and applied. It is there said: "Whatever may once have been the rule, it is now well settled that the statute of limitations runs in favor of a defendant chargeable as a trustee of an implied trust, and it is not necessary, in order to set the statute in motion, that he should have denied or repudiated the trust."

The same rule was equally applied in the case of *Nougues v. Newlands*, 118 Cal. 102, 50 Pac. 386. There it appeared that Nougues, Williams and Ralston associated together for the purpose of purchasing and improving lands, the agreement being that Maurice Dore should take title to the lands in his own name as trustee for those parties. While holding the title to the lands conveyed to him for the other agreeing parties under this express voluntary trust, Dore conveyed it all to William Sharon, who had notice of the interest of the other parties and written notice from Nougues of the terms on which Dore held the property. The court ⁴¹⁷ held that Sharon on taking the deed from Dore with full knowl-

edge of the trust became an involuntary trustee of a trust cast upon him by operation of law; that Ralston's deed to Sharon did not create Nougues and Williams beneficiaries thereunder, and that on the conveyance from Dore to Sharon the statute of limitations commenced to run in favor of the latter, who was grantor of defendant Newlands, and the decision to the effect that the statute of limitations commenced to operate on the acceptance of the deed from Dore by Sharon was expressly based on the proposition that thereby Sharon became an involuntary trustee of the property.

Broder v. Conklin, 121 Cal. 282, 53 Pac. 699, is to the same effect. Without particularly referring to the facts in that case, it appears that an assignee in insolvency—a voluntary trustee—transferred the property of the insolvent's estate to the defendant, against whom the creditors of the insolvent debtor brought an action to have it decreed that the defendant, who was the attorney of the assignee at the time of the purchase, held the property in trust for them upon both an express and constructive trust. It is there said (quoting from the syllabus which correctly states the conclusion of the court) that "the statute of limitations does not begin to run against an express trust until a repudiation thereof is brought to the knowledge of the beneficiary, and it begins to run against the enforcement of a constructive trust from the date of its inception, and it appearing that the constructive trust established by the conveyance was created upon the purchase of the property of the insolvent debtor by the attorney for the assignee some seven years prior to the commencement of the action, its enforcement by the creditors is barred by the statute of limitations."

It is subsequently as clearly reiterated in *Barker v. Hurley*, 132 Cal. 21, 63 Pac. 1071, that, "where a trust, if it exists at all, is not created by agreement of the parties, but is only implied or such as is by operation of law fixed upon the conscience of a person, the statute begins to run from the inception of the trust."

In the case at bar, so far as this defendant was concerned, if the trust exists at all as to him, it is not by reason of any agreement on his part, but because it is thrust upon him by operation of law.

⁴¹⁸ Under the principle of these decisions as the defendant Bassett was but an involuntary trustee—the trustee of a constructive trust—the statute of limitations commenced to run as soon as that trust relationship was created by devolution of the title of the trust property on him. No disaffirmance

of the trust on his part was necessary to set the statute in motion. Nor did the recognition of the trust which it is alleged was made by the administrator of the estate of O. T. Bassett, the deceased voluntary trustee, or by the guardian of the defendant Bassett, or by Bassett himself, operate to change the relation of the latter to the property from that of an involuntary to that of a voluntary trustee. Neither the administrator nor guardian is vested with any authority in law to make any recognition which would have that effect. Neither did the alleged promise of the defendant, while a minor, to make an accounting when he attained his majority accomplish it. It is not averred that any written recognition of the trust was made by the defendant Bassett, and no oral recognition of it would operate to change his relation from a constructive to an express trustee. As said in *Nougues v. Newlands*, 118 Cal. 102, 50 Pac. 386, to which we have heretofore called attention, "the recognition of Sharon of the rights of Nougues and Williams which is pleaded in a paragraph of the bill above quoted, could not operate in law to change the position of Sharon from that of an involuntary to that of an express trustee. To accomplish this Sharon must have declared the trust by a signed instrument in writing: Civ. Code, sec. 852. It is not averred that he ever did this, and to the contrary the matters pleaded distinctly negative the idea that such was the fact." Neither is there any allegation of any written acknowledgment or promise made by defendant Bassett with reference to the trust or an accounting thereof such as was necessary to take the case out of the operation of the statute of limitations: Code Civ. Proc., sec. 360.

In support of their contention that the statute had not run in favor of the defendant Bassett because there had been no repudiation of the trust, respondents rely on the cases of *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384, *Roach v. Carrafa*, 85 Cal. 436, 25 Pac. 22, *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64, *Butler v. Hyland*, 89 Cal. 419 575, 26 Pac. 1108, *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077, *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482, and *White v. Costigan*, 138 Cal. 564, 72 Pac. 178. But in all these cases, save in *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108, and *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077, the trusts with which the court was dealing were voluntary trusts, such as was the trust as it existed while the elder Bassett was alive and held the property as trustee for the benefit of plaintiffs. The rule, as we have seen, is uniform

in such cases, that before the statute of limitations will commence to run there must be a repudiation of the trust. These cases, of course, can have no application here, because, as we have seen, the position of the defendant Bassett was not that of a trustee of a voluntary trust, but that of an involuntary trustee—the trustee of a trust obligation cast upon him by the law and to which the rule in the cases cited, as we have seen, has no application. The only cases cited which could have any possible application are the cases of *Butler v. Hyland* and *Hovey v. Bradbury* above referred to. It is true that in those cases the trusts sought to be enforced were involuntary trusts, but in each of those cases only two years had elapsed from the death of one of the parties to the voluntary trust which had been changed into the involuntary one which was sought to be enforced. Clearly, there, the four-year statute of limitations had not run in favor of the involuntary trustees.

In the case at bar the trust cast on the defendant Bassett was an involuntary one. The plaintiffs had a right to proceed to enforce their claim to the trust property immediately that the title to the trust property vested in the defendant Bassett as an involuntary or constructive trustee; the statute commenced to run from that date, and this action, not having been commenced until over five years thereafter, was barred by the provisions of the statute requiring such actions to be commenced within four years from the time the right of action accrues.

The trial court should have sustained the demurrer to the complaint on this ground. The judgment and order are reversed and the cause remanded, with directions to the trial court to set aside the judgment entered and to enter an order sustaining the demurrer of the defendant Bassett to the complaint and the amendment thereto.

⁴²⁰ Shaw, J., Angellotti, J., Henshaw, J., and Sloss, J., concurred.

Rehearing denied.

The Statute of Limitations has No Application in the case of an express trust, where there has been no denial or repudiation of the trust: *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948; *Pierce v. Perry*, 189 Mass. 332, 109 Am. St. Rep. 637. But this rule does not apply to constructive or implied trusts raised by the law: *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81; *Lide v. Park*, 135 Ala. 131, 93 Am. St. Rep. 17; note to *Miles v. Thorne*, 99 Am. Dec. 391.

BRADLEY v. ROSENTHAL.

[154 Cal. 420, 97 Pac. 875.]

PRINCIPAL AND AGENT, Liability of the Former for Negligence, When Dependent on the Liability of the Latter.—If two are sued for their alleged negligence and one of them is shown to have been the agent and the other his principal, and the former to have been in charge of the work, carrying it out without any express instruction from his principal, and the jury finds in favor of the agent, this finding necessarily exonerates the principal, and a verdict against him cannot be sustained. (pp. 173, 175.)

JURY TRIAL—Erroneous Instruction, Presumed Effect of.—Where, in an action against a principal and agent for damages alleged to be due to negligence, the court erroneously instructs the jury that the principal alone can be held liable, and there is a verdict in favor of the agent but against the principal, the appellate court cannot presume that such verdict was due to such erroneous instruction, if the evidence as to the negligence was conflicting and the jury might have reached the conclusion that the agent was free from negligence. Therefore, both the judgment against the principal and that in favor of the agent must be set aside. (p. 175.)

Pillsbury, Madison & Sutro and Dixon L. Phillips, for the appellant.

Maurice E. Power and William H. Alford, for the plaintiff and respondent.

G. W. Zartman, for the defendant and respondent.

421 HENSHAW, J. Plaintiff sued to recover damages for personal injuries sustained by him. In his complaint he set forth that he was employed by the defendants to aid in the construction of a telephone line; that his employment consisted in helping to set up and erect poles and place thereon wires and other necessary appliances; that the defendants agreed to furnish suitable and proper poles, "that said defendants carelessly, negligently and with want of ordinary care on their part furnished certain poles which were very brittle and unfit for said purposes, and the fact of the unfitness of such poles was known to said defendants at the time they furnished the same, but was unknown to plaintiff." He then alleges that while in the course of his employment he was in the act of ascending one of the poles in a careful and workmanlike manner, the pole, "by reason of its brittleness and unfitness for said purpose, broke," and he was thrown violently to the ground, sustaining the injuries for which he seeks damages. The defendants answered separately. Defendant Rosenthal admitted his employment of the plaintiff, but alleged that in so employing he acted solely as the agent of the codefendant telephone company. He denied the fur-

nishing of unfit and unsuitable poles, and in this regard alleged that the plaintiff represented to defendant that he was an experienced and skilled lineman, competent to erect and set up poles for telephone lines, and that the plaintiff, at defendant's direction, himself selected the poles which were used. The telephone company in its answer denied all responsibility for, and participation in, the construction of the telephone line; denied that it employed the plaintiff; denied that it furnished or agreed to furnish suitable or any poles, and denied that it had furnished unsuitable poles. Under the issues thus joined trial was had before a jury.

It is to be noted that the plaintiff charges that he was employed by "the defendants," and that the negligence which ⁴²² occasioned his accident and injury was the negligence of the defendants. So far as appears from the complaint, therefore, both of the defendants were principals in the negligent act. By the answers, radically different issues were tendered, the defendant telephone company denying responsibility for, or participation in, the construction of the telephone line, and denying that it had ever employed the plaintiff; the defendant Rosenthal admitting his employment of plaintiff, but pleading that in employing him he was acting as agent of his principal the telephone company. Evidence was addressed to these issues. On behalf of the telephone company it was sought to be shown that Rosenthal was building the telephone line upon his own responsibility and not as agent of the telephone company; that his method was to construct such lines in the rural districts at his own risk and cost, and when constructed seek and obtain telephonic connection with the lines of the telephone company. Rosenthal, on the other hand, contended, and introduced evidence to show, that he was building the line for the telephone company, and in managing the work of construction he was acting as its agent.

As to the occasion of the accident, it is not disputed that it resulted from the breaking of a telephone pole, the selection of which was not made, nor directly authorized to be made by the telephone company, but was made by the defendant Rosenthal.

At the request of the defendant Rosenthal the court gave the following instruction: "If you believe from the testimony that F. Rosenthal acting as agent of the Sunset Telephone and Telegraph Company . . . employed the plaintiff as a lineman to work for said company, and that he was in the employ of said company at the time of the injury complained of, then in no event can said Rosenthal be held liable in this

action, but should you find in favor of plaintiff your verdict must be against the Sunset Telephone and Telegraph Company only." And again the court charged the jury: "If defendant Rosenthal was the agent of the defendant Sunset Telephone and Telegraph Company, and acting as and in the capacity of agent of said company employed plaintiff to work on said line and poles, you cannot find or assess any damages against him." The jury returned a verdict in favor of defendant Rosenthal and against the telephone and telegraph company. ⁴²³ Judgment was entered accordingly. The defendant telephone company moved for a new trial, which motion was denied, and it appeals from the judgments in favor of plaintiff and in favor of Rosenthal, and also from the order refusing its motion for a new trial, serving notice of appeal both upon plaintiff and upon its codefendant.

Appellant argues that the evidence establishes without conflict that if it be responsible at all, it is responsible solely because of the relationship of principal and agent found to exist between itself and the codefendant Rosenthal; that not one word of evidence tends to establish any direct personal participation, personal knowledge or personal culpability upon its part, or that its employé, Rosenthal, was in any way carrying out its express instructions in the particular matter for the doing of which negligence is charged; that under such circumstances the employer is liable only because of the rule of law which holds him responsible, as well for the undirected as for the directed act of the agent within the scope of his employment; that in such kind of cases where there have been no express instructions for the doing of the act complained of in the particular way, the principal and agent, master and servant, are not joint tort-feasors as the law employs that term. The employé's responsibility is primary. He is responsible because he committed the wrongful or negligent act. The employer's responsibility is secondary, in the sense that he has committed no moral wrong, but under the law is held accountable for his agent's conduct. While both may be sued in a single action, a verdict exonerating the agent must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has done no wrong, and the principal cannot be responsible for the agent if the agent has committed no tort. While no right of contribution exists between joint tort-feasors, whether sued separately or collectively, there exists in the kind of case here presented much more than the mere right of contribution. The principal who has been obliged thus to pay

for the unauthorized negligent act of his agent resulting in injury may indemnify himself to the full amount against his agent.

These legal propositions, it will be seen, receive universal recognition. Applying them to the present case, appellant ⁴²⁴ argues that the verdict of the jury in favor of Rosenthal must be construed as their finding that he was not negligent, and as the appellant could be responsible only because Rosenthal was its agent, the judgment against it must be reversed, and upon the authority of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, this court should order a like judgment in favor of it.

Upon the general question here presented as to the correlative rights of master and servant, principal and agent, to indemnity, Cooley thus clearly enunciates the well-settled principle (1 Cooley on Torts, 3d ed., p. 255): "A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and its servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servants, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself. On the other hand, suppose the servant be directed by the officers of the company to do a certain act which it turns out they had no right to do, and for doing which he is made to pay damages. Here, if the act was a plain and manifest wrong, as would be leaving the cars to commit a battery, the servant can have no indemnity, because he must have known the act to be unlawful, but if the act directed was one he had reason to suppose was legal, and he obeyed directions on that supposition, it would ill become the railroad company to demand that he be treated as a wrongdoer when called upon to indemnify him against the consequences of the act its officers had directed. In such a case the servant is not in morals a wrongdoer at all, and his claim to indemnity would be based upon a faithful obedience to orders which he had a right to presume were rightful, nothing to the contrary appearing": See, also, 9 Ency. of Law & Pr., p. 807; 9 Story on Agency, p. 271; *Bailey v. Bussing*, 28 Conn. 455; *Old Colony R. R. Co. v. Slavens*, 148 Mass. 363, 12 Am. St. Rep.

558, 19 N. E. 372; Grand Trunk Ry. ⁴²⁵ Co. v. Latham, 63 Me. 177; Feathersson v. Newburgh & C. Turnpike, 71 Hun, 109, 24 N. Y. Supp. 603; New Orleans & N. E. R. R. Co. v. Jones, 142 U. S. 18, 12 Sup. Ct. Rep. 109, 35 L. ed. 919; Montfort v. Hughes, 3 E. D. Smith (N. Y.), 591; Culmer v. Wilson, 13 Utah, 129, 57 Am. St. Rep. 713, 44 Pac. 833.

Where recovery is sought, based upon the act or omission of an agent which the principal did not direct and in which he did not participate, where, thus, his responsibility is simply the responsibility cast upon him by law by reason of his relationship to his agent, the effect of the judgment in favor of and exonerating the agent is learnedly considered in *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. Generally speaking, it may be said that such a judgment in favor of the agent *ex proprio vigore* relieves the principal of responsibility, and may be availed of by the principal for that purpose. Thus in *Lake Shore etc. R. Co. v. Goldberg*, 2 Ill. App. 228, several defendants had been sued in trespass, and one who had joined in the act of trespass and had acted as the agent of appellant had been acquitted. Appellant had acted only through the agent, and in its own defense offered the judgment of acquittal. The court, holding the defense good, said: "But where the real actor, none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be. The principal can be no more guilty by reason of the act of his agent than if he had committed the act in person and the party who was alone charged to have committed the act in person was conclusively adjudged not guilty. We see no way of escape from our conclusion, and for authority refer to *Thomas v. Rumsey*, 6 Johns. (N. Y.) 26, and *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627." In *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, the action was brought to recover damages for injury sustained by plaintiff. It was prosecuted against the railroad company and against Root, the conductor of the company's train. It was charged that the conductor Root did not obey orders and by his negligence caused a collision. After trial the jury rendered its verdict in favor of Root and against the railroad company. Judgment followed and the company appealed. The case received elaborate consideration. The judgment in favor of Root was not appealed from. Such being the condition, it was not subject to reversal. The ⁴²⁶ supreme court of Washington was compelled to hold that the case was one where the jury had found that the servant, who alone was charged with

the culpable act, had committed no wrong, and that of necessity, therefore, the employer could have committed no wrong. Unable to reverse the judgment in favor of Root, it was constrained to decree the exoneration of the principal.

As has been said, the appellant here contends for a like ruling, but in certain vital aspects the case at bar differs from *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. Here an appeal has been taken from the judgment in favor of Rosenthal, and there is no such embarrassment as confronted the supreme court of Washington. Upon the other hand, while appellant, in seeking a judgment in its favor, is asking more than it is entitled to, respondent in turn makes a like request in arguing for an affirmance of the judgments as they stand. Herein he urges that his complaint charged both defendants equally as joint tort-feasors; that in such a case it is well settled that a verdict may pass for one and against another; that this was the result in the case at bar; that the jury must be held to have followed the erroneous instruction of the court in exonerating Rosenthal, or, in other words, must be held to have determined that Rosenthal was acting as the agent of the telephone company, and that this determination by the jury fixes, at any rate, the liability of the company, and that it can matter not that Rosenthal was, under the erroneous instructions, allowed to escape just liability. But there are many and insurmountable objections to this view. While it is true that the complaint charges both of the defendants as having been culpably negligent, the evidence beyond peradventure established that whatever negligence there was, was exclusively the negligence of Rosenthal, and that it was a negligence not directed nor participated in by the telephone company. Again, the issue of agency or nonagency was in controversy between the parties, and was important because of the right to indemnification which the principal has for such negligent act of his agent. The effect of the verdict in favor of Rosenthal in a matter thus litigated between the parties would be to bar the principal's right of recovery over. And, finally, this appeal can be denied only upon a declaration by this court that the jury's verdict in favor of Rosenthal was based upon the ⁴²⁷ erroneous instructions. But under the circumstances such a declaration cannot judicially be made. The evidence upon the question of the negligence was conflicting; a counter charge of contributory negligence was also made against the plaintiff, and the jury was properly instructed that if the plaintiff was guilty of contributory negligence he could not recover,

and if the defendants were not guilty of negligence plaintiff could not recover. Under the evidence presented the jury might have reached the conclusion that the defendant Rosenthal was not negligent at all, in which case it should have rendered a verdict in his favor. If it be said that a jury would stultify itself in holding that an agent was not guilty of negligence and at the same time holding his principal responsible because of the agent's negligence, and that therefore it must be concluded that the jury followed the erroneous instruction, answer must be made that juries have done precisely this thing, and that the case of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, is a typical instance of it. Judicially, therefore, it cannot be declared whether the verdict of the jury in favor of Rosenthal was based upon the correct instructions given by the court or upon the incorrect ones. If upon the incorrect instructions, then appellant is injured, since the judgment exonerates its agent from whom it is entitled to seek indemnity. If upon the correct instructions, then also is appellant injured, since, if the agent was free from negligence, the principal was also entitled to the jury's verdict.

For these reasons it is held that the judgment in favor of Rosenthal and the judgment against the appellant must both be and hereby are reversed and the cause remanded for a new trial.

Shaw, J., Angellotti, J., Sloss, J., and Lorigan, J., concurred.

A Verdict Which Exonerates a Servant in an action against him and his master for injuries caused by the servant's misfeasance should exonerate the master also: *McGinnis v. Chicago etc. Ry. Co.*, 200 Mo. 347, 118 Am. St. Rep. 661.

STILL v. SAN FRANCISCO AND NORTHWESTERN RAILWAY COMPANY.

[154 Cal. 559, 98 Pac. 672.]

MASTER AND SERVANT—Fellow-servants—Conductor and Fireman on Different Trains.—A conductor and fireman, though working upon different trains belonging to the same employer, are fellow-servants, in the absence of any statute to the contrary. (p. 180.)

MASTER AND SERVANT—Liability for Injury to a Servant Resulting from the Employment of an Incompetent Fellow-servant.—Under the Civil Code of California as it existed in 1903, an employer was not liable to an employé for injuries due to the incompetency of a fellow-employé in whose selection ordinary care was used. (p. 181.)

APPEAL AND ERROR—Conclusiveness of Verdict.—In case of a mere conflict of evidence, the conclusions of the trial jury and the judge are final, and will be disregarded by the appellate court. (pp. 181, 182.)

MASTER AND SERVANT—Incompetency, What is.—Incompetency on the part of a servant connotes the converse of reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with the person in the general employment. (p. 182.)

MASTER AND SERVANT—Burden of Proof as to the Incompetency of a Fellow-servant.—In an action against a master to recover for injuries claimed to be due to the incompetency of a fellow-servant, the plaintiff must assume the burden of proving such incompetency, that it was the cause of the injury, and that the defendant at the time of selecting the fellow-servant knew, or with the exercise of ordinary care would have known, of the incompetency. (p. 182.)

MASTER AND SERVANT—Conductor of Railway, When Shown to have been Incompetent.—A conductor who did not know the meaning of the rules and orders used on a railroad relative to the movement of trains was absolutely incompetent to act as conductor of a train, where he would be called upon to follow such rules and orders in moving trains, as where, receiving a special order to meet an inferior train before its arrival, he did not know that he was bound to wait such arrival unless the special order was modified or withdrawn. (pp. 182, 184.)

MASTER AND SERVANT.—Ordinary Care in the Selection of a Servant means that degree of care which a man of ordinary prudence would use in view of the nature of the employment and the consequence of the employment of an incompetent person—a degree of care commensurate with the nature and danger of the business and the grade of service for which the servant is intended, and the hazards to which other servants are to be exposed from the employment of a careless or incompetent person. (pp. 184, 185.)

MASTER AND SERVANT—Care Which Must be Exercised in the Employment of a Servant.—Where the service in which a servant is to be employed is such as to endanger the lives and persons of co-employés if the servant is not competent, the employer is bound, in exercising ordinary care, to make reasonable investigations into the character, skill, qualifications and habits of life of the person to be employed. (p. 185.)

MASTER AND SERVANT—Care in the Selection of a Servant, When a Question for the Jury.—Whether an employer made such investigation as was reasonable under all the circumstances before employing a servant whose incompetency might lead to the injury of his fellow-servants is a question for the jury. (p. 185.)

NEGLIGENCE, Question of, When for the Jury.—Though there is no conflict in the evidence on the question of negligence, still, if the conceded facts are such that reasonable men might differ as to the conclusions to be drawn, the question is one for the jury. (p. 185.)

MASTER AND SERVANT—Presumption of Care in the Selection of Servants.—The presumption is that an employer did his duty by exercising ordinary care in the selection of employés whose incompetency might lead to the injury of fellow-servants, and, as a general rule, the employer's knowledge of incompetency, or the fact that he could have obtained such knowledge had he made reasonable inquiry, must be shown by evidence independent of that showing the incompetency, and cannot be inferred therefrom. (p. 185.)

MASTER AND SERVANT—Knowledge of Incompetency of Servant, When Inferable from the Fact of Such Incompetency.—The incompetency of an employé at the time of his employment may be such as to rebut the presumption that his employer used requisite care in his selection, and make the question one for the jury. (p. 186.)

MASTER AND SERVANT—Incompetency, Inquiry as to on a Change of Duties.—An employer is bound to institute affirmative inquiries to ascertain the qualifications of an employé whom he transfers to a more responsible position for which special qualifications are demanded, unless the employé has given proof of his capacity in some similar position. (p. 186.)

MASTER AND SERVANT—Incompetency of Servant, Knowledge or Want of Inquiry Respecting, When may be Presumed.—If it appears that the conductor of a railway train did not understand the signification of a meeting order, and that it required him to wait until the arrival of the train he was directed to meet or until the order had been modified or withdrawn, and that a collision resulted, it is a fair inference not only that he was incompetent, but further, that reasonable inquiry must have disclosed the incompetency. (pp. 187, 188.)

MASTER AND SERVANT—Competency of Employé, Inquiries Concerning, What Necessary.—Personal examination of one about to be employed, even in so responsible a position as that of conductor of a railroad train, is not always essential to the exercise of reasonable care, but such investigation as will warrant the assumption under all the existing circumstances that the employé has adequate knowledge and qualifications is essential. This assumption may be warranted by the knowledge of the employer of the experience or reputation of the employé as to work calling for the knowledge and qualification adequate to the change of the duties of the place, or by the recommendation of other persons on whom he is justified in relying. Each case must be determined on its own facts, and generally, the question whether due care was exercised by the employer in this regard is one exclusively for the jury and the trial judge. (pp. 188, 189.)

JURY TRIAL—Singling Out Specific Testimony.—It is not error to refuse an instruction referring to specific evidence when, under the general instruction, the jury must have known that such evidence was to be considered with the other evidence in determining the issues submitted to them. (p. 189.)

JURY TRIAL—Refusal of Instruction Because Misleading.—It is not error to refuse an instruction, though it correctly states the law, if, as applied to the case, it is misleading and assumes facts as to which there is conflict in the evidence. (p. 189.)

Gillett & Cutler and F. A. Cutler, for the appellant.

George T. Rolley and Coonan & Kehoe, for the respondents.

⁵⁶¹ **ANGELLOTTI, J.** This is an appeal by defendant from a judgment for plaintiffs in an action brought by the surviving ⁵⁶² wife and two minor children of Charles Still, deceased, for damages resulting to them from the death of said Still, alleged to have been caused by the negligence of defendant. The principal claim of defendant is that the evidence given on the trial is insufficient to support the verdict.

Charles Still was killed on October 5, 1903, in a collision

which occurred between two of defendant's trains, one known as "Extra No. 4," a special train, in Conductor Rolley's charge, which was running southerly from South Bay, near Eureka, and the other known as "Freight Train No. 5," a regular schedule train, under Peter Clark as conductor, which was running northerly from Carlotta, the southerly terminus of the road, to South Bay. He was the fireman on "Extra No. 4," and at the time of the collision was in the cab of the locomotive engaged in the discharge of his duties. His train was proceeding under an order addressed to its conductor and engineer, which was as follows: "Leave South Bay 6:45 October 5th. Take E. R. V. L. Co's empties to their switch. Return light to Gravel Pit. Meet P. L. Co's train at Singley's. Meet No. 5 at Cousins' switch. Exchange engines at Cousins' switch with No. 5." A special meet order had been given to the conductor and engineer of freight train 5, reading as follows: "October 5, '03. Train No. 5, Conductor Clark, Engineer Thayer. Meet Extra 4 at Cousins' switch. Exchange engines with her. Take E. R. V. Lbr. Co's train to S. Bay." It is conceded that such an order supersedes all schedules and means exactly what it says—viz., that the trains to which it is addressed must meet at the place named, and that the one arriving first at the designated place must stay at that place until the other train arrives, or until the order is withdrawn or changed. Train 5 started from Carlotta at its scheduled time and proceeded according to its schedule to Cousins' switch, which was almost midway between South Bay and Carlotta. Extra 4 had been delayed by an accident farther north, and had not yet arrived at Cousins' switch. Conductor Clark of train 5, having taken on the E. R. V. Lumber Company's train as directed by his special order, proceeded north with his train without waiting for extra 4, with the result that in the neighborhood of Fortuna, the next station north of Cousins' switch, his train came into collision with extra 4, which was proceeding south in strict accord 563 with its orders. Concededly, the failure of Clark to comply with the requirements of the meet order was the sole cause of the deplorable accident. Under the law of this state as it was at the time of the collision, deceased and Clark were fellow-servants, and no recovery could be had against defendant by the heirs of deceased for damages resulting solely from the negligence of Clark.

The claim of plaintiffs, sustained by the jury that tried the case, was that Clark was incompetent to act as conductor of train 5, that defendant had failed to use ordinary care in

selecting him to serve in that capacity, and that his incompetency was the cause of the accident, thus bringing the case within the rule of law that renders the employer liable to an employé for damages resulting from his failure to use ordinary care in the selection of other employés and to select only those who are competent to properly perform the duties of the position for which they are selected—the rule declared by section 1970 of the Civil Code, as it was at the time of the accident, as follows: “An employer is not bound to indemnify his employé for loss suffered by the latter . . . in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé.”

In accord with this claim, the jury specifically found in response to questions submitted to them—1. That Peter Clark was incompetent to act as conductor of train No. 5 at the time of the collision; 2. That the collision was caused by such incompetency of Peter Clark to act as conductor; 3. That the defendant failed to use ordinary care in the selection of Peter Clark for the position of conductor for such train; and 4. That the defendant prior to the accident knew that Clark was incompetent for the position of conductor on such train, or could have known it by the exercise of ordinary care on its part. A general verdict in favor of plaintiffs was also rendered.

It must be borne in mind that the question before us in considering the attack on the verdict of the jury is not how we would find the facts to be, but whether there was enough in the evidence from which the jury might find the existence ⁵⁶⁴ of facts which would justify the verdict they rendered. It, of course, devolved on plaintiffs to show that Clark was in fact incompetent for the position to which he was assigned, that defendant at the time of his selection therefor either knew or by the exercise of ordinary care would have known of such incompetency, and that such incompetency was the cause of the accident. The verdict of the jury constituted findings in the affirmative upon all these propositions. Was there substantial evidence in support thereof? If so, the verdict must stand, however strongly such evidence may be opposed to other evidence given on the trial. In cases of mere conflict of evidence, the conclusions of the trial jury and judge are conclusive on the question as to which side produced

the "preponderance of evidence": See *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 151, 86 Pac. 178.

As we have said, it is necessarily conceded that the failure of Clark to hold its regular schedule train at Cousins' switch until the arrival of extra 4, in accord with the requirements of the meet order, was the cause of the accident. Was this failure due to his incompetency or unfitness from any cause to act in the position to which he had been assigned, or was it due to his mere negligence in the discharge of duties which he was entirely competent to perform? The incompetency claimed is that he was not possessed of adequate knowledge of the meaning and effect of a "meet order" under such circumstances as confronted him at Cousins' switch on the day of the accident, the kind of incompetency referred to in *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425, where it was said: "An engineer might not be careless; he might exercise extreme care within the limitations of his knowledge, and yet for lack of adequate knowledge might be unfit and incompetent for the position," and in *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450, 7 Am. St. Rep. 458, 17 N. E. 101, a case similar in many respects to this. Incompetency connotes the converse of reliability, in "all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment": 1 Labatt on Master and Servant, sec. 181. It goes without saying that one who does not know the meaning of the rules or orders used on a railroad relative to the ⁵⁶⁵ movement of trains is absolutely incompetent to act as a conductor of a train thereon where he would be called upon to follow such rules and orders in moving his train. We are satisfied that the evidence amply warranted the jury in finding that Clark was without this knowledge, and that his ignorance in this respect was the sole cause of the accident.

Clark had been acting as conductor of this train for less than a month, having commenced on September 10, 1903. His employment on this train was practically his first experience as conductor on a schedule train, there being some testimony that between July 17, 1903, when he came to this road, and September 10, 1903, he had acted for a few days as conductor. During the same time, he had acted for a few weeks as conductor of a gravel train, an inferior unscheduled train, running under special orders. During the same interval of less than two months he had also acted for a very short time as brakeman on a passenger train on this road.

For nearly two years prior to July 17, 1903, he had been a brakeman on a passenger train on the railroad running from Eureka to Arcata, a short road which had only one train and one train crew, and where, consequently, there were no rules or orders as to the meeting and passing of trains. Prior to that time, he had worked for some years on the road where the accident occurred in the several capacities of section-man, tunnel watchman and fireman, positions in which he had not been required to know or charge his mind as to the effect of orders relative to the meeting of trains. Prior to assuming the work of conductor he had shown himself to be a reliable and competent man in the various positions in which he had been placed, which would rather tend to indicate that within the limits of his knowledge he would not be likely to make a mistake in such a vital matter as the one causing the accident. The evidence was not such as to compel the conclusion that he had ever before been confronted with the situation that confronted him at Cousins' switch on the day of the accident, or that he had ever been informed or had ever learned that a regular schedule train, arriving at a place where it had been directed by special order to meet an inferior train before the arrival of the latter, was bound to await such arrival unless the special order was withdrawn or modified. Upon being made a conductor, he was given a printed schedule or ⁵⁶⁶ time table of the various regular trains, on the back of which were printed what was styled "Time Table Rules." A new time table to take effect October 5, 1903, at 12:01 A. M., was issued before the accident, and a copy placed in his hands. On this appears the schedule for his train, "No. 5 Freight." At the bottom of the page, in large type, appeared the following: "North-bound trains are superior to and have the right of track over south-bound trains of same or inferior class." At the time of the accident his train was north-bound, while extra 4 was south-bound, and inferior to his train under the express provisions of a rule printed on the back of the time table. Among the other rules so printed on the back of such time table was rule 8, providing that "inferior trains must keep out of the way of all superior trains," and rule 16, providing "when the expected train is not found at the schedule meeting or passing point, the superior train will proceed on schedule; the inferior train will take siding and wait for the superior train." When Clark arrived at Cousins' switch, he had his special order in mind, as is fully shown by his compliance with that portion thereof requiring him to take on the "E. R. V. Lbr. Co's train," so that his

action in proceeding with his train cannot be accounted for on the theory that he had forgotten the existence of any special order. In addition to this, Joseph Still, the fireman on train 5, testified that before directing the engineer to move out from Cousins' switch, Clark told him, the engineer, "our instructions were to meet No. 4, but we are the superior train and we will run on schedule, run on rule 16, and extra 4 will have to take siding and keep out of the way." It appears that this statement of Still was denied by Clark when he was recalled as a witness by defendant, and that Still was a brother of deceased, and also had a damage suit pending against defendant arising out of the same accident, but we must assume that the jury believed the testimony of Still in this regard, and they were the sole judges as to his credibility. It also appeared that Still had given the same testimony in the presence of Clark on two previous trials of another action growing out of this accident, and that no denial thereof had then been made. Clark himself was not called by either party to testify at this trial as to the circumstances of the accident, or to explain why he had disregarded the "meet order."

567 Of course, it is possible that Clark did know the full meaning and effect of such orders as applied to regular schedule trains, and that his proceeding on the day of the accident in violation of the order he had received was due simply to forgetfulness, and constituted merely an act of negligence on his part. But we have no doubt whatever that the evidence above set forth was sufficient to warrant a jury in concluding that he did not possess the knowledge that such an order superseded all schedules and printed rules in so far as such schedules and printed rules conflicted therewith, and that he believed that it was his duty to proceed from Cousins' switch with his regular schedule train under such printed rules, without waiting for the inferior train he had been directed to meet at that point. If they so concluded, they were necessarily compelled to find him to be incompetent to discharge the duties of the place to which he had been assigned.

This brings us to the question whether defendant used ordinary care in the selection of Clark as conductor of the freight train, or rather, whether the evidence was such as to sustain the finding of the jury that it did not use ordinary care. Under all the authorities, the term "ordinary care" as used in this connection means that degree of care that a man of ordinary prudence would use in view of the nature of the employment and the consequences of the employment of an

incompetent person—a degree of care commensurate with the nature and danger of the business and the grade of service for which the servant is intended, and the hazards to which other servants are to be exposed from the employment of a careless or incompetent person: Wood on Law of Master and Servant, secs. 417, 418. In accord with this rule, it is generally declared that where the service in which the servant is employed is such as to endanger the lives and persons of co-employees if the servant is not competent, an employer is bound in the exercise of ordinary care, upon the plainest principles of justice and good faith, to make a reasonable investigation into his character, skill, qualifications and habits of life: See 1 Labatt on Master and Servant, sec. 194; Bailey's Personal Injuries, sec. 1407; *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244, 38 N. E. 241; *Mann v. Delaware etc. Co.*, 91 N. Y. 495. The question whether he has made such investigation as is reasonable under all the circumstances ⁵⁶⁸ is peculiarly one for the jury. As has been said before, even where there is no conflict in the evidence on the question of negligence, if the conceded facts are such that reasonable minds might differ as to the conclusion to be drawn, the question is one of fact for the jury: *Seller v. Market St. Ry. Co.*, 139 Cal. 268, 72 Pac. 1006. The presumption is that the employer has done his duty in this regard (*Beaseley v. San Jose Fruit etc. Co.*, 92 Cal. 388, 28 Pac. 485), and as a general rule, the employer's knowledge of incompetency, or the fact that he would have obtained such knowledge had he made reasonable inquiry, must be shown by evidence independent of that showing the incompetency and cannot be inferred therefrom. Mr. Labatt, in his *Master and Servant*, says that the latter rule is subject to certain qualifications, one of which is that the testimony by which the incompetency is established may be such as to warrant a conclusion that the employer either had notice of the incompetency, or omitted to make such inquiries as common prudence would have dictated (sec. 196), and that it seems impossible to deny that the delinquency which caused the injury may be of such a flagrant character that a jury might fairly infer that the master could not have failed to discover the servant's unfitness if proper inquiries had been instituted when he was hired: Sec. 199. See, also, Bailey on Personal Injuries, sec. 1419. In *Murphy v. St. Louis etc. R. Co.*, 71 Mo. 202, this is declared to be the law, and the statement is made that the inference is one of fact for the jury. In *Lee v. Michigan C. R. Co.*, 87 Mich. 574, 49 N. W. 909, the evi-

dence showing incompetency was of such a nature that the court said that proof that he was so incompetent when employed need not be supplemented by proof of the employer's knowledge thereof, the presumption that the employer had done his duty being overcome by the proof of incompetency. It further said that where one competent at the time of employment becomes incompetent or indulges in a habit which renders him incompetent during its indulgence, notice of the incompetency must be brought home, but that where the incompetency existed at the time of the employment, proof of notice is not necessary. This was said in reference to one who had been employed only a few weeks. In *Pleasants v. Raleigh etc. R. Co.*, 121 N. C. 492, 61 Am. St. Rep. 674, 28 S. E. 267, the court said that there was no evidence that the defendant ⁵⁶⁹ knew of the incompetency of Dunn when he was employed, except his action on the occasion of this fearful wreck, and the fact that he had been employed in this capacity only a few weeks, but that these facts raised such a presumption against the defendant as to make this an issue fit to be submitted to the jury under proper instructions. These are examples of decisions that support the statement of Mr. Labatt. If it be conceded that any of them states the rule in broader terms than is warranted, we think nevertheless that there can be no doubt under the authorities that the incompetency of an employé at the time of his employment may be of such a character that the evidence showing it will be legally sufficient to rebut the presumption that the employer used the requisite care in his selection, and make the question one for the jury. This is on the theory that the incompetency was of such a nature that a reasonable investigation would have disclosed it, and that, therefore, the employer either knew of it or omitted to make such investigation, the same theory upon which evidence of general reputation of the employé for incompetency is admissible to show want of care on the part of the employer: See *Gier v. Los Angeles C. E. Ry. Co.*, 108 Cal. 129, 41 Pac. 22; *Gilman v. Eastern R. R. Co.*, 13 Allen, 423, 90 Am. Dec. 210. When we speak of the time of his employment, we mean the time when he was assigned to the particular employment. An employer is bound to institute affirmative inquiries in order to ascertain the qualifications of an employé whom he transfers to a more responsible position, for which special qualifications are demanded, unless the employé has given proof of his capacity in some similar position: Labatt on Master and Servant, sec. 194. See, also, *Mann v. Delaware etc. Co.*, 91 N. Y. 495.

The rule we have just discussed appears to us to be peculiarly applicable to incompetency of the character found by the jury on sufficient evidence to exist in the present case—viz., want of knowledge by a conductor of a schedule train as to the meaning and effect of telegraphic orders referring to the movement of his train in relation to other trains on the road. The safety of all those associated with him is dependent on his having such knowledge, and the most ordinary care requires reasonable affirmative investigation on the part of the employer to ascertain that the employé has it before ⁵⁷⁰ assigning him to the employment. Where such incompetency is shown, it is a fair inference that a reasonable investigation would have disclosed it, when it could have been remedied by proper instruction. The uncontested showing by an employer in response to the prima facie case thus made may doubtless be such in some cases as to require the conclusion, as a matter of law, that the requisite investigation was made and that the result thereof fully warranted the employer in selecting the culpable employé. But the record here presents no such case. There was evidence showing some inquiry by the trainmaster, and some discussion by him with Clark himself relative to the duties to be performed about the time he was first assigned as a conductor, but the evidence in this behalf relied on by defendant was such that, assuming it to be without conflict, reasonable men might well differ as to whether it showed such investigation as was requisite under the circumstances. The proposed conductor was being taken from the position of brakeman on a road where, by reason of the fact that there was only one engine and one train crew, it was not essential for even a conductor to know anything about the rules and orders for the meeting and passing of trains. His service in that capacity on that road had continued for nearly two years next preceding his employment on the road where the accident occurred. His former employment on the road where the accident occurred had been several years before and in capacities wherein he was not required to charge his mind with rules and orders relative to the meeting and passing of trains. His reputation as a careful and competent man, and the recommendation of Mr. Rose, the former trainmaster, amounted to no more than a showing that he was a competent railroad man within the lines of his knowledge and experience, and that he was the kind of a man who might safely be made conductor of an extra train on defendant's road. Mr. Rose's statement to the trainmaster was substantially that he was a valuable man, and that he had promised him a conductorship

of a gravel train on this road when the same was put on. There was nothing in all this to warrant the conclusion on the part of the trainmaster that, either by experience or actual instruction, Clark had acquired the adequate knowledge as to rules and orders relative to the meeting and passing of trains. The testimony as to the conversations between Clark⁵⁷¹ and the trainmaster at and about the time of his employment is not of such a nature as to require a conclusion that the trainmaster was warranted in assuming that he had such knowledge, and the same must be said of the experience of Clark as conductor of the extra gravel train immediately prior to his employment as conductor of a regular freight train. A very clear knowledge on the part of the conductor of a regular schedule train as to the unprinted rule making a special "meet order" superior to all the printed "time-table rules" was especially essential, in view of the printed rules which expressly declared extra trains "inferior to all regular trains," required "inferior trains" to keep out of the way of all "superior trains," and provided that when the expected train is not found at the schedule meeting or passing point, the superior train will proceed on schedule time, and the inferior train will take siding and wait for the superior train.

The case of *Gier v. Los Angeles C. E. Ry. Co.*, 108 Cal. 129, 41 Pac. 22, is much relied on by learned counsel for defendant, but we see nothing therein that is in conflict with what we have said. As the court there said, the act producing injury in that case "was not one evincing incompetency, employing the word strictly to denote a lack of skill or ability to use appliances or perform a duty in a workmanlike way, but was a single and signal exhibition of carelessness or recklessness," being the voluntary starting and sending ahead his electric car by a motorman under such circumstances that the car must strike the conductor who was standing at a switch. The motorman had been originally employed by the defendant as a driver of a horse-car, and was subsequently trained as a motorman. At the time of his original employment, inquiry was made by the defendant of his former employers for whom he had acted in the capacity of driver of a horse-car, and they had declared him "to be the best and most careful of men."

It was in regard to such a case that the court said that defendant was not at fault in originally employing as a motorman a horse-car driver without questioning him personally, inasmuch as it took pains to avail itself of evidence upon the matter "disinterested and superior," that of his former employers. But we do not desire to be understood as intimating

that a personal examination of one about to be employed even in such a responsible position as that of conductor of a railroad ⁵⁷² train is always essential to the exercise of reasonable care. Such investigation as will warrant the assumption under all the existing circumstances that the employé has adequate knowledge and qualifications is essential. Such an assumption may be warranted by the knowledge of the employer of the experience and reputation of the employé as to work calling for the knowledge and qualifications adequate to the discharge of the duties of the place, or by the recommendation of other persons on whom he is justified in relying. Each case must be determined on its own facts, and generally, as here, the question whether due care was exercised by the employer in this regard is one exclusively for the jury and trial judge.

The verdict was not in conflict with any of the instructions.

The only other points made for reversal are as to the refusal of the trial court to give certain requested instructions to the jury.

The first of these was one to the effect that in determining the question of incompetency the jury might take into consideration, "with other evidence" given on the trial, certain specified evidence. As to this instruction it is sufficient to say that no reason appears why the court should have singled out a portion of the evidence given on the issue of incompetency, and specially directed that it might be considered. Under their general instructions, the jury must have known that this evidence with all other evidence on the subject was to be considered by them in determining the question. Instructions which are drawn solely for the purpose of and which simply have the effect of emphasizing some particular portion of the evidence are not to be commended.

The second, defendant's proposed instruction 9, was properly refused. While taken from the opinion in *Gier v. Los Angeles C. E. Ry. Co.*, 108 Cal. 129, 41 Pac. 22, it was misleading as applied to the facts in this case, and assumed facts as to which there was a conflict in the evidence, if, indeed, one of such assumed facts was not wholly at variance therewith.

If the third, defendant's proposed instruction 12, had been limited to the proposition suggested by learned counsel, that if defendant had made reasonable inquiry as to the fitness and competency of Clark at the time of his employment, with the result that Clark appeared to be competent, it had fulfilled its duty in the matter of selection, notwithstanding it was ⁵⁷³ afterward disclosed that Clark was in fact incom-

petent, it would doubtless have stated the law correctly. Such was the effect of other instructions given as we read them. But by this proposed instruction it was attempted to have the court state what specific acts, inquiries and information would constitute a reasonable investigation warranting the assumption of competency and requiring a conclusion that defendant had used proper care. We think this proposed statement would have been very misleading as applied to the evidence given on the trial, and that the court properly refused to give it.

The instructions given by the learned judge of the trial court were very complete and fair, and clearly and correctly stated the law applicable to the case.

The judgment is affirmed.

Shaw, J., Sloss, J., Lorigan, J., Henshaw, J., and Beatty, C. J., concurred.

Rehearing denied.

Employés of a Railroad Company on One Train have been held fellow-servants with employés on a different train: See the notes to *Mast v. Kern*, 75 Am. St. Rep. 610; *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 32; *Fox v. Sandford*, 67 Am. Dec. 595. Employés on one train of a cable street railway are said to be fellow-servants with the employés on the train next preceding: *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216. The motorman and conductor on one street-car are said to be fellow-servants with like employés on another car: *Berg v. Seattle etc. Ry. Co.*, 44 Wash. 14, 120 Am. St. Rep. 968. And the conductor of a passenger train and a brakeman on a freight train have been held fellow-servants: *Louisville etc. R. R. Co. v. Dillard*, 114 Tenn. 240, 108 Am. St. Rep. 894.

The Rule that an Employé Assumes the Risk of the Negligence of his fellow-servants implies that the employer has exercised due care in selecting and retaining in his service competent employés: *First Nat. Bank v. Chandler*, 144 Ala. 286, 113 Am. St. Rep. 39, and cases cited in the cross-reference note thereto.

STANSBURY v. POINDEXTER.

[154 Cal. 709, 99 Pac. 182.]

STREET ASSESSMENTS—Unauthorized Provision in Contract for the Work, When Avoids.—A provision in a contract for street work that "all loss or damage arising from the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from encumbrances on the lines of the work, or for any act or omission on the part of the contractor, or any person or agent employed by him not authorized by this agreement, shall be sustained by the contractor," is unauthorized,

and has the effect of invalidating the contract, assessment and lien. (p. 191.)

STREET ASSESSMENTS—Illegal Provision in Contract, Evidence Which does not Show It to have been Harmless.—Where, in an action upon a street assessment, a contract is invalid as imposing conditions on the contractor more onerous than were allowed by law, the evidence by all who presented bids for the work that the specifications quoted had not operated to increase the amount of their bids is properly excluded, because, conceding such to be the case, there may have been others who were deterred from bidding at all by reason of the unlawful restrictions in the contract. (pp. 191, 192.)

Scarborough & Bowen for the appellant.

Long & Baker, for the respondent.

⁷⁰⁰ MELVIN, J. This is an action by a contractor upon his claim for work performed upon Normandie avenue, Los Angeles, adjacent to defendant's property. The contract, assessment and lien were declared invalid by the superior court, and judgment was given for the defendant. The contract between the street superintendent and appellant provided that Normandie avenue should be graded and graveled "in accordance with the plans and profile on file at the office of the city engineer, and specifications for the construction of graveled streets on file in the office of the city clerk, said specifications being numbered 68," and that curbing should be laid "in accordance ⁷¹⁰ with specifications for constructing redwood curbs on file in the office of the city clerk, said specifications being numbered 52." In each of said specifications the following language is used: "All loss or damage arising from the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from encumbrances on the lines of the work, or for any act or omission on the part of the contractor, or any person or agent employed by him not authorized by this agreement, shall be sustained by the contractor." Practically the same provision was declared fatal to the validity of the ordinance authorizing certain street work, considered in the case of Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, and that case is conclusive of the question presented here. There is no merit in appellant's point that he was denied opportunity of showing, by all who presented bids to the city council for the work, that the specifications quoted had not operated to increase the amount of their bids. This objection leaves out of consideration the fact that some bidders may have been deterred from offering to do the work at all by reason of the unlawful

restrictions contained in the proposed contract. Such persons may have concluded very properly that they could not afford to do the work, in view of the burdens imposed, and, without such burdens, they might have been prepared to present lower bids than those filed by their more daring competitors.

The judgment is affirmed.

Henshaw, J., and Lorigan, J., concurred.

That the Incorporation in Contracts for Public Work of conditions which impose unusual burdens upon the contractor may invalidate the contract, see Anderson v. Fuller, 51 Fla. 380, 120 Am. St. Rep. 170; Inge v. Board of Public Works, 135 Ala. 187, 93 Am. St. Rep. 20; Alameda Macadamizing Co. v. Pringle, 130 Cal. 226, 80 Am. St. Rep. 124; Portland v. Bituminous Paving Co., 33 Or. 307, 72 Am. St. Rep. 713. Compare, however, Dillingham v. City Council of Spartanburg, 75 S. C. 549, 117 Am. St. Rep. 917.

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

YOUNG v. LEMIEUX.

[79 Conn. 434, 65 Atl. 436.]

APPEAL.—The Connecticut Statute, Which Provides that When Notice of appeal has been filed all proceedings to make or complete the record shall be suspended during July and August, does not prevent court or counsel from filing the necessary papers during those months, to become operative upon the expiration of that period. (p. 195.)

BULK-SALE STATUTE—What Sales are Within.—Where one who conducts a general store carries on a drugstore as a separate and independent business in another building and under another name, a sale of the stock in trade in the drugstore is within the purview of a statute invalidating the sale by a dealer of his entire stock in trade at a single transaction without giving notice of his intention so to do. (p. 196.)

BULK-SALE STATUTE—Constitutionality of Act.—A statute providing that a sale by a retail dealer of his entire stock at a single transaction, and not in the usual course of business, shall be void as against existing creditors unless he gives at least seven days' notice of his intention by writing recorded in the town clerk's office, is constitutional. (p. 198.)

BULK-SALE STATUTE—Replevin of Goods.—Where a dealer has sold his stock in trade in violation of the bulk-sale statute, his trustee in bankruptcy may recover of the buyer goods which are merely replacements purchased with the proceeds of sales of the original goods. (p. 199.)

John J. Phelan, for the appellant.

Donald G. Perkins and Jeremiah J. Desmond, for the appellee.

436 HALL, J. The plaintiff is the trustee of the estate of Philip E. Hendrick, who was adjudicated a bankrupt upon the petition of sundry creditors, dated September 19, 1904.

On and for some years prior to August 31, 1904, said Hendrick conducted personally, in his own name and in his build-

ing in Taftville, in this state, a retail general store and meat market, and at the same time, in a store hired by him on the opposite side of the street, carried on a separate and independent retail drug business under the name of the Taftville Drug Company, which was managed by a licensed druggist employed by him.

The value of the stock in the general store was about two thousand dollars, and of the stock, fixtures and soda fountain in the drugstore, about three thousand five hundred dollars. There was no evidence at the trial of the separate value of the stock, fixtures and soda fountain.

On the 31st of August, 1904, said Hendrick, at a single transaction and not in the regular course of business, and without any written bill of sale, and without having caused to be recorded the notice of his intention to make such sale required by chapter 72 of the Public Acts of 1903, sold and delivered to the defendant said drugstore and the whole of his stock, fixtures and soda fountain therein, for the price of three thousand five hundred dollars, receiving therefor from the defendant fifty dollars in cash, a small indorsed check, one note for two thousand dollars, payable in five days, and one for fourteen hundred dollars payable in seven days, both being signed by the defendant as agent. It was understood between Hendrick and the defendant that payment of said notes would not be demanded before January 1, 1905. The defendant has never paid said notes, and it did not appear at the trial that payment thereof had ever been demanded.

The defendant had been managing said drug business, as a clerk for Hendrick, for two months before such sale, with ⁴³⁷ the expectation of eventually buying it. He had no property, had previously failed in business and was owing debts on account thereof, and for that reason signed said notes as agent.

After such purchase the defendant continued to conduct said drug business, purchasing goods in small amounts from time to time from the receipts of the business to keep up the stock, and drawing from the receipts about sixteen dollars a week for his living expenses, until the goods were replevied by the plaintiff in January, 1905.

At the time of said sale Hendrick was largely indebted and was being pressed by his creditors, but he did not believe that he was in fact insolvent. His general store was closed by attachment on the 16th of September, 1904. The property in the hands of the plaintiff is insufficient to pay the claims of Hendrick's creditors.

The trial court held that the sale to the defendant was not made to hinder or defraud creditors, nor in contemplation of insolvency, but that it was void under chapter 72 of the Public Acts of 1903 and section 4869 of the General Statutes, and rendered judgment for the plaintiff.

In his reasons of appeal the defendant claims that the trial court erred in holding, upon the facts above stated, that the sale of the drug business was a sale by Hendrick of "the whole, or a large part of his stock in trade," within the meaning of chapter 72 of the Public Acts of 1903, and was void under said act and section 4869 of the General Statutes, and in not holding that said act of 1903 was in conflict with the state and federal constitutions.

In this court the plaintiff pleaded in abatement of the defendant's appeal, that the finding of facts for the appeal was filed, and notice thereof given to the defendant, on the 26th of July, 1906, and that the appeal was not filed until August 11, 1906, and not within ten days after such notice of the filing of the finding.

To this plea the defendant demurred, upon the ground that he was not required to file his appeal within ten days after July 26th, since chapter 24 of the Public Acts of 1905 provides that "all proceedings to make or complete the record on such appeal shall be suspended during the months of July and August."

The plea in abatement is insufficient. The appeal was filed in time. The filing of the finding in July and of the appeal in August were effective, notwithstanding the provision that all proceedings should be suspended during those months. That provision was not intended to prevent either court or counsel from filing the necessary papers to make or complete the record on the appeal, during the months of July and August, to become operative upon the expiration of that period.

As the drugstore was not conducted as a part of the business of the general store, but as a separate and independent business, carried on in another building, and under another name, the decision of the trial court that the sale was within the statute is clearly sustainable, upon the ground that it was a sale of Hendrick's whole stock in trade in an independent business.

Section 4868 as amended by chapter 72 of the Public Acts of 1903 is not invalid as conflicting with either the federal or state constitution.

In 1901 an act entitled "An act concerning sales of personal property" was passed, which provided in effect, as

afterward stated in section 4868 of the General Statutes, that any sale by such dealer, at a single transaction and not in the regular course of business, of the whole or a large part of this stock in trade, should be in writing, describing the property sold and all the conditions of the sale, acknowledged before competent authority, and recorded within one day after the sale in the town clerk's office where the vendor had his place of business; and, as afterward stated in section 4869 of the General Statutes, that such sales made without these formalities should be void as against the creditors of the vendor at the time of the sale: Pub. Acts 1901, p. 1356, c. 161.

In 1903 an act was passed, entitled "An act concerning the transferring of a person's business," which was ⁴³⁹ in force at the time the sale in question was made, and which reads as follows: "Section 4868 of the General Statutes is hereby amended to read as follows: No person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, shall, at a single transaction and not in the regular course of business, sell, assign or deliver the whole, or a large part of his stock in trade, unless he shall, not less than seven days previous to such sale, assignment or delivery, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment or delivery, which notice shall be in writing describing in general terms the property to be so sold, assigned or delivered, and all conditions of such sale, assignment or delivery, and the parties thereto": Pub. Acts 1903, p. 49, c. 72. Said act neither repealed nor changed section 4869 of the General Statutes.

In 1905 section 4868 of the General Statutes was further amended, so that instead of absolutely prohibiting such sales without such notice, as the language of that section did, it should only render them void as against the vendor's creditors: Pub. Acts 1905, p. 408, c. 211.

In *State v. Reynolds*, 77 Conn. 131, 58 Atl. 755, in sustaining, as a valid exercise of the police power of the state, section 1358 of the General Statutes prohibiting any person from exposing for sale from any wagon or temporary stand any article of provisions within one mile from the fair ground of any incorporated society, we expressly approved of the language of the courts of other jurisdictions, describing the police power of the state as extending "beyond the protection of health, peace, morals, education and good order,"

and as comprehending "all those general laws of internal regulation necessary to secure the peace, good order, the health and comfort of society, and the regulation and protection of all property in the state," and as the "power to prescribe regulations to promote the health, peace, morals, education and good order of the people. ⁴⁴⁰ and to legislate so as to increase the industries of the state . . . and add to its wealth and prosperity"; citing *State v. Harrington*, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100, and *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923.

In *Walp v. Moar*, 76 Conn. 515, 57 Atl. 277, we said of section 4868 as it read before it was amended in 1903, that it was not unconstitutional because it applied only to retail dealers, nor as depriving persons of their property without due process of law; that the purpose of the act was to prevent fraud; that the legislature had the undoubted power to adopt reasonable measures for regulating the sale of merchandise in this state so as to prevent fraud; and that the act then in question was clearly within that power.

No citizen has an absolute right to sell his property either in such manner or at such time as he may choose. Every person holds his rights, however fundamental they may be, subject to the exercise, within constitutional limits, of that governmental power vested in the legislature of the state in which he resides, which is commonly called the police power: *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. ed. 620.

While the exercise of such power by the legislature is only to be justified upon the ground that it is for the public good; that its purpose is the removal of an existing evil; that the provisions of the act bear a reasonable relation to the evil sought to be cured, and that they are such as are not unduly oppressive upon individuals, and do not impose unnecessary restrictions upon lawful occupations—yet when courts are required to pass upon the validity of such legislation it is to be remembered that in the exercise of such police power "a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests" (*Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385); that every such law is not to be held void "which may seem to the judges who pass upon it excessive, or unsuited to its ostensible end, or ⁴⁴¹ based upon conceptions of morality with which they disagree" (*Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. ed. 323;

Atehison etc. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. Rep. 609, 43 L. ed. 909); that "every presumption and intendment is to be made in favor of its validity, and unless it appears, beyond reasonable doubt, to be 'a clear usurpation of power prohibited,' it must stand as a valid act": State v. Reynolds, 77 Conn. 131, 58 Atl. 755; Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. Rep. 425, 46 L. ed. 623; State v. Main, 69 Conn. 123, 61 Am. St. Rep. 30, 37 Atl. 80, 36 L. R. A. 623; State v. Feingold, 77 Conn. 326, 59 Atl. 211.

The manifest purpose of the act in question is to protect creditors of retail dealers against a class of sales which are often fraudulent, and opportunities for making which are readily afforded by the nature of the retail business and the manner in which it is usually conducted: Walp v. Mooar, 76 Conn. 515, 57 Atl. 277. Enactments to prevent such fraudulent transfers are clearly within that class of legislation generally denominated police regulations. In considering whether, in passing this particular act, the legislature has transcended the limits of its constitutional authority, we are to inquire whether the methods provided by the act for curing the existing evil are reasonably appropriate for that purpose, and whether they unreasonably infringe upon personal or property rights.

Section 4868, as originally enacted, provided no other notice to creditors than by the recording of the bill of sale within one day after the sale. In enacting the amendment of 1903, the legislature probably believed that a notice before the sale would be a much more effectual means of enabling creditors to protect their rights than a notice after the sale had been made.

It may be that this act approaches the verge of legislative power, but we cannot say that its requirements as to the manner and time of giving notice of the sale are so clearly unreasonable or so unnecessarily burdensome as to compel us to hold that any constitutional rights have been infringed. It cannot be said that such notice as creditors ⁴⁴² would receive from the recording, seven days before the sale, of a notice of his intention to sell by the vendor, would give them an unnecessarily long time to take steps to protect their interests.

Although by the language of the amendment of 1903, taken strictly, sales of the character there described, made without the required notice, are absolutely forbidden, it is apparent, and especially from the fact that section 4869 was left unchanged, that they were only intended to be voidable at the instance of creditors.

It does not seem to us, either from a consideration of the requirements themselves of the act or of the facts of the case before us, that the restrictions placed by the legislature upon sales of the kind in question are such as will cause such serious inconvenience to those affected by them as will amount to any unconstitutional deprivation of property. A retail dealer who owes no debts may lawfully sell his entire stock without giving the required notice. One who is indebted may make a valid sale without such notice, by paying his debts even after the sale is made. Insolvent and fraudulent vendors are those who will be chiefly affected by the act, and it is for the protection of creditors against sales by them of their entire stock at a single transaction and not in the regular course of business, that its provisions are aimed. It is of course possible that an honest and solvent retail dealer might, in consequence of the required notice before the sale, lose an opportunity of selling his business, or suffer some loss from the delay of a sale occasioned by the giving of such notice. But a "possible application to extreme cases" is not the test of the reasonableness of public rules and regulations: *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142. "The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public": *Chicago etc. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624, 41 L. R. A. 481.

Statutes imposing even more severe restrictions upon ⁴⁴³ such sales than those of the act before us have been sustained in other jurisdictions in the cases cited in *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277, of *Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 312, 69 N. E. 312, *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37, 60 L. R. A. 947, and *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50.

The fact that some of the goods replevied were placed in stock by the defendant after his attempted purchase from Hendrick does not entitle the defendant to retain them. It appears that he merely replaced goods sold with others purchased with the avails of such sales.

There is no error.

In this opinion Baldwin, Prentice and Shumway, JJ., concurred.

Justice Hamersley Dissented from the foregoing opinion, and in part said:

"The act of 1903, read in connection with its amendment by chapter 211 of the Public Acts of 1905, requires every retail dealer, before making a sale of his stock in trade, to come to an agreement with his vendee as to all the conditions of the sale; to state these conditions in writing, together with a description of the property to be sold and the parties to the sale; and to cause this writing, signed by him, to be recorded at least seven days previous to making such sale, under penalty, in case of disobedience, of the sale being void as against existing creditors.

"Do these limitations upon the owner's right to sell his property necessarily involve a substantial impairment of the value of that property? If they do, then the act takes private property without compensation, and it is immaterial under what form of words or pretense the result is accomplished. 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority': *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205. The validity of the act of 1903 turns upon the answer to this question. If the limitations upon sale involve no substantial impairment of the value of the owner's property, then the justification of the incidental annoyance to the owner may be regarded as a legislative rather than a judicial question; but if the necessary effect of the act is destruction of private property without compensation, then the principles of the law applicable to such a case involve the invalidity of the act. As to these principles there is little, if any, controversy. They are settled by our own decisions in accordance with the weight of authority in other jurisdictions. The protection of the citizen in the equal enjoyment of personal freedom and private property are secured by our constitution in terms as broad as those which vest the legislative power in the General Assembly. The power to destroy or substantially impair these rights is not included in the grant of legislative power, and a law purporting to be the exercise of legislative power, whether of the power of taxation, or of trade regulation, or of protective legislation (often called police power), or of any other legislative power, is void if in effect it is a substantial impairment of those rights secured by the constitution against the operation of every manifestation of legislative power: *State v. Conlon*, 65 Conn. 478, 48 Am. St. Rep. 227, 33 Atl. 519, 31 L. R. A. 55; *State v. Travelers' Ins. Co.*, 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481; *McKeon v. New York etc. R. Co.*, 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730; *State v. McMahon*, 76 Conn. 97, 55 Atl. 591; *State v. Feingold*, 77 Conn. 326, 59 Atl. 211. . . .

"If, therefore, the restrictions of the act of 1903 do substantially impair the value of the property affected, there is no serious question as to its invalidity. Acts imposing somewhat similar restrictions and

apparently intended to accomplish a similar purpose were in the same year (1903), through a strange coincidence, enacted by the legislatures of a large number of states. The courts of New York, Ohio and Utah have held such legislation invalid: *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A., N. S., 338; *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631; *Block v. Schwartz*, 27 Utah, 387, 101 Am. St. Rep. 971, 76 Pac. 22, 65 L. R. A. 308. The courts of Massachusetts, Tennessee and Washington have supported their validity: *Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37, 60 L. R. A. 947.

"In this class of cases the primary question is, Does the law in its necessary practical effect appropriate property not dangerous to the public either inherently or in its particular use? This question determined, the application of the settled principles defining the limitation of legislative power is comparatively simple. As was said in *State v. Feingold*, 77 Conn. 326, 59 Atl. 211: 'In drawing the line which separates the field of arbitrary interference with protected rights of property and freedom in personal action, from that of protective legislation in behalf of public safety, each case must fall on one or the other side in accordance with its particular circumstances.' The act of 1903 prohibits all retail dealers from selling their property which is palpably not dangerous to public safety either inherently or in its particular use, without complying with certain antecedent requirements. Applying the rule of common sense to the commonly known conditions of trade, it seems to me that the necessary practical effect of these requirements is a substantial impairment of the value of the property affected, and for this reason (without reference to the question whether the act also violates that equality under the law in the enjoyment of civil rights which is guaranteed by our constitution) I am unable to concur in the decision of the court."

The Principal Case was Affirmed by the Supreme Court of the United States in *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. Rep. 174, 53 L. ed. 000, Justice White delivering the following opinion therein:

"Whether the following provisions of the general laws of Connecticut are repugnant to the fourteenth amendment because wanting in due process of law and denying the equal protection of the laws is the question for decision.

"Section 4868, as amended by chapter 72 of the Public Acts of Connecticut of 1903: No person who makes it his business to buy commodities and sell the same in small quantities, for the purpose of making a profit, shall, at a single transaction, and not in the regular course of business, sell, assign, or deliver the whole, or a large part of his stock in trade, unless he shall, not less than seven days previous to such sale, assignment, or delivery, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or

delivery, which notice shall be in writing, describing in general terms the property to be so sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, and the parties thereto.

"Sec. 4869. All such sales, assignments, or deliveries of commodities which shall be made without the formalities required by the provisions of section 4868 shall be void as against all persons who were creditors of the vendor at the time of such transaction."

"The controversy thus arose: Philip E. Hendrick conducted a retail drugstore at Taftville, Connecticut. While engaged in such business, in August, 1904, he sold his stock in bulk to Joseph A. Lemieux, his clerk, for a small cash payment and his personal negotiable notes. The sale was made without compliance with the requirements of the statute above quoted. Subsequently Hendricks was adjudicated a bankrupt, and the trustee of his estate commenced this action against Lemieux and replevied the stock of goods. Among other grounds the trustee based his right to recover upon the noncompliance with the statutory requirements in question. In the trial one of the grounds upon which Lemieux relied was the assertion that the statute was void for repugnancy to the fourteenth amendment to the constitution of the United States, because wanting in due process of law and denying the equal protection of the laws. The trial court adjudged in favor of the trustee, and his action in so doing was affirmed by the supreme court of errors of Connecticut, to which the case was taken on appeal: 79 Conn. 434, ante, p. 193, 65 Atl. 436, 20 L. R. A., N. S., 160, 8 Am. & Eng. Ann. Cas. 452. The cause was then brought to this court.

"The supreme court of errors, in upholding the validity of the statute, decided that the subject with which it dealt was within the police power of the state, as the statute alone sought to regulate the manner of disposing of a stock in trade outside of the regular course of business, by methods which, if uncontrolled, were often resorted to for the consummation of fraud, to the injury of innocent creditors. In considering whether the requirements of the statute were so onerous and restrictive as to be repugnant to the fourteenth amendment, the court said:

"It does not seem to us, either from a consideration of the requirements themselves of the act, or of the facts of the case before us, that the restrictions placed by the legislature upon sales of the kind in question are such as will cause such serious inconvenience to those affected by them as will amount to any unconstitutional deprivation of property. A retail dealer who owes no debts may lawfully sell his entire stock without giving the required notice. One who is indebted may make a valid sale without such notice, by paying his debts, even after the sale is made. Insolvent and fraudulent vendors are those who will be chiefly affected by the act, and it is for the protection of creditors against sales by them of their entire stock at a single transaction, and not in the regular course of business, that its provisions are aimed. It is, of course, possible that an honest and solvent retail dealer might, in consequence of the required notice before the sale,

lose an opportunity of selling his business, or suffer some loss from the delay of a sale, occasioned by the giving of such notice. But a "possible application to extreme cases" is not the test of the reasonableness of public rules and regulations: *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142. "The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public": *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624, 41 L. R. A. 481.'

"That the court below was right in holding that the subject with which the statute dealt was within the lawful scope of the police authority of the state, we think is too clear to require discussion. As pointed out by Vann, J., in a dissenting opinion delivered by him in *Wright v. Hart*, 182 N. Y. 350, 75 N. E. 404, 2 L. R. A., N. S., 338, 3 Am. & Eng. Ann. Cas. 263, the subject has been, with great unanimity, considered not only to be within the police power, but as requiring an exertion of such power. He said:

"Twenty states, as well as the federal government in the District of Columbia, have similar statutes, some with provisions more stringent than our own, and all aimed at the suppression of an evil that is thus shown to be almost universal. California: Civ. Code, sec. 3440, as amended March 10, 1903 (Stats. 1903, c. 100, p. 111). Colorado: Sess. Laws 1903, c. 110, p. 225. Connecticut: Pub. Acts 1903, c. 72, p. 49. Delaware: Laws 1903, c. 387, p. 748. District of Columbia: 33 Stats. at Large, 555, c. 1809; Acts 58th Cong. April 28, 1904. Georgia: Laws 1903, p. 92, No. 457. Idaho: Laws 1903, p. 11, H. B. 18. Indiana: Acts 1903, c. 153, p. 276. Kentucky: Acts 1904, c. 22, p. 72. Louisiana: Acts 1896, p. 137, No. 94. Maryland: Laws 1900, c. 579, p. 907. Massachusetts: Acts and Resolves 1903, c. 415, p. 389. Minnesota: Gen. Laws 1899, c. 291, p. 357. Ohio: Laws 1902, p. 96, H. B. 334. Oklahoma: Sess. Laws 1903, c. 30, p. 249. Oregon: B. & C. Ann. Codes & Stats., c. 7, p. 1479. Tennessee: Acts 1901, c. 133, p. 234. Utah: Laws 1901, c. 67, p. 67. Virginia: Acts approved January 2, 1904; Acts 1902-04, c. 554, p. 884 (Va. Code 1904, p. 1217, sec. 2460a). Washington: Laws 1901, c. 109, p. 222. Wisconsin: Laws 1901, c. 463, p. 684. A statute with the same object attained by a similar remedy has been held valid by the highest courts in Massachusetts, Connecticut, Tennessee and Washington: *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Walp v. Moorar*, 76 Conn. 515, 57 Atl. 277; *Neas v. Borehes*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37, 60 L. R. A. 947. An act declaring such sales presumptively fraudulent was assumed to be valid by the courts of last resort in Wisconsin and Maryland: *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392; *Hart v. Roney*, 93 Md. 432, 49 Atl. 661. On the other hand, a statute with more exacting conditions was held unconstitutional in Ohio (*Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 1 Am. & Eng. Ann. Cas. 558), and a similar act met the same fate in Utah, where a violation of the statute was made a crime:

Block v. Schwartz, 27 Utah, 387, 101 Am. St. Rep. 971, 76 Pac. 22, 65 L. R. A. 308, 1 Am. & Eng. Ann. Cas. 550.'

"To the cases thus cited may be added *Williams v. Fourth Nat. Bank*, 15 Okl. 477, 82 Pac. 496, 2 L. R. A., N. S., 334, 6 Am. & Eng. Ann. Cas. 970, where a statute was sustained, which made sales in bulk presumptively fraudulent when the requirements of the statute were not observed.

"The argument here, however, does not deny all power to pass a statute regulating the subject in question, but principally insists that the conditions exacted by this particular statute are so arbitrary and onerous as to cause the law to be repugnant to the fourteenth amendment. To support this view in many forms of statement it is reiterated that the conditions imposed by the statute so fetter the power to contract for the purchase and sale of property of the character described in the statute as to deprive of property without due process of law; and, moreover, because the conditions apply only to retail dealers, it is urged that the necessary effect of the statute is, as to such dealers, to give rise to a denial of the equal protection of the laws. We think it is unnecessary to follow in detail the elaborate argument by which it is sought to sustain these propositions. Their want of merit is demonstrated by the reasoning by which the court below sustained the statute, as partially shown by the excerpt which we have previously quoted from the opinion announced below. Indeed, the court below, in its opinion, pointed out that the statute did not cause sales which were made without compliance with its requirements to be absolutely void, but made them simply voidable, at the instance of those who were creditors at the time the sales were made. Moreover, the unsoundness of the contentions is additionally shown by the number of cases in the state courts of last resort, sustaining statutes of a similar nature, which we need not here cite, as they are referred to in the excerpt heretofore made from the opinion of Vann, J., in *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A., N. S., 338.

"Much support in argument was sought to be deduced from the opinion in *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A., N. S., 338; *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 1 Am. & Eng. Ann. Cas. 558, and *Block v. Schwartz*, 27 Utah, 387, 101 Am. St. Rep. 971, 76 Pac. 22, 65 L. R. A. 308, 1 Am. & Eng. Ann. Cas. 550. It is true that in those cases the statutes dealing with the subject with which the one before us is concerned were decided to be unconstitutional. But we think it unnecessary to analyze the cases or to intimate any opinion as to the persuasiveness of the reasoning by which the conclusion expressed in them was sustained. This is said because it is apparent from the most casual inspection of the opinions in the cases in question that the statutes there considered contained conditions of a much more onerous and restrictive character than those which are found in the statute before us.

"As the subject to which the statute relates was clearly within the police powers of the state, the statute cannot be held to be repugnant

to the due process clause of the fourteenth amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power: *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. Rep. 425, 46 L. ed. 623. This, we think, is clearly not the case. So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection of the laws.

"Affirmed."

The Constitutionality of Statutes Regulating Sales in bulk is the subject of a note to Block & Griff v. Schwartz, 101 Am. St. Rep. 986. Such statutes have generally been held free from objection on constitutional grounds: *Spurr v. Travis*, 145 Mich. 721, 116 Am. St. Rep. 330; *Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322; *Neas v. Borches*, 109 Tenn. 298, 97 Am. St. Rep. 851. Some courts, however, have taken a different view: *Block & Griff v. Schwartz*, 27 Utah, 387, 101 Am. St. Rep. 971; *Off & Co. v. Morehead*, 235 Ill. 40, 126 Am. St. Rep. 184.

STATE v. KILBURN.

[81 Conn. 9, 69 Atl. 1028.]

CITY ASSESSMENTS—Whether Lien on State Property.—A city cannot, without the permission of the state, assess benefits against it as the owner of land benefited by a public improvement; and general expressions granting liberty to assess all persons specially benefited do not import such permission. (pp. 206, 207.)

STATE—Whether must do Equity Toward Defendant.—A state by bringing an equitable action opens the door to any defense or cross-complaint germane to the matter in controversy. A sovereign who asks for equity must do equity. (p. 208.)

CITY ASSESSMENTS—Priority of School Mortgage.—The lien for a sewer assessment or for the expense of removing snow and ice from sidewalks, though taking precedence over prior liens held by a private individual because of the public interest, is inferior to a school fund mortgage, prior in date and record. (p. 208.)

Action to foreclose a school fund mortgage, wherein the city of Hartford filed an answer setting up liens imposed on the land under its charter. The other defendants failed to make an appearance, and a decree having been rendered against them by default, they failed to redeem. A demurrer to part of the answer of the city was filed, and the questions thereon arising were reserved for the advice of this court.

Edward M. Day and Marcus H. Holcomb, attorney general, for the plaintiff.

Lawrence A. Howard, for the defendant.

¹⁰ BALDWIN, C. J. The charter of the city of Hartford (6 Special Laws, p. 315; 8 Special Laws, p. 111) authorizes the court of common council to assess the whole or any part of the expense of constructing a sewer upon the persons whose property is in its opinion specially benefited thereby, or, at its option, directly upon any land so benefited. Any such assessment of benefits "shall be a lien upon the land on account of which they were assessed," commencing from the time of the passage of the vote ordering the construction of the sewer, and can be perpetuated by filing a proper certificate with the town clerk: *Hartford v. Mechanics Savings Bank*, 79 Conn. 38, 63 Atl. 658.

The charter (10 Special Laws, p. 225) also provides that for any expense incurred by it in removing snow from a sidewalk, the city shall have "a claim against the owner or proprietor of the land adjacent to such sidewalk, which may be collected and enforced at law, and a lien and real encumbrance in favor of said city upon said land," which can be perpetuated by a similar certificate.

¹¹ Liens evidenced respectively by a certificate of the former kind, for a sewer assessment against the estate of one Kilburn, and certificates of the latter kind for a claim against the same estate for the expense of removing snow from a sidewalk, were imposed upon a lot of land in Hartford, which had previously been mortgaged by Kilburn to the state, to secure a note for a loan made from the school fund and payable on demand at the office of the school fund commissioner, with interest payable semi-annually.

By General Statutes, section 1954, city liens for assessments of benefits for any public work may be foreclosed in the same manner as tax liens. They put the owner of the land against whom the assessment is made in the position of a debtor to the city: *Hartford v. Mechanics' Savings Bank*, 79 Conn. 38, 63 Atl. 658. They also rank before mortgages to private individuals previously existing and recorded: *Norwich v. Hubbard*, 22 Conn. 587. Do they have like priority over such a mortgage to the state?

The city could not, without the permission of the state, assess benefits against it as the owner of land benefited by a public improvement. General expressions, granting it liberty to assess all persons specially benefited would not import

such permission. The state holds the immunities in this respect belonging by the English common law to the king. It is not to be sued without its consent. Its rights are not to be diminished by statute, unless a clear intention to that effect on the part of the legislature is disclosed, by the use of express terms or by force of a necessary implication: *State v. Hartford*, 50 Conn. 89, 47 Am. Rep. 622.

With respect to such assessments on land "belonging to" the state, the charter of Hartford (13 Special Laws, p. 504, section 4) now grants full power. The term "belonging to," as thus used, imports beneficial ownership: *Brooks v. Hartford*, 61 Conn. 112, 23 Atl. 697. There is no implication that like power is given as to land on which the state may have a mortgage, for the benefit of the school fund. School fund loans on mortgage can only be made on unencumbered lands worth double the amount loaned: ¹² Gen. Stats., sec. 157. One holding such a mortgage stands in no need of further security. He would, however, be prejudiced should, after the acquisition of his mortgage title, any other and subsequent encumbrance be given priority. The law expressly provides that "no tax assessed upon property mortgaged to the state of Connecticut to secure a loan from the school fund, shall be a lien upon said property which shall take precedence of such mortgage or mortgages thereon": Gen. Stats., sec. 2392. It is unnecessary to determine whether the words "tax assessed," as thus used, cover benefits assessed: See *Bridgeport v. New York etc. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Sargent v. Tuttle*, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822. They certainly do not justify any inference that municipal assessments for benefits can take precedence of a school fund mortgage prior in date and record.

The preservation of that fund inviolate was specially guarded in the constitution (article 8, section 2) which declares that it shall "remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public, or common schools throughout the state, and for the equal benefit of all the people thereof," and that "no law shall ever be made, authorizing said fund to be diverted to any other use than the encouragement and support of public or common schools, among the several school societies, as justice and equity shall require." If, in the face of these provisions, any statute could avail to subject an investment of the fund, once properly made, to risk of loss from a cause subsequently arising, it would require

at least a clear and unmistakable expression of the legislative will.

This action being an equitable one, the state, by bringing it, opened the door to any defense or cross-complaint germane to the matter in controversy, that the city might see fit to interpose. A sovereign who asks for equity must do equity: *Rowan v. Sharps Rifle Mfg. Co.*, 29 Conn. 282.

There is, however, no equity in favor of the city. Liens¹³ for municipal assessments on account of the expense of a public work override a prior mortgage to a private individual because the municipality is a public body, and it is for the public interest that the collection of such assessments should be made secure: *Albany Brewing Co. v. Meriden*, 48 Conn. 243. They are imposed by authority of the state, and by a political agency of the state, which, so far forth, participates in the exercise of its sovereignty. But because a city to that extent shares in the privilege of a sovereign to command a preference over ordinary creditors, it does not follow that it can command it as against the sovereign itself.

As the lien for the sewer assessment is inferior to the school fund mortgage, those for the expense of cleaning sidewalks, *a fortiori*, are also.

The court of common pleas is advised to sustain the demurrer of the state.

No costs will be taxed in this court.

In this opinion the other judges concurred.

A State is Exempt from Suit either directly or indirectly by making one of its officers defendant: *Elmore v. Fields*, 153 Ala. 345, 127 Am. St. Rep. 31; *Alabama Industrial School v. Addler*, 144 Ala. 555, 113 Am. St. Rep. 58; *General Oil Co. v. Crain*, 117 Tenn. 82, 121 Am. St. Rep. 967; *Sanders v. Saxton*, 182 N. Y. 477, 108 Am. St. Rep. 826, and note.

The Exemption of School Districts from Taxation does not, according to some authorities, exempt their property from special assessments for street improvements: *In re Howard Avenue North*, 44 Wash. 62, 120 Am. St. Rep. 973.

HUBLEY MANUFACTURING AND SUPPLY COMPANY
v. IVES.

[81 Conn. 244, 70 Atl. 615.]

SETOFF—Judgment of Sister State.—A Claim for Unliquidated Damages for breach of contract can be set off in a suit by a non-resident, upon a judgment of a sister state, against a citizen of this state. (pp. 209, 211.)

SETOFF.—It is a General Principle that two suits shall not be maintained for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, or to both, when such determination can be had as effectually and properly in one suit. (p. 210.)

SETOFF.—Equity Recognizes Rights of Setoff which go far beyond those which the early legislation of England and of Connecticut introduced in actions at common law. Rights may be the proper subject of a counterclaim, under the Connecticut practice act, although not founded on any debt which could be called "mutual" according to the earlier definition of that term. (p. 211.)

Hobart L. Hotchkiss and Harry W. Asher, for the appellant.

Edmund Zacher, for the appellee.

245 BALDWIN, C. J. The sole question in this cause is whether a claim for unliquidated damages for breach of contract can be set off in a suit by a nonresident, upon a judgment of a sister state, against a citizen of Connecticut.

The defendant, admitting in his answer that the judgment was duly rendered in 1899, and that one hundred and twenty-three dollars and seventy-four cents remains unpaid upon it, pleaded by way of counterclaim that in May, 1904, the defendant agreed to buy of the plaintiff, and the plaintiff agreed to sell and deliver to the defendant, certain goods at a certain price, but that the plaintiff refused to deliver them as agreed, to the damage of the defendant in the sum of three hundred dollars, which sum he offered to set off; asking also a judgment for the balance that would then remain due. The demurrer was upon the ground that the damages thus claimed by the defendant were unliquidated, and his claim not of the nature of a mutual debt.

Under the practice act of 1879, in all cases not brought before a justice of the peace, "where the defendant has **246** either in law or in equity, or in both, a counterclaim, or right of setoff, against the plaintiff's demand, he may have the benefit of any such setoffs or counterclaims by pleading the same, as such, in his answer, and demanding judgment accordingly; and the same shall be pleaded and replied to, according to the rules governing complaints and answers":

Gen. Stats., sec. 612. That act also provided that in any such action "the plaintiff may include in his complaint both legal and equitable rights and causes of action, and demand both legal and equitable remedies"; that several causes of action on contract express or implied might be so united; and that "in all cases where several causes of action are joined in the same complaint, or as matter of counterclaim or setoff, in the answer, if it appear to the court that they cannot all be conveniently heard together, the court may order separate trials of any such causes of action, or may direct that any one or more of them be expunged from the complaint or answer": Gen. Stats., sec. 613. Both these sections are in furtherance of the fundamental purpose of the practice act, that "all courts which are vested with jurisdiction both in law and in equity may, to the full extent of their respective jurisdictions, administer legal and equitable rights and apply legal and equitable remedies, in favor of either party, in one and the same suit, so that legal and equitable rights of the parties may be enforced and protected in one action": Gen. Stats., sec. 532.

The defendant in the case at bar was therefore at liberty to file any counterclaim adapted to enforce the substantial equities between him and the plaintiff: *Norwich Printing Co. v. Kloppenberg*, 50 Conn. 295. In so doing he would be following what for nearly thirty years has been the established principle of our law, "that two suits shall not be brought for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, or to both, when such determination ²⁴⁷ can be had as effectually and properly in one suit": *Welles v. Rhodes*, 59 Conn. 498, 22 Atl. 286.

It appeared from the complaint that the defendant was a citizen of Connecticut, and the plaintiff a Massachusetts corporation suing on a judgment rendered by a court of Rhode Island. The counterclaim stated, and the demurrer necessarily admitted, that this corporation owed the defendant, as damages for a breach of contract, more than the amount of the judgment. It would not comport with the principles of equity, under such circumstances, to allow the plaintiff to use our courts to force the defendant to pay its claim against him upon the judgment, while refusing to satisfy his equally valid claim against it on the contract of sale, and leaving him, so far as appears, no remedy for its recovery except by a new suit brought in another state: See *Rowan v. Sharps Rifle Mfg. Co.*, 29 Conn. 282.

Our original statute of setoff provided that "in all actions, brought for the recovery of a debt, before any court in this state, wherein the plaintiff lives or resides out of this state, or is a bankrupt, or insolvent, and where there shall be mutual debts between the plaintiff and defendant in such action, one debt may be set off against the other": Stats., ed. 1821, p. 43, sec. 32. In the Revision of 1902, this appears in the following form: "In all actions brought for the recovery of a debt, if there shall be mutual debts between the plaintiff or plaintiffs, or either of them, and the defendant or defendants, or either of them, one debt may be set off against the other": Gen. Stats., sec. 649. This statute must be taken in connection with the broader provisions of the practice act. The court, on proper pleadings, is to settle the contractual relations of the parties in such a way as to do equity, and full equity, between them. Equity recognizes rights of setoff which go far beyond those which the early legislation of England and of Connecticut introduced in actions at common law: ²⁴⁸ *Goodwin v. Keney*, 49 Conn. 563. Such rights may be the proper subject of a counterclaim, under the practice act, although not founded on any debt which could be called "mutual" according to the definitions established under these statutes: *Boothe v. Armstrong*, 76 Conn. 530, 57 Atl. 173; 80 Conn. 218, 67 Atl. 484; *Betts v. Connecticut Life Ins. Co.*, 78 Conn. 442, 62 Atl. 345.

The plaintiff contends that the judgment appealed from was warranted by our opinion in *Harral v. Levery*, 50 Conn. 46, 47 Am. Rep. 608.

That was an action to foreclose a mortgage given by one Levery, who held the legal title, but was under an obligation to convey the property, for a sum much less than its value, to one McDonald. A foreclosure was granted against Levery as the legal owner and McDonald as the equitable owner; the decree providing that a redemption by McDonald should operate to vest in him the legal title. McDonald had filed a counterclaim against Levery for damages for fraud in refusing to make the stipulated conveyance, and also for the difference between the amount of the plaintiff's mortgage and the sum for which Levery had agreed to convey to him. We held that there was no error in refusing to McDonald the relief thus sought, since the matter which he set up was not so connected with the mortgage that its consideration was necessary to a full determination of the rights of the parties, and could furnish no ground for a setoff against the plain-

tiff. He had an equity against Levery, but none against Harral.

There is error; the judgment of the court of common pleas is reversed and the cause remanded, with instructions to overrule the demurrer.

In this opinion the other judges concurred.

The Right of Setoff was in the beginning a creature of equity jurisprudence, and was unknown to the common law. Statutes giving defendants the right to assert a setoff or counterclaim should be given a liberal interpretation: *Caldwell v. Ryan*, 210 Mo. 17, 124 Am. St. Rep. 717, and cases cited in the cross-reference note thereto.

The Right of Setoff is Usually Limited to Mutual Demands; *Drennen v. Gilmore*, 132 Ala. 246, 90 Am. St. Rep. 902; *Collins v. Campbell*, 97 Me. 23, 94 Am. St. Rep. 458.

Damages Readily Ascertainable may be Set Off against a liquidated demand: See, however, *Higbie v. Rust*, 211 Ill. 333, 103 Am. St. Rep. 204; *Rice v. Sanders*, 152 Mass. 108, 23 Am. St. Rep. 804; *Smith v. Washington Gaslight Co.*, 31 Md. 12, 100 Am. Dec. 49.

BULKLEY v. NORWICH AND WESTERLY RAILWAY COMPANY.

[81 Conn. 284, 70 Atl. 1021.]

COMPLAINT—Averment as to Time of Negligence.—An averment of the time when the events which furnish the basis of an action for negligence occurred is immaterial, and upon the trial proof that they occurred upon some subsequent day is admissible. (p. 213.)

COMPLAINT—Allegation of Time—Demurrer.—An allegation of time, originally immaterial, may become material by reason of subsequent pleading, but such a result does not follow from demurring. (p. 213.)

COMPLAINT—Recitals in Return as Basis for Demurrer.—Statements in the officer's return of service cannot be treated as part of the complaint and thus utilized by the defendant as a basis for demurrer. (p. 214.)

NEGLIGENCE—Presentation of Claim—Limitations—Pleading.—The Connecticut statute providing that no action for personal injuries not commenced within four months shall be brought against any railroad company unless a written notice of the injury shall have been given within that period, simply places a limitation analogous to the general statute of limitations upon the right of action, creating a condition subsequent by which an existing right is cut off rather than a condition precedent to a continuing right. Therefore, a defense predicated upon it need not be anticipated and negated by the plaintiff, but may properly be left to be pleaded by the defendant. (p. 214.)

Donald G. Perkins, for the appellant.

Richard H. Tyner, for the appellees.

²⁸⁴ PRENTICE, J. The complaint, dated November 21, 1907, alleges in substance that the plaintiff wife, on August 1, 1907, ²⁸⁵ while a passenger in the exercise of due care, on a car of the defendant common carrier, received bodily injuries as the result of a collision between such car and another car of the defendant going in the opposite direction upon the same track, which collision and injuries were caused by the negligence of the defendant, its servants and agents. There was no allegation of the giving of a written notice to the defendant. The officer's return of his service of the writ and complaint stated that it was made on December 2, 1907.

The defendant demurred to the complaint because "it appears and is alleged in said complaint that the injury to the plaintiffs constituting said cause of action occurred on August 1, 1907, and this action was not commenced within the period of four months from said August 1, 1907, as appears from the officer's return therein, and it is not alleged and does not appear in said complaint that written notice containing a general description of the injury and of the time, place and cause of its occurrence, as nearly as the same can be ascertained, was given to the defendant within four months after said August 1, 1907, the date of the neglect complained of in said action."

The demurrer was overruled, and this action of the court is assigned as the sole reason of appeal.

This demurrer involves two false assumptions, to wit: First, that the plaintiffs' allegations of time precluded them from proving that Mrs. Bulkley received her alleged injuries on some day later than that alleged; and second, that the statements of the officer in his return of service were to be accepted as facts coming within the purview of the demurrer to the complaint.

²⁸⁶ The plaintiffs' averment of the time when the events which furnished the basis of their cause of action occurred was an immaterial one, and upon a trial proof that they occurred upon some subsequent day, which would render the demurrer pointless, would have been admissible: *Fitzgerald v. Scovil Mfg. Co.*, 77 Conn. 528, 60 Atl. 132; *Sage v. Hawley*, 16 Conn. 106, 41 Am. Dec. 128; *Gould on Pleading*, 4th ed., c. 3, secs. 63, 64. An allegation of time originally immaterial may become material by reason of subsequent pleading: *Fitzgerald v. Scovil Mfg. Co.*, 77 Conn. 528, 60 Atl. 132. Such a result, however, does not follow from demurring. The complaint stated a good cause of action, since under its aver-

ments such a cause of action could be proved without creating a variance.

The demurrer was to the complaint. We have held that a complaint may, for the purposes of a demurrer, be read in connection with the writ which it accompanies: *Radezky v. Sargent*, 77 Conn. 110, 58 Atl. 709. It is a very different thing, however, to say that the statements in the return of the officer serving the writ and complaint may be treated as facts supplementing those set up in the complaint, and so forming a part of the complaint that they may be utilized by the defendant in a demurrer to the plaintiff's statement of his cause of action. We can imagine no justification for such a proposition. The facts attending the officer's action, although reported to the court in a return on file as a part of the record of the cause and importing verity, are facts aliunde the pleadings, and must be pleaded by whichever party would avail himself of them, thus permitting an issue of fact to be joined thereon. The language of the demurrer indicates that the defendant appreciated that it was going outside of the complaint for a necessary fact and pleading it as a fact. The demurrer carefully refrains from stating that it appears from the complaint that the action was not begun within the four-month period. On the contrary, ²⁸⁷ it asserts the proposition that such was the fact, thus making it in form, as it was in fact, a speaking demurrer. If the defendant desired to avail itself of the date of service, it was its duty to set it up in a defense in bar of the action.

Section 1130 of the General Statutes, with which we are here concerned, is quite different in its character from section 2020 relating to actions against municipal corporations by reason of defective highways. The latter section gives a right of action where there would otherwise be none, and makes the giving of a prescribed notice a condition precedent to the existence of such a right under any and all circumstances: *Crocker v. Hartford*, 66 Conn. 387, 34 Atl. 98; *Forbes v. Suffield*, 81 Conn. 274, 70 Atl. 1023. On the other hand, an action may be maintained against this defendant upon the facts set up in this complaint. A written notice is not a prerequisite. Section 1130 simply places a limitation, analogous to the general statute of limitations, upon the right of an injured party to prosecute such an action without further proceedings. This limitation is to be regarded as creating a condition subsequent, by which an existing right is cut off by the nonperformance of the condition, rather than a condition precedent to a continuing right. Such being its

essential character, a defense predicated upon it, as upon conditions subsequent and limitations generally, need not be anticipated and negatived by the plaintiff, but may properly be left to be pleaded by the defendant: Gould on Pleading, 4th ed., c. 4, sec. 17.

The court in its memorandum assigned another reason for its action in overruling the demurrer. We have no need to pass upon the sufficiency of this reason.

There is no error.

In this opinion the other judges concurred.

The Giving of Notice Required by Statute of a claim against a city for injuries based upon its negligence is a prerequisite to the right to recover for the injury; and if the claim is not presented within the time fixed, the right of action is extinguished: Hay v. City of Baraboo, 127 Wis. 1, 115 Am. St. Rep. 977. As to whether such a provision of the law is a statute of limitations which is suspended during the infancy of the claimant or during his physical disability, see Winter v. City of Niagara Falls, 190 N. Y. 198, 123 Am. St. Rep. 540; Forsyth v. City of Oswego, 191 N. Y. 441, 123 Am. St. Rep. 605.

BARRY v. McCOLLOM.

[81 Conn. 293, 70 Atl. 1035.]

LIBEL—Report of School Superintendent.—A superintendent of schools who, in his official report to the school visitors, makes statements reflecting on the efficiency of a teacher, is protected by his privilege if he honestly believes his statements to be true and makes them in good faith. It is not necessary to his protection that he must have had what might seem to the jury "good reason" or "reasonable grounds" for believing the statements true, nor is he bound to prove that he published them with no intention of injuring the teacher. (p. 217.)

WORDS AND PHRASES.—The Word "Injury" includes any act or omission which harms or damages another, whether or not it is justified by law. (p. 218.)

LIBEL—Presumption of Malice and Falsity.—Statements made in his official report by a superintendent of schools, which reflect on the efficiency of a teacher, are in the nature of a privileged communication, and she can rely on no presumption either of falsity or malice. (p. 218.)

LIBEL.—The Declarations of a Person Charged with Libel expressing his feeling with reference to the libelous statements, made a few days prior to the statements, may be relevant, if made in a natural manner and not under circumstances suggesting a purpose to manufacture evidence in his own favor, not as part of the *res gestae*, but as the best evidence of the existence of the facts as to which they speak. (p. 219.)

LIBEL—Declarations of Defendant.—Whether Remoteness in Point of Time so weakens declarations of a person charged with libel

as to make them not worth being admitted in evidence is a matter addressing itself to the sound discretion of the trial judge. (p. 219.)

LIBEL—Statements Reflecting on Teacher.—Where one of the statements in the report of a superintendent of schools is that a teacher has not “even the externals of refinement,” the court should not instruct, after the teacher has taken the stand in her own behalf, that “the possession of the externals of refinement is rather a subject of your own observation, because you know by seeing a person whether they have or not the externals of refinement.” (p. 220.)

Charles E. Perkins and Herbert O. Bowers, for the appellant.

Benedict M. Holden and Hugh M. Alcorn, for the appellee.

294 **BALDWIN, C. J.** In May, 1907, the plaintiff was the teacher of a public district school in the town of South Windsor, and the defendant was the superintendent of all **295** the public schools in that and another town. One of his duties was to report to the board of school visitors in each town in regard to the efficiency and qualification of the teachers employed in the different schools. He made a written report to the secretary of the South Windsor board, in which are statements concerning the plaintiff which were libelous, unless protected as a privileged communication. She brought this action, alleging a publication of these statements and that they were false and malicious. His answer denied that they were false and malicious, set up the official relations of the parties and his consequent privilege, and also averred the truth of everything contained in the report.

In the charge to the jury the trial court, after stating that the defendant could claim the benefit of protection for whatever was contained in the report by a conditional or qualified privilege, and that the controlling question for them to decide was whether he published it in good faith, without any improper or unjustifiable motive, proceeded thus:

“The defendant is not obliged to prove the words were in fact true, but he must prove that he believed them to be true, and had reason to believe them to be true, and that they were published in good faith, and with no intention and purpose on his part of injuring the plaintiff, but with an intention of performing his duty in reporting to the school board of South Windsor what he believed to be true, and had good reason for believing to be true. . . .

“In order to find in favor of the plaintiff in this case, you must find from the evidence the existence of some improper and unjustifiable motive on the part of the defendant when he made the report in question. The defendant may have

arrived at conclusions without sufficient evidence, but the privilege protects him from liability in this suit on that ground, until the plaintiff has overcome the presumption of good faith by proof of malice in fact, ²⁹⁶ as she assumes the burden of proof of the existence of malice by other proof than the presumption which arises from the mere publication of the defamatory matter. . . .

"Now, in determining his good faith, you must ask yourselves upon what evidence did he make these statements. He is relieved, by reason of the position which he occupied, from the ordinary duty of a person who makes slanderous or libelous statements to prove their exact truth. He is entitled to be relieved from liability if he honestly believed them to be true, and made them in good faith. . . .

"If the facts stated in the report, or any of them, imputing unfitness to teach on the part of the plaintiff, Miss Helen Barry, are not true, and the defendant knew they were not true, then the conclusion that he acted in bad faith is almost irresistible. But if the defendant did not know the statements in the report were untrue, then you should ask yourself the question whether he had reasonable grounds for believing them to be true, and if you find that he did, you would be justified in finding a verdict in his favor. But if you find that he had not reasonable grounds for believing his statements to be true, you would be justified in finding a verdict in favor of the plaintiff."

The jury were thus correctly instructed at one point in the charge that the defendant was protected by his privilege if he honestly believed his statements to be true and made them in good faith, and incorrectly instructed at other points that he must have had "good reason," or "reasonable grounds," for believing them to be true, and also was bound to prove that he published them with no intention and purpose of injuring the plaintiff.

The necessary and inevitable effect of such a report was to injure the plaintiff. It charged her with faults so serious that those charged with the duty of employing her or re-employing her as a teacher, if they gave credit to ²⁹⁷ them, would naturally discharge or decline to re-engage her. The jury could not fail to find that the defendant must have known this, and therefore that he intended to injure her, for the word "injury," as generally used, includes any act or omission which harms or damages another, whether it be or be not justified by law.

Nor was it necessary for the defendant's justification that he should have had what might seem to the jury good reason or reasonable grounds for the injurious statements contained in his report. It was enough if he honestly and in good faith, at the time when he made them, believed them to be true. This required nothing more than that there were grounds for such a belief which then seemed to him reasonable and sufficient, and that his motive in making the publication was an honest desire to discharge the duties of his office with fidelity: *Haight v. Cornell*, 15 Conn. 74.

The charge was also erroneous in respect to the burden of proof. The foundation of the plaintiff's case was that the statements of which she complained were false and malicious. Her averment that they were such having been traversed, although their truth had been specially pleaded, when, in the course of the trial, it became an admitted fact that the defendant made them in an official report, which in its nature was a privileged communication, she could rely on no presumption either of falsity or malice: *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865.

With respect to this particular point, the trial court charged the jury that "if the defendant believed, and had good reason to believe, that the plaintiff was guilty of the matters of which she is accused in the report, and he was actuated by no improper or unjustifiable motive in publishing them, it was his duty to communicate the fact to the board of school visitors, all of whom had a corresponding duty with respect to everything that concerned the ²⁹⁸ welfare of the South Windsor schools, and his statements, under such circumstances, were conditionally privileged until the plaintiff removes the privilege by proof on her part of actual, or, as it is sometimes called, express malice, or malice in fact." This was erroneous, for the reasons already stated, in assuming that the privilege relied on might depend on the defendant's having good reason to believe his charges against the plaintiff to be true.

One of these was that she was "at fault in her management of the sanitary conditions of the school—conditions which she could adequately deal with, if she wished." A witness offered in defense testified that a week or two before the report was sent in she met the defendant at the schoolhouse and remarked to him that it appeared to have been unswept for a month and was in a filthy condition, to which he replied that it was in a deplorable condition and he had a report to make, which he should be sorry to send in. It appears by the

evidence in the cause, which has been certified to this court at length, that the witness resided in South Windsor and was the wife of one who filled the office of chairman of the board of school visitors of that town, at the time of the conversation in question. It was in answer to her complaint of the unsanitary condition of the school that the defendant admitted the fact, and said substantially that he was sorry to have to report it. This expression of his feeling with reference to the paper which it was his duty to prepare was in reply to a criticism of the administration of school affairs, made by one who had a right to complain and to ask him for an explanation. Proof that he had this feeling when he afterward sent the paper in would have gone directly to defeat the plaintiff's case. To show that he then had it, proof that he had it a few days previously, at the time of his conversation with the witness, was certainly not irrelevant. For such proof resort could properly be had to his declarations as to his then existing feelings in relation to the ²⁹⁹ subject of inquiry; provided such declarations were made in a natural manner, and not under circumstances leading to a suspicion that he was thus seeking to manufacture evidence in his own favor, for use, if needed, in some anticipated controversy: 3 Wigmore on Evidence, secs. 1714, 1725.

They would be admissible, not as part of the *res gestae*, for they were not explanatory of any accompanying act; but because in their nature, if true, they were the best evidence of the existence of the fact as to which they speak.

Whether declarations of this kind, if admitted, are in fact true, is a proper question for the jury; and the danger to be anticipated from letting them be proved is far less than that from admitting the testimony of him who made them, given long afterward, under the pressure of a strong interest.

The evidence now in question was of a declaration of a public officer, accompanying an announcement, to one entitled to inquire into his official conduct, of his purpose to do a certain official act, and characterizing that purpose. As such, it had a legitimate tendency to explain the nature of the act, soon afterward done, as being one prompted by duty and not by malice. But whether this tendency was of sufficient moment to call for the admission of the testimony, or whether remoteness in point of time so weakened its force as to make it not worth while to permit its introduction, was a matter addressing itself to the sound discretion of the trial judge: *State v. Kelly*, 77 Conn. 266, 58 Atl. 705. It was within his power either to receive or exclude it, as he might

think would best promote justice in view of all the circumstances attending the trial. Error in its exclusion, therefore, is not well assigned. That evidence is legally admissible does not in all cases necessarily require its admission.

One of the statements in the report was that the plaintiff had not "even the externals of refinement." The court, after instructing the jury in reference to another of its ³⁰⁰ statements, that they must look carefully at the character and interest of the witnesses who had testified regarding its truth or falsity, proceeded as follows: "The possession . . . of the externals of refinement is rather a subject of your own observation, because you know by seeing a person whether they have or not the externals of refinement."

The plaintiff had taken the stand in her own behalf. Her appearance there was, of course, to be taken into account by the jury in determining whether, nine months before, she had possessed "the externals of refinement"; but it is evident that it might not in all respects be the best evidence. The jury might well have understood from the language used, and its collocation, that it was the best. The exception to the charge upon this point is therefore sustained.

There are other reasons of appeal, but they relate to points not likely to recur upon a new trial and require no discussion.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

What Communications are Privileged Within the Law of Libel is the subject of a note to *Nichols v. Daily Reporter Co.*, 116 Am. St. Rep. 802; and what words are libelous per se is the subject of a note to *Holmes v. Clisby*, 104 Am. St. Rep. 110. Justification in actions for libel and slander is the subject of a note to *Rutherford v. Paddock*, 91 Am. St. Rep. 285.

KELLEY v. KILLOUREY.

[81 Conn. 320, 70 Atl. 1031.]

STATUTES.—The Letter of a Law is not in All Cases a correct guide to the true sense of the law-maker. (p. 221.)

STATUTES—Implied Exceptions Therein.—Statutes general in their terms are frequently construed to admit implied exceptions. (p. 221.)

DOGS—Liability of Owner.—One Who Willfully Provokes and Abuses a Dog, in consequence of which it bites him, cannot recover from the owner, although there is a statute making the owner or keeper of a dog liable for all damages done by it to person or property. (p. 222.)

Action for personal injuries resulting in death alleged to have been occasioned by the bite of the defendant's dog. The answer, in addition to a general denial, contained a special defense to the effect that the injuries were received in consequence of the decedent's treatment of the dog, and that he was at the time of the injury wrongfully, willfully and persistently annoying, hurting and provoking the animal, as a result of which it was angered and incited to bite.

Donald G. Perkins, for the appellant.

Gardiner Greene and Jeremiah J. Desmond, for the appellee.

321 PRENTICE, J. It was a conceded fact that the plaintiff's intestate was bitten by a dog owned and kept by the defendant. Relying upon section 4487 of the General Statutes, the plaintiff requested the court to instruct the jury, in substance, that upon that state of facts alone, and altogether regardless of any conduct on the intestate's part which was instrumental in his being bitten, the plaintiff was entitled to a verdict for the resulting damage; and also that the defendant could not avail himself of any defense of contributory negligence on the intestate's part. The latter request was complied with; the former was not. On the contrary, the jury were told that certain conduct of the intestate inducing the act of the dog would be a bar to the plaintiff's recovery.

The statute in question is general in its terms, embodies no exceptions, and, when interpreted literally, furnishes justification for the plaintiff's contention that it renders an owner or keeper of a dog liable for all damage done under any circumstances by it to the body or property of any person. Such, however, is not its true intent and meaning. The letter of a law is not in all cases a correct guide to the true sense of the lawmaker. Statutes general in their terms are frequently construed to admit implied exceptions: *Ryegate v. Wardsboro*, 30 Vt. 746; **322** *State v. Audrette*, 81 Vt. 400, 70 Atl. 833, 18 L. R. A., N. S., 527; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. Rep. 511, 36 L. ed. 227. So statutes defining the liability of owners or keepers for the acts of dogs, and couched in unrestricted language similar to that employed in the one under review, have been repeatedly held to embody implied limitations: *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Quimby v. Woodbury*, 63 N. H. 370; *Peck v. Williams*, 24 R. I. 583, 54

Atl. 381, 61 L. R. A. 351. The first two of these cases admit the defense of contributory negligence. We have not gone so far: *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175. But that very case observed that the unrestricted language of the statute was not to be interpreted as admitting of no exceptions, so that the owner of a dog who had done efficient service for his master in protecting his premises against the perpetration of a felony would be liable to the felon for the consequences to the latter's person. The long existing rights incident to such a situation were recognized as creating an implied limitation upon the operation of the statute, which in the literal interpretation of its terms took away those rights in so far as the agency of a dog was concerned. This same case recognizes scarcely less distinctly the necessity for another and more pertinent exception; for, after quoting a statement of Lord Denman in *May v. Burdett*, 9 Ad. & El., N. S., 101, our court adds: "And it would seem that if the plaintiff have knowledge of the ferocity of the animal, and provoke him willfully, he should be considered to have purposely brought the injury on himself, and be left to bear it, although the owner of the dog be in the wrong in keeping him." Here is stated, with approval, the central idea of a principle which has had frequent acceptance and is founded in sound reason: *Peck v. Williams*, 24 R. I. 583, 54 Atl. 381, 61 L. R. A. 351; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716, 47 N. W. 450; *Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837; *Hott v. Wilkes*, 3 Barn. & Ald. 304. The principle is that 323 when one's conduct toward a dog or other animal is knowingly such as is calculated to incite or provoke it to acts of damage, its naturally resulting action, in so far as it involves consequences to the inciter or provoker, is to be regarded in law as his and not having reference to the animal in such manner as to be chargeable to its owner or keeper; and that in respect to knowledge of the natural consequences of his acts, he will be presumed to possess such as is common to ordinary rational persons.

In the present case the court, having told the jury that the defendant could not avail himself of the defense of contributory negligence, as that principle is applied in negligence cases, so that the plaintiff would be entitled to recover notwithstanding any negligent conduct in relation to the dog on the intestate's part, proceeded to say that the second defense set up something more than contributory negligence and embodied a sufficient defense to the action, to wit: That

the intestate's injuries were due to his own willful and intentional misconduct—to the wrongful and willful provocation of the dog. Commenting upon the statute, it was said that it ought not to be so construed as to authorize a recovery against the owner or keeper in every case where damage results from the acts of a dog. Then followed this language: "No one under it ought to be permitted to recover damages for an injury brought upon himself by his own willful and wrongful provocation of a dog. Such misconduct ought to bar his right to recover, and in my judgment does, as a matter of law. Any injury from a dog bite voluntarily brought upon one's self while one is engaged in an unlawful act cannot support a recovery. This is not to deny the force of the statute, but to exclude from its remedy one who is engaged in a wrongful or willful and unlawful act. Willful in that connection means intentional, purposely, knowingly. It is unnecessary to discuss at length the ground of such a conclusion: it is sufficient for your purpose to state it. ³²⁴ If you find the facts proven by the defendant, by a fair preponderance of the evidence as set forth in the second defense, the plaintiff is not entitled to recover and your verdict should be in favor of the defendant." And later: "It is not, as you have noticed, gentlemen, a provocation that may result, or an injury that may follow, from a mere accident, as stepping upon the dog's tail, or might occur from negligence in playing or fooling with the dog; it must be this willful and wrongful conduct as set forth in this second defense. Provocation must follow from that, and the consequent biting and injury must follow from that."

If this language were presented as an attempt to formulate a broad and comprehensive statement, in the abstract, of the law as applicable to all situations, it would be open to criticism. It would be easy, for instance, to criticise, as the plaintiff has done, the broad statement that the remedy of the statute is to be denied to one who is injured while engaged in a wrongful or willful and unlawful act. And so the language quoted would be inadequate as a precise statement of abstract principles, in that it did not expressly embody the controlling condition that the action of the man which proved to be provocative of the conduct of the dog should be such as was in fact calculated to cause that provocation, and was known to him, either actually or as an un rebutted presumption from common knowledge, to be so. But the court was dealing with a concrete situation, and endeavoring to give to the jury intelligent rules for their guidance

in respect to that situation. The only unlawful act of which the deceased could, under the facts as claimed by either party, have been guilty, consisted of maltreatment of the dog, and the pronounced character of that maltreatment, in order that it amount to a good defense, as stated to the jury not only in the passages quoted but in others commenting upon testimony, was such that the conditions which the law attaches to a valid defense were necessarily implied in them. They ³²⁵ were told that "fooling with the dog," or spitting in front of its face, as witnesses testified was the deceased's conduct, was not sufficient, and thrice at least were told that the defendant could only justify by proof of the facts set up in the second defense, to wit (as stated by the court in its instructions), that the deceased wrongfully, willfully, and persistently annoyed, hurt, tortured and provoked the dog, and that the dog bit him in consequence thereof. Such facts involved willful abuse of the dog, and abuse of such a character as, to the knowledge of every man of ordinary intelligence, be he the actor or a jurymen, and as a matter of judicial knowledge, would be calculated to rouse a dog to defensive action by the use of its natural weapons of defense. The plaintiff could not have been harmed by the charge as given.

There is no error.

In this opinion the other judges concurred.

The Owner of a Dog of gentle and kind disposition is not liable when, without his fault, the animal bites a person: *Martinez v. Bernhard*, 106 La. 368, 87 Am. St. Rep. 306. But one who keeps a vicious dog, with knowledge of its propensity, and without adopting proper measures to restrain it, is responsible for injuries it inflicts upon persons themselves without fault: *Crowley v. Groonell*, 73 Vt. 45, 87 Am. St. Rep. 690; *Plummer v. Ricker*, 71 Vt. 114, 76 Am. St. Rep. 757; *Harris v. Fisher*, 115 N. C. 318, 44 Am. St. Rep. 452; *Robinson v. Marino*, 3 Wash. 434, 28 Am. St. Rep. 50; *Knowles v. Mulder*, 74 Mich. 202, 16 Am. St. Rep. 627; *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454. Yet, where a person, with knowledge of the viciousness of a dog, wantonly excites him and voluntarily and unnecessarily puts himself in his way, he cannot recover for an injury: *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716.

ALLYN'S APPEAL FROM COUNTY COMMISSIONERS.

[81 Conn. 534, 71 Atl. 794.]

CONSTITUTIONAL LAW—Whether Sale of Liquors can be Legalized by Legislature.—The legislature is competent to legalize by license the sale of intoxicating liquors to be drunk as a beverage at the place of sale, for it is not forbidden by the constitution of the state or of the United States, and the practice of licensing such sales has been so long in vogue that it cannot be maintained that they are so destructive of public health and morals that they cannot be sanctioned. (pp. 226, 227.)

CONSTITUTIONAL LAW—The Term "Police Power" has at bottom no other meaning than the general power of governing its people and dominions belonging to every sovereignty. (p. 227.)

CONSTITUTIONAL LAW—License to Sell Liquors.—In testing the validity of a statute licensing the sale of intoxicating liquors, the question whether the licenses are issued by way of regulation or for purposes of revenue is irrelevant. (p. 228.)

Thomas C. Coughlin and Frank L. Wilder, for the appellant.

Homer S. Cummings, for the appellee.

535 BALDWIN, C. J. The sole ground of the appeal to this court is that the license law (Rev. 1902, chapters 157 and 158) is void. The claim is that the sale of intoxicating liquors to be drunk as a beverage at the place of sale is so destructive to the public health and so inherently immoral that no law upholding it can be valid either under the constitution of this state or of the United States.

The appellant first contends that, as the people of Connecticut, in the preamble of their constitution, gratefully acknowledge "the good providence of God, in having permitted them to enjoy a free government," this is a recognition of God as the source of that government; that the Bible contains the "word of God"; that it condemns the use and sale of intoxicating liquors as a beverage; and therefore that the state cannot permit it on any terms.

There was a time in the early history of this commonwealth when the Bible was, "in the case of the defect of a law in any particular case," a rule of political government: 1 Col. Rec. of Conn. 509. But even then it was never considered to contain any absolute prohibition of such a business as that for which the license now in question was granted. As early as 1643 it was provided by the colonial laws that no person or persons should sell wine or "strong water in any place within these libertyes, without license from the particular

court or any two magistrates": 1 Col. Rec. of Conn. 100; Cf. Ibid. 154. Our Code of 1650 (1 Col. Rec. 533), under the title of "Innkeepers," recited that "forasmuch as there is a necessary vse of howses of Common ⁵³⁶ Interteinment in euery Common wealth, and of such as retaile wine, beare and victualls, yet because there are so many abuses of that lawfull libberty, both by persons interteining and persons interteined, there is allso need of strict lawes and rules to regulate such an imployment." Legislation of a similar character appears in subsequent revisions of the statute, down to the date of the adoption of our constitution: Stats., ed. 1715, 123; Comp. 1808, 640; Pub. Acts 1810, p. 33, c. 7. It had been one of the permanent features of that free government, for the enjoyment of which the people expressed in that instrument, in the language quoted, their gratitude to the good providence of God. In the face of this long history of dealing with the use and sale of intoxicating liquors as a beverage, to be drunk at the place where they are purchased, it is idle to claim that the framers of the constitution understood or intended that anything contained in it should be regarded as prohibiting altogether the licensing of such a business: *Minor v. Happersett*, 21 Wall. (U. S.) 162, 22 L. ed. 627.

Our constitution (art. 3, sec. 1) vests "the legislative power of this state" in the General Assembly. That power covers the whole field of legitimate legislation except so far as limitations are to be found in other provisions of this constitution or in that of the United States.

The latter provides (art. 4, sec. 4) that the "United States shall guarantee to every state in this Union a republican form of government." Connecticut is therefore impliedly bound forever to maintain such a form of government. She put her legislative power in the hands of the General Assembly. She put only, because she could put only, such power of that nature as was consistent with a republican form of government: *Fletcher v. Peck*, 6 Cranch (U. S.), 87, 3 L. ed. 162; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239. In constitutional republics, as was observed by Chief Justice Chase in a case where arguments somewhat resembling those now made at our bar were advanced, "there are, undoubtedly, fundamental ⁵³⁷ principles of morality and justice which no legislature is at liberty to disregard; but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature": *License Tax Cases*, 5 Wall. (U. S.) 462, 18 L. ed.

497; *Citizens' Sav. & Loan Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455.

The General Assembly of Connecticut, under the fourteenth amendment to the constitution of the United States, can deprive no one of life, liberty, or property, without due process of law. Any precise and exhaustive definition of the phrase "due process of law" has been sedulously avoided by the supreme court of the United States: *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616. It has, however, been repeatedly declared to refer not merely to forms of legal proceedings, but to "that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure": *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. Rep. 292, 28 L. ed. 232. It therefore embraces such a matter as taxation by a state of personal property having a situs in territory beyond its borders: *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. Rep. 36, 50 L. ed. 150. It forbids arbitrary interference with any man's liberty of contract: *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. Rep. 277, 52 L. ed. 436.

But however broad the scope that has been given to the guaranty of due process of law by such decisions as those to which reference has been made, that there is nothing un-republican, nor beyond the legitimate sphere of legislative power, in the maintenance of such a system as that long established here for governmental licenses to sell intoxicating liquors, is plain from the fact, of which judicial notice ⁵³⁸ must be taken, that most free governments have, at all periods of time, made that business a subject not of prohibition but of regulation. Either mode of treatment is equally legitimate: *State v. Brennan's Liquors*, 25 Conn. 278; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. ed. 620. At common law it was a business lawful and open to any man. Our statutes do not enlarge but restrict this right: *Sopher v. State*, 169 Ind. 177, 81 N. E. 913, 14 L. R. A., N. S., 173.

Finally, it is argued that the statute is essentially a revenue measure, though ostensibly in the interests of public police. The term "police power" has, at bottom, no other meaning than the general power of governing its people and dominions belonging to every sovereignty: *McKeon v. New York*, N. H.

& H. R. Co., 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730. The state may properly restrict a business dangerous, if unregulated, to public morals or security, by the requirement of large license fees: *State v. Conlon*, 65 Conn. 478, 48 Am. St. Rep. 227, 33 Atl. 519, 31 L. R. A. 55. It is only important to distinguish between licenses issued by way of regulation and licenses issued for purposes of revenue, in the case of municipal corporations acting under legislative authority. The question then is, For what object was the authority given by the legislature? Such an inquiry is irrelevant in testing the validity of a statute of the state.

There is no error.

In this opinion the other judges concurred.

The Traffic in Intoxicating Liquors is a proper subject of police regulation, and may be controlled, restricted or even prohibited, without violating any constitutional right: *Beauvoir Club v. State*, 148 Ala. 643, 121 Am. St. Rep. 82; *State v. Herring*, 145 N. C. 418, 122 Am. St. Rep. 461; *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82.

NATIONAL FIREPROOFING COMPANY v. HUNTINGTON.

[81 Conn. 632, 71 Atl. 911.]

MECHANICS' LIENS—**Strict Construction of Law**.—Statutes creating mechanics' liens are in derogation of the common law, and call for a strict rather than a liberal construction. (p. 229.)

MECHANICS' LIENS—**Public Schoolhouses**.—A statute creating a mechanics' lien on "any building" does not apply to such public buildings as schoolhouses. (p. 230.)

MECHANICS' LIENS.—**The Equities of Subcontractors** are derived from their relation to the original contractor, and are not superior to his, so that if he is not entitled to a lien on a public building, they are not. (p. 230.)

Edward A. Harriman and William S. Downs, for the plaintiff.

John W. Banks, for the defendant.

⁶³² BALDWIN, C. J. Action by a subcontractor against the town of Huntington and sundry other subcontractors, who, like the ⁶³³ plaintiff, had filed certificates of mechanics' liens on a town schoolhouse, to foreclose the plaintiff's lien; to ascertain what balance was due from the town on the "purchase price," and the respective amounts of the several liens; and to have the balance due from the town apportioned

among the several lienors, brought to the superior court in Fairfield county and reserved (Gager, J.) for the advice of this court, on a stipulation as to the facts. One of these was that the town of Huntington, in the case of the plaintiff's lien and the lien of each of the defendants appearing, had on hand at the time of the filing of the lien and of the service of notice of intention to claim lien, an amount of money sufficient to pay such lien, and subject to such lien under the contract with the contractor if such lien is valid.

General Statutes, sections 4135-4138, provide for the creation, under certain conditions, of a mechanic's lien in favor of any original contractor or subcontractor, having a claim for over ten dollars for material furnished or services rendered in the construction of "any building, or any of its appurtenances." These general words, if taken literally, cover every kind of building, public or private. It is clear, however, that they could not be construed to embrace buildings belonging to the state: *State v. Kilburn*, 81 Conn. 9, 11, 69 Atl. 1028. Nor do they include any public buildings, belonging to corporations or communities created by the state as governmental agencies for purely public purposes, to defray the cost of which they can freely exercise the power of taxation.

The mischief which the statute was designed to remedy ⁶³⁴ is an important guide in ascertaining its meaning. A thing within the letter of a statute may be unaffected by its provisions, if not within the intention of the makers, and if what was this intention sufficiently appears from the terms which they used, in connection with the conditions calling for such legislation: *Bridgeport v. Hubbell*, 5 Conn. 237; *Wetherell v. Hollister*, 73 Conn. 622, 48 Atl. 826; *Kelley v. Kilboure*, 81 Conn. 320, 129 Am. St. Rep. 220, 70 Atl. 1031. The statute under consideration created a new means of securing the claims of a particular class of creditors. It is in derogation of the common law, and of a kind calling for a strict rather than a liberal construction: *Chapin v. Persse & Brooks Paper Works*, 30 Conn. 461, 79 Am. Dec. 263; *Hubbell v. Kingman*, 52 Conn. 17.

The mischief to be prevented was loss to those furnishing services or materials in the construction of a building, if unable to collect what might be due them on such account from the owner of the real estate. The original contractor for the erection of a public building for such a public corporation as has been described is always sure of his pay. His debtor commands the resources of the whole community. As no lien is necessary for his protection, it is not to be presumed, in

view of what such a lien would put it in his power to do, that the General Assembly intended to give him one. The possessor of a mechanic's lien on real estate can gain title to it by foreclosure. If such a lien can be imposed upon public buildings, they can thus be turned into private buildings. If it can attach to a schoolhouse, it is difficult to see why it would not equally attach to a city hall, a county courthouse, or a county jail. It would be intolerable to put it in the power of a private citizen, in case the negligence of a county should result in his obtaining a foreclosure of a mechanic's lien, to take possession of a courthouse and turn out the courts, or of a jail and turn out the prisoners.

It is suggested that the statute may be so construed ⁶³⁵ as to permit a lien, but not its enforcement against the public corporation. This would strip the privilege of most of its value. The right and the remedy must stand or fall together. True, should the corporation sell the building to a private citizen, such a lien might be foreclosed; but it is ordinarily to be presumed that a building devoted to public uses will continue permanently to be devoted to them.

It is therefore our opinion that the statute was not intended to give any lien on a public building to an original contractor. This being so, it cannot have been within its purpose to give one to subcontractors. To them the owner of the building owes no debt. Their equities are derived from their relation to the original contractor, and are not superior to his.

We have held that a railroad station owned by a railroad corporation may be the subject of a mechanic's lien: *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn. 454. Such a corporation being a private one, though serving public as well as private uses, and having no power of taxation to pay its debts, is not at all in the position of a strictly governmental agency, such as is a town or county: *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294; *McKeon v. New York, N. H. & H. R. Co.*, 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730.

The claims for relief other than that for a foreclosure are subsidiary to that, and must fall with it.

The superior court is advised to render judgment for the defendants; and they will recover costs in this court.

In this opinion the other judges concurred.

A Mechanic's Lien cannot be Enforced Against Public Buildings, such as schoolhouses, libraries and churches: See Eureka Stone Co. v. First Christian Church, 86 Ark. 212, 126 Am. St. Rep. 1088, and cases cited in the cross-reference note thereto.

MURDOCH v. MURDOCH.

[81 Conn. 681, 72 Atl. 290.]

WILLS—Conflict of Law.—Whether a Man Dies Testate or intestate is to be determined by the law of his domicile, in respect to his personal property, and in respect to his real estate by the law of the place where it is situated. (p. 233.)

WILLS—Naming Executor—Conflict of Laws.—The determination of the question whether a will designates executors, and if it does whether they are to be approved or disapproved, is for the court of the testator's domicile. And when the will of a nonresident is produced for record in this state, it is to be accepted here, so far as concerns his appointment of executors, as meaning what the foreign court adjudged it to mean. But it does not follow that the probate court in this state is bound to issue letters testamentary to the same individuals; it has the right to approve or disapprove the appointment. (p. 234.)

PROBATE COURT—Power to Revoke Decree.—The probate court in Connecticut itself has no power, save in exceptional cases, to revoke its own decree. (p. 235.)

FOREIGN PROBATE—Notice to Parties in Interest.—If the publication of notice merely, with nothing in the way of citation, in proceedings to establish the foreign probate of a will is erroneous, the defect is not jurisdictional, but a mere irregularity, and the only consequence of the fault, in the present case, is to make the decree as to some of the persons in interest *ex parte*. (pp. 235, 236.)

WILLS—Modifying or Revoking Ex Parte Orders.—The power of the probate court to modify or revoke its *ex parte* orders and decrees conferred by the Connecticut statute rests in its judicial discretion, subject to revision only by the superior court in the exercise of a like discretion on appeal. (p. 236.)

William H. Ely, for the appellant.

George D. Watrous, for the appellee.

682 BALDWIN, C. J. William B. Murdoch of Mississippi signed in Mississippi, on August 5, 1891, a holographic paper, reading as follows:

"Cain Mount, Claiborne Co., Mississippi, August 5th, 1891.

683 "This my last will and testament—

"1st. I leave to my wife Annie A. Murdoch, the entire use and management of all my property, both real and personal during her life—at her death it all goes to my living brothers and sisters, or their heirs.

"2nd. No inventory of my estate is to be taken.

"3rd. My wife has perfect right to sell any of it as may be for the best.

"4th. I ask that my friend James M. Gillespie of Tensas Parish, La. and my cousin John W. Bristol of New Haven Connecticut act as Co-Executors with my wife and befriend and aid her in her business—they give no bond—nor is it

necessary for them to qualify as Executors in any Court—Simply by furnishing a certified copy of this will, the signature of either of them with the signature of my wife, is all that is necessary to sell or transfer any of the property, as they may deem best—

“5th. No account is to be kept of the disposition or management of my property—my wife to have full use, and manage it the best she can, with advice of the two Co-Executors, and at her death, what is left goes to my brother & sisters or their heirs—

“6th. I leave with this a letter to certain friends and relatives, asking them to befriend my wife the balance of her life—

“(Signed) W. B. MURDOCH.

“To my Brothers and Sisters:

“To my cousin John Butler and Louis Bristol. To my friends John E. Carey, E. W. Constance and Wade Benjamin and my two friends that I have asked to act as co-executors to my will.

“My last request is that you will befriend my wife and see her protected from some who might be her enemies. I have talked on this subject with some of you.

“W. B. MURDOCH.”

He died April 24, 1903. By the laws of Mississippi holographic ⁶⁸⁴ wills are valid, though unattested, and the “court of chancery” has “full jurisdiction” over “matters testamentary and of administration.” The paper was presented for probate to the court of chancery, which admitted it to probate, and on May 16, 1903, appointed Annie A. Murdoch sole executrix of the will, James Gillespie being dead, and John W. Bristol having declined to act as executor.

On June 17, 1903, she filed in the court of probate for the district of New Haven an authenticated and exemplified copy of the will and the record of the proceedings in the court of chancery, and an application for its admission to probate by the court of probate and the issue of letters testamentary. At the time of his death William B. Murdoch owned real estate in New Haven and also personal property in the hands of residents of New Haven. An order was thereupon issued by the court of probate that the application be heard on July 1, 1903, and that public notice to all parties interested in the estate of William B. Murdoch be given by publishing the order three times in a newspaper having a circulation in the probate district. This notice having been given, the hearing was continued from July 1st to September 8th, when the ap-

plication was granted, the will admitted to probate and ordered on record, and letters testamentary issued to Mrs. Murdoch as executrix, on her giving a probate bond, which was duly approved.

The application to the court of probate to reopen the matter and set aside these orders and decrees was made by the appellants October 17, 1905.

Whether a man dies testate or intestate ⁶⁸⁵ is to be determined by the law of his domicile, in respect to his personal property, and, in respect to his real estate, by that of the state or country within which such real estate is situated. General Statutes, sections 293, 305, provide that "all wills executed according to the laws of the state or country where they are executed may be admitted to probate in this state, and shall be effectual to pass any estate of the testator situated in this state"; and that "when a will conveying property situated in this state has been proved and established out of this state, in and by a court of competent jurisdiction, the executor of said will, or any person interested in said property, may produce to the court of probate in the district in which any of said property is situated a duly authenticated and exemplified copy of such will, and of the record of the proceedings proving and establishing the same, and request that such copies be filed and recorded; and if, upon due hearing had after public notice and such citation as said court shall order, no sufficient objection be shown, said court shall order said copies to be filed and recorded, and they shall thereupon become part of the files and records of said court, and shall have the same effect upon the property so conveyed as if said will had been originally proved and established in said court of probate."

The proceedings before the court of chancery of Mississippi were such as to entitle any person interested in the property of William B. Murdoch within the district of New Haven to apply to the court of probate for that district to have duly authenticated and exemplified copies of the record of them made part of its files and records. They also, when proved by such copies, conclusively established that the paper admitted to probate was entitled to probate in Mississippi as the will of William B. Murdoch, and that Annie A. Murdoch was designated in it as an executor; for no court can make an original appointment of an executor, its power being limited to recognizing and approving or ⁶⁸⁶ disapproving an appointment made by the testator: Terry's Appeal, 67 Conn. 181, 34 Atl. 1032. The will of Mr. Murdoch does not directly

name his wife as an executor. It, however, names two others who are asked to act as coexecutors with her, and "aid her in her business," but are exonerated from giving any bonds or qualifying as executors in any court. It also gives Mrs. Murdoch the entire use and management, without account, of all the estate during her life, with power of sale. Whether the ample authority thus bestowed upon her, coupled with the provision as to coexecutors and that those asked to act in that capacity need not qualify before any court, justified the conclusion that the testator intended that his wife should be an executor of his will and had used words which sufficiently expressed that intention, was a question of testamentary construction. It is for the courts of the domicile of a testator to construe his will so far as respects any matters subject to their jurisdiction: *Clarke's Appeal*, 70 Conn. 195, 39 Atl. 155; *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. Rep. 873, 44 L. ed. 1028. Among such clearly are, after the probate of the will, the determination of the question whether it designates executors, and if there be such a designation, their approval or disapproval as such.

The copies presented to the court of probate of the proceedings in the court of chancery, having been duly authenticated and exemplified under the laws of the United States, were entitled to the same faith and credit here as that due to them in Mississippi. The paper there found to be the will of William B. Murdoch was, consequently, to be accepted here as his will, and accepted, so far as concerns his appointment of executors, as meaning what the Mississippi court adjudged it to mean.

That this will was sufficient to convey all his property, real or personal, situated in this state, is clear, under General Statutes, section 293.

It did not, however, follow that the court of probate was ⁶⁸⁷ bound to issue letters testamentary to Mrs. Murdoch as executor. It had the right to approve or disapprove that appointment: *Overby v. Gordon*, 177 U. S. 214, 20 Sup. Ct. Rep. 603, 44 L. ed. 741. She might have been competent to manage and dispose of the Mississippi property and incompetent to manage and dispose of that in Connecticut.

It is therefore necessary to inquire whether the decree of probate, granting her letters testamentary, ought to have been revoked.

General Statutes, section 305, provides that in cases of this nature the will and the proceedings resulting in its probate by a court of another jurisdiction may be filed and recorded

in the court of probate, "if, upon due hearing had after public notice and such citation as said court shall order, no sufficient objection be shown"; and that the will shall thereupon have the same effect as to property in Connecticut as if it had been originally probated here. Courts of probate are empowered to "make any proper order providing for the notice to be given to any person residing out of" the state of matters pending before them, "and the notice given under such order shall be a legal notice to such person," provided that any person "interested in any application that may be made to any court of probate for the probating of a will or the granting of administration, may, in person, or by attorney, file with said court a written request for special notice to be given to him, or his attorney, of any order passed by such court of probate thereon," in which case he shall be entitled to reasonable notice, personally. "of any hearing in said matter": Gen. Stats., secs. 208, 209. No such written request was ever filed in behalf of any of the appellants, who are the brothers and sisters of the testator, and his heirs at law, one residing in Louisiana and the others in Maryland. They had no actual notice of the proceedings in the court of probate in 1903, until more than two years after they were closed.

If the publication of the order of notice in a newspaper, ⁶⁸⁸ with nothing further in the way of a citation, satisfied the requirements of these statutes, the appellants received "legal notice," and the decree subsequently entered cannot be regarded as an ex parte one, within the meaning of General Statutes, section 203, but stands on the footing of any other decree, as respects proceedings to set it aside. These in ordinary course are by appeal to the superior court; and the appeal must be taken by those who had legal notice to be present at the rendition of the decree, within one month, and by those who had no notice to be present and were not present, within twelve months: Gen. Stats., sec. 407. The court of probate itself has no power, save in exceptional cases, of which this, on the assumption above made, would not be one, to revoke its own decrees: Gen. Stats., secs. 194, 203, 314; *Delehanty v. Pitkin*, 76 Conn. 412, 56 Atl. 881, 199 U. S. 602, 26 Sup. Ct. Rep. 748, 50 L. ed. 328.

No appeal was taken by any of the present appellants from the original decree of probate.

If, on the other hand, the notice given of the original application of Mrs. Murdoch did not satisfy the requirements of General Statutes, sections 305, 208, the defect was not jur-

isdictional, but a mere irregularity. The court of probate had unquestionable power to entertain and dispose of the original application, with respect both to its subject matter and to the rights of all who were or might be interested in it: *State v. Blake*, 69 Conn. 64, 36 Atl. 1019. Its fault, on the present assumption, would have been one of procedure, and the consequence of the fault, at most, so far as concerns the present case, would be to make the decree, as to the appellants, an ex parte one: *State v. Thresher*, 77 Conn. 70, 58 Atl. 460; *Johnes v. Jackson*, 67 Conn. 81, 34 Atl. 709.

By General Statutes, section 203, "any court of probate may modify or revoke any order or decree made by it ex parte, before any appeal therefrom, and, if made in reference to the settlement of any estate, before the final settlement ⁶⁸⁹ thereof, upon the written application of any person interested therein, and after notice of the time and place of hearing on such application, appointed by the court, to be given in the manner prescribed by it, to the person having charge of such estate, and to all other interested parties; and upon any modification, or revocation, there shall be the same right of, and time for, appeal, as in case of any other order or decree." The power of modification or revocation thus conferred is one that, on an application made in a prescribed manner, "may," not must, be exercised. The action to be taken by the court rests in its judicial discretion, subject to revision only by the superior court in the exercise of a like discretion, on appeal.

In the application of the appellants to the court of probate it was not denied that Mr. Murdoch left a valid will. The allegations relied on, as a cause for setting aside the decrees in question, were that the will did not authorize the appointment of Mrs. Murdoch as executrix, and that she was, at the time of the testator's death and for years had been, to his knowledge, mentally incapable to administer such an estate. These averments were found untrue, and there was therefore no sufficient ground shown for revoking the decrees appealed from.

The appellants produced a witness who had seen Mrs. Murdoch in 1900 when she was at Saratoga without her husband, and asked him how much he had then seen of her, claiming that by this and other testimony they were prepared to show that prior to the execution of the will and down to the death of Mr. Murdoch continuously she was insane and incompetent to carry on business affairs of any kind, all of which her husband knew, when he signed his will. The purpose of intro-

ducing this evidence they stated to be to show the surrounding circumstances accompanying the drawing and execution of the will.

If these circumstances could be of any importance in disposing of the present proceedings, it would be because ⁶⁹⁰ they bore on the proper construction of the will, with respect to the designation of Mrs. Murdoch as an executor. As that was a matter to be decided by, and which had been decided by, the court of the testator's domicile, the evidence offered was properly excluded.

Had it been offered for the purpose of showing that, when the court of probate in this state approved her appointment, she was mentally incapable of acting as executrix, a question would have been presented which, as things are, need not be considered.

There is no error.

In this opinion the other judges concurred.

The Probate of Foreign Wills is discussed in the notes to *Estate of Clark*, 113 Am. St. Rep. 211; *State v. District Court*, 115 Am. St. Rep. 518.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

HAGER v. WALKER.

[128 Ky. 1, 107 S. W. 254.]

LICENSE TAX—Equality and Uniformity.—An occupation tax on real estate agents, graduated in amount according to the class of the city in which the agents reside, and exempting those who reside or do business outside of cities and towns, is unconstitutional because not equal and uniform in its operation. (p. 247.)

LICENSE TAX.—The Courts have Authority to Determine whether or not a statute imposing an occupation tax is in violation of the constitution, and this although the purpose of the statute may be the raising of revenue. (p. 248.)

N. B. Hays, attorney general, and Chas. H. Morris, for the appellant.

M. H. McLean and Hines, Chandler & Norman, for the appellees.

6 CARROLL, J. This action was brought by the several appellees, who were engaged in carrying on the business of real estate agents in the cities of Covington and Newport, both of which are cities of the second class, and in the city of Ludlow, a city of the fourth class, to enjoin the collection of a license tax imposed upon real estate agents by the revenue act of March 15, 1906: Acts 1906, p. 88, c. 22. Subdivision 4, article 12, section 1, of this act contains this provision: "Before engaging in any occupation or selling any article named in this subdivision of article 12 of this act, the person desiring to do so shall procure a license and pay the tax thereon, as follows: . . . On each real estate agent in cities of the first, second and third class, twenty-five dollars;

same, in each city or town of the fourth, fifth or sixth classes, ten dollars."

The validity of this statute is assailed principally upon the ground that, although a state tax, it is not uniform throughout the state, as real estate agents outside of cities and towns are not required to pay any license, and the tax upon agents in cities is graduated by the class of the city in which they do business. The statute in question is a revenue measure. This point is admitted by the attorney general, and there can be no doubt about its correctness. The occupation taxed is essentially a harmless one. It has none of the features requiring police regulation, and there is no reason why the police power should be invoked concerning it, so that, in inquiring into the validity of the statute, we will treat it as enacted for revenue purposes.

The sections of the constitution that are directly involved in the consideration of the questions before us are section 171, declaring that "the General Assembly shall provide by law an annual tax, which with other resources shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws"—and section 181, reading in part: "The General Assembly may by general laws only provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax, and may by general laws delegate^s the power to counties, towns, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

We do not agree with counsel for appellee that the direction in section 171 that "taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax" applies directly or specifically to the license fees that may be levied on franchises, stock used for breeding purposes, trades, occupations, and professions mentioned in section 181. Yet it is entitled to serious consideration as indicating a purpose that all laws imposing taxes shall operate in a uniform manner, to the end that no favoritism can be shown or discrimination be practiced. Section 171 authorizes the imposition of an ad valorem tax upon all the property in the state for state purposes, and in counties,

cities, towns, and taxing districts for local purposes. This ad valorem property tax, whether imposed or levied for state, county, municipal, or local purposes, must be uniform within the territory in which it is imposed. If it be for state purposes, it must be exactly the same in all parts of the state; and uniformity must exist when it is authorized to be levied by local authorities for local purposes. It is very clear that the legislature has no power to select, classify or discriminate in the imposition of what we may term a property or ad valorem tax—that is, a tax levied upon all the property in the state—as lack of uniformity in this respect would be a direct violation of section 172, providing in part that “all property not exempted from taxation by this constitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale,” as well as of ⁹ section 174, providing in part that “all property whether owned by natural persons or corporations shall be taxed in proportion to its value, unless exempted by the constitution; and all corporate property shall pay the same rate of taxation paid by individual property.” We will therefore proceed to inquire whether or not, and to what extent, the rule of uniformity applies to the imposition of license fees on franchises, stock used for breeding purposes, trades, occupations, and professions.

The authority to tax under this section is as far-reaching and as sweeping as language could make it. It would be difficult to find three words that cover wider fields of employment than trades, occupations, and professions. Under its authority to tax them the General Assembly has the power and the right to tax every business and every individual in the state—the merchant, trader, and banker; the lawyer, minister, and doctor; the mechanic and farmer. Indeed, it would be difficult to mention a person who has not some trade, occupation, or profession, and, if he has, the authority to tax him is granted, and this without respect to the nature or character of the trade, occupation, or profession, or whether it be humble or great, large or small. Nor does the constitution undertake to place any limitation upon the amount of tax that may be imposed, although it may be conceded that, if it should be so unreasonable or arbitrary as to amount to a confiscation of property or a denial of the right to engage in a particular trade, occupation or profession, the courts would interpose to protect the class of persons affected from this oppressive burden, on the ground that it was a violation of the principles recognized and established in the Bill of Rights,

declaring that all men have "the right of ¹⁰ seeking and pursuing their safety and happiness" and "the right of acquiring and protecting property."

The General Assembly may also grant to counties, towns, cities, and other municipal corporations the authority to exact license fees, and within the territory affected the discretion is as far-reaching as when exercised by general laws for state purposes. And it also seems that, if the power is delegated to those local subdivisions to impose the taxes authorized by this section, the local authorities are invested with the discretion to fix the license fees at any sum, always subject to the limitation that it must not be unreasonable or arbitrary. We also think that in each class of these local subdivisions, as in the first, second, third, fourth, and fifth class cities and towns, the local authorities are not required to impose the same amount of tax. Cities of the first class may, to illustrate, charge a license fee to lawyers of twenty-five dollars a year, and cities of the second class a license fee of ten dollars; and so cities of the third class may charge architects a license fee of fifteen dollars, and cities of the fourth class a license fee of five dollars. And this right to impose different fees in cities of different classes may be put upon the ground that the cities and towns of the state are divided by the constitution into six classes, each class being governed by a set of laws applicable alone to the cities within that class and constituting a separate and distinct governmental agency with a set of laws applicable alone to it. But the license fees imposed upon any particular trade, occupation, or profession in any class of cities must be uniform in the sense that the same fee must be charged every person engaged in the particular trade, occupation, or profession that is taxed. We doubt if it would be seriously contended that the governing authorities in cities of the first ¹¹ class might impose a license tax of fifty dollars upon doctors residing or doing business in one part or locality of the city, and a tax of twenty-five dollars upon doctors living or doing business in another part or locality. The rule of uniformity in this respect applies equally and alike to every trade, occupation and profession that is singled out for taxation. We also believe that it is competent for the legislature under this section by general laws for state purposes, as well as by a general law delegating the power to the municipalities mentioned, to divide trades, occupations and professions into classes, and to impose a different license fee upon each class that the trade, occupation or profession may fairly and reasonably be divided into. To illustrate: Dealers in hardware

might be divided into wholesale and retail dealers. And trades, occupations and professions may be further classified according to the volume of business done by them. Nor is the General Assembly, either by general laws for state purposes or general law in aid of or for the benefit of municipalities, required to impose the license fees that may be levied upon all trades, occupations, and professions. Any one or more trades, occupations or professions may be singled out for taxation, and all the others not thus selected be exempted. It will thus be seen that according to our construction of this section it is susceptible of wide and varying application.

The only remaining question, and the vital one in this case, is whether or not the license fees imposed must be uniform upon the particular trade, occupation or profession that is singled out for taxation. And, confining our observations to general laws enacted for the purpose of bringing revenue into the state treasury, we mean "uniform" in the sense that ¹² precisely the same license fee must be exacted from every person within the state who is engaged in the trade, occupation or profession that is taxed, without reference to whether he lives in a sixth-class town or a first-class city, or does business in the country or in a city. We do not believe it was contemplated by this section that the General Assembly might impose a license fee for state purposes upon blacksmiths in one county and exempt blacksmiths in another, or exact a license fee from physicians practicing in one city and exempt physicians practicing in another, or to say that the auctioneer who lived in a sixth-class town should pay a license fee for carrying on his occupation and the auctioneer who lived outside the town limits should be exempt. The authority to impose these special taxes does not carry with it the right of discrimination and exemption in any class that is dealt with. The language, "The General Assembly may by general laws only" provide for this species of revenue, would seem to imply that it was intended that the application of the law should be general, operating equally and alike upon every trade, occupation, and profession that it was designed to reach. If a few, or any number of persons less than all, who follow a designated trade, occupation or profession may be exempt, while the others are taxed, the law imposing the tax would not be general, but special or local, and forbidden by sections 59 and 60 of the constitution. This construction is in harmony with the dominant spirit of the constitution, which provides for uniformity in almost every subject it treats of, among which may be noticed the following, where

the idea of uniformity has been carried to its fullest extent, as in the jurisdiction, number and character of courts, as well as the trial of causes; in ¹³ everything pertaining to the enactment of laws; the punishment of crimes; the regulation of elections; the creation and division of counties; the fees and compensation of public officers; the establishment, government and classification of cities and towns; the amount of indebtedness that municipalities may create or incur; the regulation and control of railroads, common carriers, and public corporations generally. A weighty reason, too, in favor of uniformity, is the further consideration that it is important that the representatives of the people in the law-making department of the government shall all be directly interested in behalf of their constituents in laws involving the subject of taxation. A member of the legislature might be willing to vote a tax upon trades, occupations and professions in other districts than his own, not having his attention specially called to its lack of equality or fairness; and so the matter might be extended to embrace any number less than a majority of the members of the legislature. But if the constituents of the member—the people to whom he is immediately responsible—are to bear their share of the burden imposed, they would all be interested in seeing that it was fairly and equally distributed, and their desires and interests would naturally have their weight. This restrictive influence is not to be underestimated in dealing with questions of this character.

We believe that the fundamental idea of taxation is that the burdens shall be borne equally and alike by all persons, and that no one class shall be taxed for the benefit of another, or one class be discriminated against to the advantage of another, or an exemption allowed one that is not conceded to another. If the General Assembly has power to tax real estate ¹⁴ agents living in cities of the first, second, third, fourth, and fifth class, and towns of the sixth class, and to exempt all who do not live or do business in these cities and towns, it has the power to further select and classify by exempting those who live in towns of the sixth class; and it would be difficult to draw the line between its power to tax and exempt, or to tax in such an unequal manner as that it would be equivalent to gross discrimination, if not exemption.

The argument for that state that as the constitution has divided the cities and towns into classes, and that therefore the legislature under this section may charge license fees dependent upon the class of city or town the person taxed lives

in, is not in our opinion sound. The cities and towns were divided into classes distinctly for the purpose of dealing with their local affairs. The classification was not intended for any other purpose, or designed to influence or control legislation for state purposes. It would be extending the effects of classification of municipalities far beyond its legitimate meaning to adjudge that the legislature might make the general law a local one by limiting its operation to certain territory. In the constitution adopted in 1850, and that remained in effect until the adoption of the present constitution in 1891, the legislature was left free from constitutional restraint in the matter of taxation. There was no limitation whatever upon its power. Indeed, it is a curious fact that the word "taxation" is not mentioned in the old constitution, nor does the word "revenue" appear, except in the section requiring that "all bills for raising revenue shall originate in the House of Representatives." Yet in the early case of *City of Lexington v. McQuillan's Heirs*, 9 Dana, 513, 35 Am. Dec. 159, decided in 1840, and under a constitution ¹⁵ that was also silent upon this question, the court laid down the following principles that have been accepted without question as sound from that day to this: "When shall a tax be levied? To what amount? Shall it be a capitation or property tax, direct or indirect, ad valorem or specific? And what classes of property are the fittest subjects of taxation?—are all questions wisely confided by our constitution to the discretion of the legislative department. . . . But in some other respects, and so far as the power of taxation may be effectual without being thus limited, it is, in our judgment, limited by some of the declared ends and principles of the fundamental law. Among these political ends and principles, equality, as far as practicable, and security of property against irresponsible power, are eminently conspicuous in our state constitution. An exact equalization of the burden of taxation is unattainable and Utopian. But still there are well-defined limits within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. Taxation may not be universal; but it must be general and uniform. Thus, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and, if a tax be laid on land, no appropriated land within the limits of the state can be constitutionally exempted, unless the owner be entitled to such immunity in consequence of public service. The legislature,

in the plenitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue for the whole commonwealth. . . . And, although there may be a discrimination in the subjects ¹⁶ of taxation, still persons in the same class and property of the same kind must generally be subjected alike to the same common burden. This alone is taxation, according to our notion of constitutional taxation in Kentucky."

In *Bullitt v. City of Paducah*, 8 Ky. Law Rep. 870, 3 S. W. 802, decided before the present constitution, the city was authorized by its charter to collect a license upon certain occupations and professions, among them being attorneys at law. In adjudging the right of the legislature to authorize the imposition of such tax the court said: "It is well settled that a license upon any trade, profession or calling may be imposed under legislative authority. It is in effect a tax on the profession or calling, and must be levied on all alike in the trade or profession singled out for taxation." In *Smith v. City of Louisville*, 9 Ky. Law Rep. 779, 6 S. W. 911, in passing on the validity of an ordinance authorizing the imposition of a tax upon vehicles and classifying them according to the number of animals used in their transportation, the court, in sustaining the validity of the ordinance, said: "It operates upon all alike. There is no distinction of persons. Everyone using one horse to his vehicle is taxed alike, and so of each class. The tax is uniform as to each subject of the given class." In *Rankin v. City of Henderson*, 9 Ky. Law Rep. 861, 7 S. W. 174, it was said: "That the legislature has the right to classify and impose a license tax on trades is well settled, and that such a tax, when imposed, is not required to apply to all kinds of business pursuits is equally certain. Those pursuing like occupations must be taxed in the same manner or in proportion to the amount of business conducted. We perceive, therefore, no valid objection to this legislation, as it ¹⁷ applies alike to all of the classes to be taxed." In *Simrall v. City of Covington*, 90 Ky. 444, 29 Am. St. Rep. 398, 14 S. W. 369, 12 Ky. Law Rep. 404, 9 L. R. A. 556, where an ordinance imposing a tax upon insurance agents was before the court, it was said: "In this state we have no constitutional provision as to taxation *eo nomine*; but it is a settled constitutional rule, declared by oft-repeated decision of this court, that every tax must be certain, universal, and, so far as practicable, equal and uniform. Burdens cannot constitutionally be imposed upon par-

ticular individuals, while others of the same class or locality, who have rendered no public service, are exempt." In *Schuster v. City of Louisville*, 28 Ky. Law Rep. 588, 89 S. W. 689, it was said: "While the municipal legislature may, under the amendment, classify personal property and levy a tax ad valorem on some personal property, and tax other personal property on the basis of the income, licenses or franchises, the tax must be uniform within the territorial limits of the authority levying the tax; and under the guise of substituting one method of assessment for another the burden which should fall upon all equally must not be shifted so as to throw upon some more of the common burden than their proper share."

The authorities we have cited arose in cases involving taxation for municipal purposes; but they illustrate the rule, that is firmly embodied in the principles of constitutional law that have always obtained in this state, that taxation must be uniform and equal as nearly as it is practicable to make it so, and that, although the legislature may single out certain species of property, classes of persons, and trades, occupations and professions, dealing with each class separately, yet the burden upon every person in the ¹⁸ class thus selected must be the same. If it is imposed upon the person, it must be equal and uniform; and so if it is graduated according to the amount of business done. The power to tax according to the volume of business done has been upheld by this court in *Strater Bros. Tobacco Co. v. Commonwealth*, 117 Ky. 604, 78 S. W. 871, 25 Ky. Law Rep. 1717, and here again the principle of uniformity was applied, the court saying: "We do not think the tax is lacking in the quality of uniformity. It is the same on each person or corporation which manufactures the same quantity of tobacco. The legislature had the right to impose a graduated license tax. The larger manufacturer is required to pay more than the smaller one, based upon the value of the product manufactured." And so in *Brown-Foreman Co. v. Commonwealth*, 125 Ky. 402, 30 Ky. Law Rep. 793, 101 S. W. 321, where the tax was levied upon the volume of business done.

In the case before us no account is taken of the amount of business done, nor is it pretended that the lack of uniformity and equality in the tax imposed was made to depend upon the quantity of business transacted by the real estate agents taxed. The General Assembly, doubtless proceeding upon the idea that the real estate agents in large cities transacted a larger business than those engaged in smaller cities, imposed

a heavier tax upon them; but this tax was not fixed with reference, so far as the act shows, to the amount of business done. It may be, and probably is, true that some real estate agents in large cities do a larger business than real estate agents in smaller places; but it does not necessarily follow that there are not real estate agents in fourth-class cities who do a larger business than real estate agents in second, or third, or even first class cities. ¹⁹ It might also safely be said that there are many agents who do not live in, or have a place of business in, any city or town, who do a more profitable business than many agents who have their places of business in cities or towns. The vice in the law is that, in undertaking to single out for taxation the occupation of real estate agents, it not only taxes them in unequal amounts, depending upon the place in the state where they do business, but also exempts entirely other real estate agents, thus plainly discriminating against real estate agents who live or have a place of business in a city or town, in favor of those who do not live and have no place of business in a city or town.

It is insisted for the state that a license fee or tax imposed for state purposes may be graduated alone by the population of the city or county in which such business may be conducted, or by the fact that the person from whom the fee is exacted resides or does business in one city or another, or in this county or that one; but, as we have endeavored to point out, classification cannot be made on these lines. The purpose of this opinion is not to limit or restrict in any respect the power of the legislature given to it under the section of the constitution in question, or to deny to it the right to classify, divide and select, in any reasonable manner it chooses, trades, occupations or professions for taxation, or to prevent it from exempting entirely any one or more trades, occupations or professions, but only to declare that, when any trade, occupation, or profession is selected for taxation, the tax levied upon it, or the license fee exacted from persons engaged in it, must be equal and uniform throughout the state, whether the tax be upon the individual or the business.

It is everywhere recognized that it is impossible ²⁰ to produce exact uniformity of taxation. Absolute equality is unattainable. As said by Justice Miller in *Taylor v. Secor*, 92 U. S. 575, 23 L. ed. 663: "Perfect equality and perfect uniformity of taxation, as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized." The nearest attempt to equality in taxation is the income tax, or a tax based upon the amount or

volume of business done, or an ad valorem tax upon property, which exacts from everyone the same per cent upon property owned by him. But there should be no two opinions that an act that arbitrarily singles out for taxation a certain class of persons, and exempts some of them altogether, is unfair and unequal. It must be kept in mind that in the consideration of this question we are dealing with a subject that does not fall within the purview of the police power of the state, and is not touched by its comprehensive and yet undefined reach. What we have said has no application to a condition that might arise when this power is invoked as authority for the exaction of a license fee, or the levy of a tax, or the classification or exemption of persons engaged in occupations, pursuits, or business that may fairly and reasonably come within the police power of the state, as places where liquor is sold, or circuses, theaters, or other amusements are carried on.

In considering this case we have not been unmindful that it is everywhere conceded that the power to lay taxes is the highest attribute of sovereignty, the exercise of which is confided alone to the law-making department of the government, and that the courts are reluctant to interfere with the discretion vested in the representatives of the people in imposing taxes that are necessary to sustain the government. Especially ²¹ is this true of a property or ad valorem tax operating equally and upon all property within the territory affected. The amount of tax that shall be thus imposed, if uniform and not restrained by constitutional provisions, is vested exclusively in the legislative department of the state, and entirely beyond the power of the courts to control: *People v. Commissioners of New York City*, 67 U. S. 620, 17 L. ed. 451; *Union Pacific R. Co. v. W. S. Penniston*, 85 U. S. 5, 21 L. ed. 787. But this unlimited freedom from judicial control does not extend to taxes imposed upon trades, occupations, or professions: *Bells Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679. And the courts, when the question comes to them, have the undisputed right to determine whether or not a legislative act is in violation of the constitution, although its purpose may be the raising of revenue: *Thierman Co. v. Commonwealth*, 30 Ky. Law Rep. 72, 97 S. W. 366; *Ragland v. Anderson*, 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865, 30 Ky. Law Rep. 1199.

Entertaining the opinion that the act being considered is violative of the constitution for the reasons stated the judgment of the lower court so declaring must be affirmed.

**CONSTITUTIONAL LIMITATIONS ON THE POWER TO IMPOSE
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I. Uniformity and Equality of Taxation.

a. Classification of Occupations in General.—In levying license taxes the legislature has a discretion to select and classify trades, occupations, businesses and professions, taxing some while omitting others and taxing different ones unequally. All vocations may be taxed, or some may be taxed and others spared, or some may be taxed heavily and some others lightly. The legislature has a wide discretion in this matter, and the courts will not review its action unless the classification is arbitrary, unreasonable, or in effect no classification at all. The constitutional rule that taxes shall be equal and uniform is regarded as having no direct application to license or occupation taxes, or, if applicable at all, as not depriving the legislature of the power of dividing the subjects of license taxation into classes. The only constitutional limitation upon the imposition of license taxes, so far as concerns their equality and uniformity, is that they shall be equal and uniform on all persons and subjects embraced within the same class. A license tax is uniform and equal when it bears equally upon each individual belonging to the described class upon which the tax is imposed. Constitutions do not require that all occupations, professions and businesses be taxed equally and uniform; they simply require that all persons or subjects within the same class be taxed equally and uniform. This rule may be found incorporated in some state constitutions, but courts have invariably recognized its existence independently of any such express declaration. Illustrations of how legislatures have classified subjects for the purpose of license taxation, imposing heavier burdens on some than on others, and exempting some entirely, will appear in subsequent pages of this note: *People v. Naglee*, 1 Cal. 232, 52 Am. Dec. 312; *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *Ex*

parte Hurl, 49 Cal. 557; Home Ins. Co. of New York v. City of Augusta, 50 Ga. 530; City of Rome v. McWilliams, 52 Ga. 251; Cutliff v. City of Albany, 60 Ga. 597; Davis v. City of Macon, 64 Ga. 128, 37 Am. Rep. 60; Weaver v. State, 89 Ga. 639, 15 S. E. 840; McGhee v. State, 92 Ga. 21, 17 S. E. 276; Singer Mfg. Co. v. Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Stewart v. Kehrner, 115 Ga. 184, 41 S. E. 680; City Council of Augusta v. Clark & Co., 124 Ga. 254, 52 S. E. 881; Savannah v. Cooper, 131 Ga. 670, 63 S. E. 138; State v. Doherty, 3 Idaho, 384, 29 Pac. 855; Wiggins Ferry Co. v. City of East St. Louis, 102 Ill. 560; Braun v. City of Chicago, 110 Ill. 186; Webber v. City of Chicago, 148 Ill. 313, 36 N. E. 70; Banta v. Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611; Bright v. McCullough, 27 Ind. 223; City of Terre Haute v. Kersey, 159 Ind. 300, 95 Am. St. Rep. 298, 64 N. E. 469; Kersey v. City of Terre Haute, 161 Ind. 471, 68 N. E. 1027; Covington v. Herzog, 25 Ky. Law Rep. 938, 76 S. W. 538; Heres v. Powell, 6 La. Ann. 586; State v. Rebassa, 9 La. Ann. 305; City of New Orleans v. Staiger, 11 La. Ann. 68; Merriam v. City of New Orleans, 14 La. Ann. 318; Hodgson v. City of New Orleans, 21 La. Ann. 301; State v. Becker, 30 La. Ann. 682; Parish of Plaquemines v. Bowman, 30 La. Ann. 1403; Weise v. Thibaut, 34 La. Ann. 556; City of New Orleans v. Pontchartrain R. Co., 41 La. Ann. 519, 7 South. 83; McClennan v. Pettigrew, 44 La. Ann. 356, 10 South. 853; Browne v. Selser, 106 La. 691, 31 South. 290; State v. Hammond Packing Co., 110 La. 180, 98 Am. St. Rep. 459, 34 South. 368; Clarkesdale Ins. Agency v. Cole, 87 Miss. 637, 40 South. 228; City of St. Louis v. Bowler, 94 Mo. 630, 7 S. W. 434; City of St. Louis v. Freivogel, 95 Mo. 533, 8 S. W. 715; St. Charles v. Elsner, 155 Mo. 671, 56 S. W. 291; State v. French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415; State v. McKinney, 29 Mont. 375, 74 Pac. 1095; Quong Wing v. Kirkendall (Mont.), 101 Pac. 250; Magneau v. City of Fremont, 30 Neb. 843, 27 Am. St. Rep. 436, 47 N. W. 280, 9 L. R. A. 786; Ex parte Robinson, 12 Nev. 263, 28 Am. Rep. 794; Bradley v. City of Rochester, 54 Hun, 140, 7 N. Y. Supp. 237; Standard Underground Cable Co. v. Attorney General, 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733; Kolb v. Town of Boonton, 64 N. J. L. 163, 44 Atl. 873; State v. Carter, 129 N. C. 560, 40 S. E. 11; Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53; In re Lipschitz, 14 N. D. 622, 95 N. W. 157; Kneeland v. City of Pittsburg (Pa.), 11 Atl. 657; Kniseley v. Cotterel, 196 Pa. 614, 46 Atl. 861, 50 L. R. A. 86; State v. City of Columbia, 6 Rich. (S. C.) 404; In re Watson, 17 S. D. 486, 97 N. W. 463; Thompson v. State, 17 Tex. App. 253; Fahey v. State, 27 Tex. App. 146, 11 Am. St. Rep. 182, 11 S. W. 108; Ex parte Butin, 28 Tex. App. 304, 13 S. W. 10; Salt Lake City v. Christensen, 34 Utah, 38, 95 Pac. 523, 17 L. R. A., N. S., 898; Blackrock Copper etc. Co. v. Tingey, 34 Utah, 369, 98 Pac. 180; Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 817; Norfolk P. & N. N. Co. v. Norfolk, 105 Va. 139, 52 S. E. 851; Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; Stull v. DeMattos, 23 Wash. 71, 62 Pac. 451, 51

L. R. A. 892; *Garfinkle v. Sullivan*, 37 Wash. 650, 80 Pac. 188; *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12; *Beals v. State* (Wis.), 121 N. W. 347; *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948, 62 Pac. 797, 52 L. R. A. 198; *Ex parte Thornton*, 12 Fed. 538, 4 Hughes. 220; *Singer Mfg. Co. v. Wright*, 33 Fed. 121; *American Harrow Co. v. Shaffer* (G. C.), 68 Fed. 750.

Wholesale dealers may be classified separately from retail dealers, and a lower tax imposed on the former than on the latter doing the same amount of business: *Commonwealth v. Clark*, 195 Pa. 634, 86 Am. St. Rep. 694, 46 Atl. 286, 57 L. R. A. 348; and meat-packing establishments cannot successfully maintain that they are denied equal protection because vegetable-packing establishments and the like are not subjected to the same tax: *Armour Packing Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. Rep. 232, 50 L. ed. 451, affirming 134 N. C. 567, 47 S. E. 53.

"The sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction; or, on the other hand, it may select any particular species of property, and tax that only, if in the opinion of the legislature that course will be wiser. And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by constitution. In a number of the states it has been held that the constitutional requirement of equality and uniformity does not apply at all to the taxation of occupations, owing to the fact that the taxation of all occupations equally would work the greatest possible injustice and is impossible in practice. But, if applicable at all, it does not deprive the legislature of the power of dividing the objects of taxation into classes. It merely obliges the legislature to impose an equal burden upon all those who find themselves in the same class. To be uniform, taxation need not be universal. Certain objects may be made its subject, and others may be exempted from its operation; certain occupations may be taxed and others not; so some occupations may be taxed for a greater amount and others for a less, but as between the subjects of taxation in the same class there must be an equality. The requisitions of the constitution may be carried out by a uniform tax on licenses to persons following the same pursuit under the same conditions and circumstances; a difference therein will justify a discrimination in the tax": *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948, 62 Pac. 797, 52 L. R. A. 198.

"We understand the principle," to quote from the Alabama court, "to be that the state can divide the various business vocations into classes for the purpose of levying occupation taxes, and levy varying amounts on the different occupations; the limitation being (1) that there must be uniformity among members of the same class,

and the classification must be reasonable; and (2) the state cannot levy such an occupation tax on any useful or harmless occupation as will amount to a prohibition of the same. And when we say harmless occupation, we do not mean to proscribe an occupation because one man, in the lawful pursuit of it, may draw away business from another, or outrun him in the race for patronage or trade, but harmless in the sense of not being demoralizing in its tendency, injurious to the health of the people, promotive of disorder, or interfering with the rights of other citizens to be protected in their constitutional privileges": *Kendrick v. State*, 142 Ala. 43, 39 South. 203.

b. Classification Discriminatory in Effect.—Statutes and ordinances imposing license taxes have not infrequently been condemned as unconstitutional because the classification on which they were based was arbitrary, unreasonable, and founded on no real differences, and because certain persons and classes were discriminated against without reason: *Read v. Graham*, 31 Ky. Law Rep. 569, 102 S. W. 860; *Western & Southern Life Ins. Co. v. Commonwealth (Ky.)*, 117 S. W. 376; *Parish of Orleans v. Cochran*, 20 La. Ann. 373; *Valentine v. Berrien Circuit Judge*, 124 Mich. 664, 83 Am. St. Rep. 352, 83 N. W. 594, 50 L. R. A. 493; *Moore v. City of St. Paul*, 48 Minn. 331, 51 N. W. 219; *State v. Wagener*, 69 Minn. 206, 65 Am. St. Rep. 565, 72 N. W. 67, 38 L. R. A. 677; *City of St. Louis v. Spiegel*, 90 Mo. 587, 2 S. W. 839; *Magneau v. City of Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436, 47 N. W. 280, 9 L. R. A. 786; *Watertown v. Rodenbaugh*, 112 App. Div. 723, 93 N. Y. Supp. 885; *State v. Wright (Or.)*, 100 Pac. 296; *Commonwealth v. Snyder*, 182 Pa. 630, 38 Atl. 356; *Town of Columbia v. Beasley*, 20 Tenn. (1 Humph.) 232, 34 Am. Dec. 619; *City of Nashville v. Althrop*, 45 Tenn. (5 Cold.) 554; *Hoeftling v. City of San Antonio*, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608; *Ex parte Jones*, 38 Tex. Cr. 482, 43 S. W. 513; *Ex parte Overstreet*, 39 Tex. Cr. 474, 46 S. W. 825; *State v. Whitecom*, 122 Wis. 110, 99 N. W. 468; *Lappin v. District of Columbia*, 22 App. D. C. 68; *In re Yot Sang*, 75 Fed. 983. "Constitutional provisions do not prevent a state diversifying its legislation or other action to meet diversities in situations and conditions within its borders. There is no inhibition against a state making different regulations for different localities, for different kinds of business and occupations, for different rates and modes of taxation upon different kinds of occupations, and generally for different matters affecting differently the welfare of the people. Such different regulations of different matters are not discriminations between persons, but only between things or situations. They make no discriminations for or against anyone as an individual, or as one of a class of individuals, but only for or against his locality, his business or occupation, the nature of his property, etc. He can avoid the discrimination by varying his location, business, property, etc.: See *Leavitt v. Canadian Pac. Ry. Co.*, 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152, for a full

and clear exposition of this doctrine. But even these differentiations or classifications must be reasonable and based upon real differences in the situation, condition or tendencies of things. Arbitrary classification even of such matters is forbidden by the constitution. If there be no real difference between the localities, or business, or occupation, or property, the state cannot make one in order to favor some persons over others": *State v. Mitchell*, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887.

The following statutes and ordinances have been declared unconstitutional because discriminatory and based upon an arbitrary or unreasonable classification: An enactment taxing those grocers who employ delivery wagons but exempting those who do not: *Covington v. Dalheim*, 31 Ky. Law Rep. 466, 102 S. W. 829; an enactment requiring the owner of a four-horse vehicle to pay nearly three times as heavy a tax as the owner of a three-horse vehicle: *Fiscal Court v. Cox* (Ky.), 117 S. W. 296; an enactment requiring timber-mill companies to pay a tax, but exempting sawmill operators who do not ship their products out of the state: *Adams v. Mississippi Lumber Co.*, 84 Miss. 23, 36 South. 68; an enactment exempting cotton buyers who pay an occupation tax as merchants, the merchant tax being lower than the tax on cotton buyers: *Poteet v. State*, 41 Tex. Cr. 268, 53 S. W. 869; *Rainey v. State*, 41 Tex. Cr. App. 254, 96 Am. St. Rep. 786, 53 S. W. 882; an enactment which imposes a license tax on all persons and corporations who conduct department stores: *State v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 765, 55 S. W. 627, 48 L. R. A. 265; an enactment imposing a tax on the sale of nonintoxicating malt liquors, which applies only to prohibition territory: *Ex parte Woods*, 52 Tex. Cr. 575, 124 Am. St. Rep. 1107, 108 S. W. 1171, 16 L. R. A., N. S., 450; an enactment providing for licensing transient merchants, but providing that any municipality may suspend the provisions of the statute in any particular instance: *Brown v. Stuart*, 145 Mich. 413, 108 N. W. 717; an ordinance exacting a license for selling goods and fixing one rate of license for sales within the corporate limits or in transitu to the city, and another and much larger license for the sale of goods not in the city or in transitu to it: *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; an ordinance requiring itinerant merchants to procure a license, but exempting persons who come into the city with produce, and commercial travelers employed by wholesale houses: *City of Peoria v. Gugenheim*, 61 Ill. App. 374; and a statute imposing a tax upon persons engaged in taking assignments of wages not yet due, but exempting persons who take such assignments in payment or as security for the purchase price of necessities, insurance premiums, and homesteads: *Owens v. State*, 53 Tex. Cr. 105, 126 Am. St. Rep. 772, 112 S. W. 1075.

c. Classification Based on Population of City.—In *Hager v. Walker*, 128 Ky. 1, ante, p. 238, 107 S. W. 254, 15 L. R. A., N. S., 195, the Kentucky court appears to hold that the population of cities

or the class to which they belong is not a proper basis on which to classify occupations for the purpose of license taxation. Other decisions which lend some support to this idea are *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; *State v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 765, 55 S. W. 627, 48 L. R. A. 265; *Pavonia Horse R. Co. v. Jersey City*, 45 N. J. L. 297; *State v. Moore*, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472. And yet it would seem clear that a classification of cities, towns and villages by population as a basis for license taxation is unobjectionable, at least if founded upon a rational difference of situation or condition found in the municipalities placed in different classes. And this rule has been recognized in such occupations as plumbing: *Douglas v. People*, 225 Ill. 536, 116 Am. St. Rep. 162, 80 N. E. 341, 8 L. R. A., N. S., 1116; and barbers: *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218; *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737; and buying and selling fresh meats: *State v. Carter*, 129 N. C. 560, 40 S. E. 11; and conducting an employment agency; *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306, 61 N. E. 844, 55 L. R. A. 588; *People v. Warden of New York City Prison*, 183 N. Y. 223, 76 N. E. 11, 2 L. R. A., N. S., 859; and dealing in stocks or bills of exchange: *Texas Banking & Ins. Co. v. State*, 42 Tex. 636; and conducting places of amusement: *State v. O'Hara*, 36 La. Ann. 93; and using vehicles on the public streets: *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463.

d. Classification Based on Amount of Property or Receipts of Business.—The amount of capital invested, the amount of stock in trade, or the amount of monthly or annual sales, or the receipts of the business constitute an eminently just and proper basis for graduating license taxes. No constitutional objection can be urged against such classification when reasonably made. Taxes thus imposed are none the less occupation taxes, as distinguished from property taxes, because graduated according to the magnitude of the business done or capital invested: *Saks v. Birmingham*, 120 Ala. 190, 24 South. 728; *Southern Ry. Co. v. Greene (Ala.)*, 49 South. 404; *City and County of Sacramento v. Crocker*, 16 Cal. 119; *San Luis Obispo County v. Greenberg*, 120 Cal. 300, 52 Pac. 797; *In re Martin*, 62 Kan. 638, 64 Pac. 43; *Rankin v. City of Henderson (Ky.)*, 7 S. W. 174; *Louisville v. Schnell (Ky.)*, 114 S. W. 742; *State v. Traders' Bank*, 41 La. Ann. 329, 6 South. 582; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 South. 219; *American Union Exp. Co. v. City of St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *Gatlin v. Tarboro*, 78 N. C. 119; *City of Allentown v. Cross*, 132 Pa. 319, 19 Atl. 269; *Commonwealth v. Clark*, 195 Pa. 634, 86 Am. St. Rep. 694, 46 Atl. 286, 57 L. R. A. 348; *Ex parte Thornton*, 12 Fed. 538, 4 Hughes, 220; *Clark v. Titusville*, 184 U. S. 329, 22 Sup. Ct. Rep. 382, 46 L. ed. 569.

It has been held that a tax on the privilege of using vehicles may be graduated according to the number or capacity of the vehicles

used, or the number of horses required to haul them: *Johnston v. City of Macon*, 62 Ga. 645; *Smith v. City of Louisville (Ky.)*, 6 S. W. 911. Contra: *State v. Endom*, 23 La. Ann. 663; *Cullinan v. City of New Orleans*, 28 La. Ann. 102; that a tax on hotels may be graduated according to the gross receipts or the number of rooms: *Ex parte Lemon*, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946; *City of St. Louis v. Bircher*, 7 Mo. App. 169, affirmed 76 Mo. 431; *State v. French*, 109 N. C. 722, 26 Am. St. Rep. 590, 14 S. E. 383; that a tax on mercantile occupations may be imposed according to the annual sales: *City of Williamsport v. Wenner*, 172 Pa. 173, 33 Atl. 544; that a tax on tobacco factories may be laid according to the market value of the product: *Strater Bros. T. Co. v. Commonwealth*, 25 Ky. Law Rep. 1717, 78 S. W. 871; that a tax on packers and canners of oysters may be levied in proportion to the number of bushels packed: *State v. Applegarth*, 81 Md. 293, 31 Atl. 961, 28 L. R. A. 812; and that dairymen may be differentiated for the purpose of license taxation according to the amount of their business: *Birmingham v. Goldstein*, 151 Ala. 473, 44 South. 113.

The fact that merchants doing a small amount of business are taxed higher proportionately than those doing a larger business does not render the tax unconstitutional, if the discrimination is not unreasonable in extent: *Commonwealth v. Clark*, 195 Pa. 634, 86 Am. St. Rep. 694, 46 Atl. 286, 57 L. R. A. 348; but a tax laid on the business of stock and cotton brokerage, so graduated as to make the smaller business pay in proportion one hundred per cent more than the larger business, is not equitable graduation required by the Louisiana constitution: *State v. Pinckard*, 119 La. 228, 43 South. 1015.

e. Classification Regardless of Value of Receipts.—While it is proper to graduate a license tax in proportion to the business done, there is no constitutional necessity for so doing as a general rule. Hence it is that a one hundred dollar monthly license tax imposed by a city upon gas companies, regardless of their earnings or business done, is not invalid as an unreasonable discrimination: *Los Angeles v. Los Angeles Independent Gas Co.*, 152 Cal. 765, 93 Pac. 1006. Said the supreme court in this case: "We find no decision in this state directly holding that a license tax imposing the same amount upon all engaged in the same business, regardless of business done, or the profit received therefrom, is not an unreasonable discrimination, where it may appear that different persons in the business have much more capital employed and earn much more profit than others. But such uniform rate has always been recognized as a valid exercise of the power. Many cases have been before this court wherein the tax has been declared valid, although it was subject to the same objection here made. In other states the question has been directly decided. In Nebraska the constitution and the statute require that local license taxes should be uniform. In *Magnean v. Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436, 47 N. W. 280, 9 L. R. A. 786, in deciding this question, the court said: 'The ordinance imposes a fixed sum upon each of the various avocations therein named. The fact that

it does not classify each business and graduate the amount that shall be paid by the person pursuing an avocation according to the amount of the business he shall do is not a violation of the rule of uniformity prescribed by both the constitution and statute. It is not an income tax, but a license fee or tax for the privilege of carrying on business in the city. The ordinance makes no exceptions in favor of or against anyone carrying on the business taxed, but operates uniformly on the class to which it applies.' The following cases are to the same effect"; citing numerous authorities.

f. **Classification Discriminating Against Nonresidents.**—A statute or ordinance which, in imposing license taxes, discriminates in favor of residents of the city or state as against nonresidents in the same class is unconstitutional. Such classification, on the sole ground of residence, cannot be sustained. It is arbitrary, unreasonable, tends to restrain trade and to create monopoly, denies the equal protection of the laws, and in so far as it applies to residents of other states violates the rule that the citizens of each state are entitled to all the immunities of the citizens of the several states, and perhaps is an interference with interstate commerce: *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030; *City of Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *Town of Pacific Junction v. Dyer*, 64 Iowa, 38, 19 N. W. 862; *Simrall v. City of Covington*, 90 Ky. 444, 29 Am. St. Rep. 393, 14 S. W. 369, 9 L. R. A. 556; *City of Saginaw v. Saginaw Circuit Judge*, 106 Mich. 32, 63 N. W. 985; *City of St. Louis v. Consolidated Coal Co.*, 113 Mo. 83, 20 S. W. 699; *Thompson v. Ocean Grove Camp Meeting Assn.*, 55 N. J. L. 507, 26 Atl. 798; *City of Nashville v. Althrop*, 5 Cold. (45 Tenn.) 554; *Clements v. Town of Casper*, 4 Wyo. 494, 35 Pac. 472; *Ex parte Thornton*, 12 Fed. 538, 4 Hughes. 220.

Laws attempting this discrimination have often been made against peddlers, but have uniformly been denounced as unconstitutional: *Gould v. City of Atlanta*, 55 Ga. 678; *Braceville v. Doherty*, 30 Ill. App. 645; *Lucas v. City of Macomb*, 49 Ill. App. 60; *In re Jarvis*, 66 Kan. 329, 71 Pac. 576; *Rash v. Holloway*, 82 Ky. 674; *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633; *Ex parte Bliss*, 63 N. H. 135; *State v. Wiggin*, 64 N. H. 508, 15 Atl. 128, 1 L. R. A. 156; *Morgan v. City of Orange*, 50 N. J. L. 389, 13 Atl. 240; *Borough of Sayre v. Phillips*, 148 Pa. 482, 33 Am. St. Rep. 842, 24 Atl. 76, 16 L. R. A. 49; *Borough of Shamokin v. Flannigan*, 156 Pa. 43, 26 Atl. 780; *In re Watson*, 15 Fed. 511; though clearly a non-resident peddler may be made liable to pay a license, and subject equally with citizens of the state to the penalty for refusing to pay it: *Rash v. Farley*, 91 Ky. 344, 34 Am. St. Rep. 233, 15 S. W. 862.

The rule that nonresidents cannot be discriminated against in the imposition of license taxes does not deprive a city or state of the right to discriminate in favor of residents as against itinerants. Therefore a traveling photographer may be discriminated against: *City of Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949; so may a transient merchant or dealer: *City of Ottumwa v. Zekind*, 95 Iowa,

622, 58 Am. St. Rep. 447, 64 N. W. 646, 29 L. R. A. 734; and so may an itinerant physician: *Fairfield v. Shallenberger*, 135 Iowa, 615, 113 N. W. 459.

A state statute which forbids peddling except under a license, and which provides that citizens may be thus licensed, and that aliens shall not be, is a denial of the "equal protection of the laws" as to the latter, and an unconstitutional discrimination against them not sustainable as a proper exercise of the police power of the state: *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165; and a statute permitting the sale by peddlers of agricultural products of the United States without a license, but forbidding the unlicensed sale of agricultural products of other countries is unconstitutional, because it amounts to a regulation of foreign commerce: *Commonwealth v. Caldwell*, 190 Mass. 355, 112 Am. St. Rep. 334, 76 N. E. 955; but a state may, if it deems it necessary for the protection of its inhabitants in the exercise of its police power, restrict the right to carry on the business of peddlers or hawkers to persons who are, or who have declared their intention of becoming, citizens of the United States: *Commonwealth v. Hana*, 195 Mass. 262, 122 Am. St. Rep. 251, 81 N. E. 149, 11 L. R. A., N. S., 799.

A law which requires a license to be taken out or paid by peddlers who sell articles produced or manufactured without the state, but which requires no such license or tax, or requires a smaller one, of persons who sell in the same manner like articles manufactured or produced within the state, is unconstitutional as a denial of the equal protection of the laws and as an interference with interstate commerce: *State v. Bayer*, 34 Utah, 257, 97 Pac. 129, 19 L. R. A., N. S., 297; *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973; *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 72; *Howe Machine Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. Rep. 829, 38 L. ed. 719. That a manufacturing corporation of one state selling and distributing its goods from warehouses in another state through its representative there is a merchant and taxable as such under the laws of that state, see *American Steel & Wire Co. v. Speed*, 110 Tenn. 524, 100 Am. St. Rep. 814, 75 S. W. 1037, and note.

g. Classification Favoring War Veterans.—In imposing license taxes discriminations have been attempted in favor of soldiers who have served in the Civil War; and while statutes looking to that end do not seem to have been looked upon with entire disfavor in a few instances (*Town of Stamps v. Burk*, 83 Ark. 351, 104 S. W. 153; *Holliman v. Hawkinsville*, 109 Ga. 107, 34 S. E. 214; *Hartfield v. Columbus*, 109 Ga. 112, 34 S. E. 288), they have been very properly condemned as unconstitutional in the generality of cases: *City of Laurens v. Anderson*, 75 S. C. 62, 117 Am. St. Rep. 885, and note, 55 S. E. 136; *State v. Shedroi*, 75 Vt. 277, 98 Am. St. Rep. 825, 54 Atl. 1081, 63 L. R. A. 179; *State v. Whiteom*, 122 Wis. 110, 99 N. W. 468. There is no reasonable basis for such discrimination, whether the license be regarded as a police regulation or as a revenue measure;

and to attempt such favoritism is unwarranted class legislation, and a denial of the equal protection of the laws. Such statutes savor of sentiment and philanthropy, which, however commendable in themselves, have no proper function as an inspiration for legislation and taxation.

II. Amount and Reasonableness of Taxation.

a. **Reasonableness of Tax in General.**—A license or a license tax may be imposed merely as a police regulation or as a means of raising revenue, and the amount of the tax that may constitutionally be laid in any case will vary according to whether its purpose is revenue or regulation, more latitude being permissible in the former than in the latter case. The distinction between a license as a police regulation and a license as a revenue measure also becomes important under the rule announced by many authorities that a delegation of authority to municipal corporations to impose licenses for police purposes does not authorize the imposition of a license for revenue. When police regulation alone is the object of a license, the nature of the occupation or business upon which the burden is imposed has much to do with determining the reasonableness of the amount, for if the occupation or business is one useful and beneficial to the community, the license charge thereon cannot ordinarily be so great as in case of those not commendable in their nature or tendency: *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Schmidt v. Indianapolis*, 168 Ind. 631, 120 Am. St. Rep. 385, 80 N. E. 632, 14 L. R. A., N. S., 787. But whatever may be the nature of the occupation, the authorities are agreed that the amount of the license tax need not be confined to the mere expense of issuing the license, but that a reasonable compensation may be charged in addition, for the expense of municipal supervision over the occupation, including the cost of official services that may be required in enforcing the regulation and such other incidental expenses as may be necessarily incurred in properly carrying out police inspection and superintendence. The authorities generally hold that when authority has been delegated to municipal corporations to impose licenses for police regulation, the license fees cannot be made so heavy as to yield a revenue over and above the expense of police regulation; or as some of the courts state, municipal corporations cannot, under the guise of the police power, impose a license tax for revenue purposes. And probably this may be taken as the general rule: *City of Fayetteville v. Carter*, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509; *Fort Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51, 82 S. W. 163, 66 L. R. A. 238; *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 109 S. W. 293, 16 L. R. A., N. S., 1035; *Sierra County v. Flannigan*, 149 Cal. 769, 87 Pac. 913; *Ex parte McCoy* (Cal. App.), 101 Pac. 419; *State v. Glavin*, 67 Conn. 29, 34 Atl. 708; *Atkins v. Phillips*, 26 Fla. 281, 8 South. 429, 10 L. R. A. 158; *People v. Grant* (Mich.), 121 N. W. 300; *State v. Boyd*, 63 Neb. 829, 89 N. W. 417, 58 L. R. A. 108; *People v. Jarvis*, 19 App. Div. 406, 46 N. Y. Supp. 596; *Robinson v. Norfolk*, 108 Va. 14, 128 Am.

St. Rep. 934, 60 S. E. 762, 15 L. R. A., N. S., 294; *Tenney v. Lenz*, 16 Wis. 566; *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 110 Am. St. Rep. 886, 104 N. W. 1009, 1 L. R. A., N. S., 581; *In re Laundry License Case*, 22 Fed. 701; *City of Philadelphia v. Western Union Tel. Co.*, 40 Fed. 615. Nevertheless some courts have regarded this as a narrow rule, as perhaps it is, and have to some extent departed from it: *Kinsley v. City of Chicago*, 124 Ill. 359, 16 N. E. 260; *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488; *Ogden v. Crossman*, 17 Utah, 66, 53 Pac. 985. The Illinois court, in the case above, holds that a power in a city charter to license includes a power to fix the license high enough to become a source of revenue to the municipality.

b. **Prohibitory Taxes or Licenses.**—If it is conceded that it is no constitutional objection to a license tax imposed as a police measure that incidentally it yields a revenue, still the tax cannot be made so heavy on a legitimate occupation as to create a monopoly or in effect prohibit the pursuit of the occupation, although, as to those occupations which are productive of disorder and inimical to the public welfare, the police or taxing power may be so exercised as to discourage and even destroy their pursuit: *City Council of Montgomery v. Kelly*, 142 Ala. 552, 110 Am. St. Rep. 43, 38 South. 67, 70 L. R. A. 209; *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 109 S. W. 293, 16 L. R. A., N. S., 1035; *Amerieus v. Verner* (Ga.), 63 S. E. 347; *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306, 61 N. E. 844, 55 L. R. A. 588; *Chicago v. Gunning System*, 114 Ill. App. 377, affirmed in 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230; *Standard Oil Co. v. Commonwealth*, 26 Ky. Law Rep. 985, 82 S. W. 1020; *State v. Merchants' Trading Co.*, 114 La. 529, 38 South. 443; *State v. Hanson*, 16 N. D. 347, 113 N. W. 371; *Cache County v. Jensen*, 21 Utah, 207, 61 Pac. 303; *Garfinkle v. Sullivan*, 37 Wash. 650, 80 Pac. 188. Even when cities are granted the power to tax occupations for revenue, this is held not to authorize the imposition of taxes so burdensome on legitimate occupations as to be prohibitive: *Morton v. Mayor etc. of Macon*, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485; *Fretwell v. Troy*, 18 Kan. 271; *Caldwell v. Lincoln*, 19 Neb. 569, 27 N. W. 647; *Hirshfield v. Dallas*, 29 Tex. App. 242, 15 S. W. 124. A state perhaps has more latitude in this matter than a municipal corporation: *State v. Hume* (Or.), 95 Pac. 808. And a power to tax is, as a rule, so omnipotent as to embrace the power to destroy. But it would seem that there should be some constitutional limit on this rule as applied to occupation taxes, as to which the constitutional rule of equality and uniformity does not apply, for otherwise restraint may be placed on trade, monopolies fostered, and the constitutional right to pursue a lawful calling be denied. Said the court in *Fiscal Court v. F. & A. Cox Co.* (Ky.), 117 S. W. 296: "It may be conceded that ordinarily the reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion: *Hall v. Commonwealth*, 101 Ky. 382, 41 S. W. 2. This rule we think, however, is subject to the limitation that the tax imposed

shall not amount to a prohibition of any useful or legitimate occupation: In re Quong Woo, 7 Saw. 526, 13 Fed. 229; Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361; City of Ottumwa v. Zekind, 95 Iowa, 622, 58 Am. St. Rep. 447, 64 N. W. 646, 29 L. R. A. 734; Vansant v. Harlem Stage Co., 59 Md. 330; Brooks v. Mangan, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633; Caldwell v. City of Lincoln, 19 Neb. 569, 27 N. W. 647. While there are numerous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power. We can hardly believe that the same courts that announced that doctrine would hold to be valid an ordinance or statute imposing upon every physician and attorney at law an annual license tax of ten thousand dollars, or imposing upon every merchant a license of five thousand dollars, or upon every washer-woman a tax of one thousand dollars per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no legislative or municipal body would ever do this. The question, however, is not what it would do, but what it might do. The question is one of power. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations, but what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax? Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that among the inalienable and inherent rights guaranteed by our constitution to every law-abiding citizen is the right to live and enjoy life and the right to acquire property, and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation, the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our constitution. As the evidence in this case shows that the license tax in question is prohibitive, we have no hesitancy in declaring it invalid: Hager v. Walker, 128 Ky. 1, ante, p. 238, 107 S. W. 254, 32 Ky. Law Rep. 748, 15 L. R. A., N. S., 195."

c. Discretion of Legislature in Fixing Amount.—The reasonableness of a license tax, whether imposed as a police regulation or as a revenue measure, rests in the discretion of the legislature or municipal council imposing it, and courts will not review the action of the law-makers unless an abuse of such discretion is obvious. Nevertheless, when a license clearly appears to the court to be unreasonable in amount or in the manner of imposition, courts do not hesitate to

pronounce it unconstitutional: *Fort Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51, 82 S. W. 163, 66 L. R. A. 238; *Ex parte McCoy* (Cal. App.), 101 Pac. 419; *Munson v. Colorado Springs*, 35 Colo. 506, 84 Pac. 683, 6 L. R. A., N. S., 542; *United States Distilling Co. v. Chicago*, 112 Ill. 19, 1 N. E. 166; *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 206, 61 N. E. 844, 55 L. R. A. 588; *Schmidt v. Indianapolis*, 168 Ind. 631, 120 Am. St. Rep. 385, 80 N. E. 632, 14 L. R. A., N. S., 787; *Grossman v. Indianapolis* (Ind.), 88 N. E. 945; *In re Martin*, 62 Kan. 638, 64 Pac. 43; *Otting v. Bellevue*, 32 Ky. Law Rep. 186, 105 S. W. 375; *State v. Hammond Packing Co.*, 110 La. 180, 98 L. R. A. 459, 34 South. 368; *Meushaw v. State*, 109 Md. 84, 71 Atl. 457; *People v. Grant* (Mich.), 121 N. W. 300; *Margolies v. Atlantic City*, 67 N. J. L. 82, 50 Atl. 367; *State v. Roberson*, 136 N. C. 587, 48 S. E. 595; *State v. Foster*, 23 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; *Cooper v. District of Columbia*, 11 D. C. (McArthur & M.) 250.

d. **Illustrations of Reasonable Licenses.**—The following license fees or taxes have been upheld as reasonable and therefore constitutional: A fee of three dollars a day for peddling: *In re White*, 43 Minn. 250, 45 N. W. 232; a fee of five dollars a week for peddling; *People v. Baker*, 115 Mich. 190, 73 N. W. 115; a fee of fifteen dollars a year, or three dollars a day, for peddling clothes-wringers: *People v. Russell*, 49 Mich. 617, 43 Am. Rep. 478, 14 N. W. 568; a fee of one hundred dollars a year, sixty dollars for six months, fifteen dollars a month, or five dollars a day for peddling: *City of Duluth v. Krupp*, 46 Minn. 435, 49 N. W. 235; a fee of two dollars a month for peddling: *State v. Cederaski*, 80 Conn. 478, 69 Atl. 19; a fee of one hundred and twenty-five dollars a year for peddling: *State v. Jensen*, 93 Minn. 88, 100 N. W. 644; a fee of two dollars a day, ten dollars a week, twenty-five dollars a month, fifty dollars for three months and two hundred dollars a year of transient traders: *People v. Grant* (Mich.), 121 N. W. 300; a fee of ten dollars of a person selling goods, wares and merchandise: *Van Hook v. City of Selma*, 70 Ala. 361, 45 Am. Rep. 85; a fee of one hundred dollars a year of a pawnbroker: *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; a yearly license of fifty dollars, and a bond for five thousand dollars of pawnbrokers, and a fee of twenty-five dollars and a bond of two thousand dollars of second-hand and junk dealers: *City of Grand Rapids v. Braudy*, 105 Mich. 670, 55 Am. St. Rep. 472, 64 N. W. 29, 32 L. R. A. 116; a fee of two hundred dollars a year on commission merchants who use a city market which has cost the municipality large sums of money: *Meushaw v. State*, 109 Md. 84, 71 Atl. 457; a registration fee of one dollar a year of milk venders, and an occupation tax of two and one-half dollars for six months, and twenty-five dollars from wholesalers: *St. Louis v. Liessing*, 190 Mo. 464, 109 Am. St. Rep. 774, 89 S. W. 611, 1 L. R. A., N. S., 918; a fee of ten dollars a year of milk venders: *Littlefield v. State*, 42 Neb. 223, 47 Am. St. Rep. 697, 60 N. W. 724, 28 L. R. A. 588; a fee of fifteen dollars for each wagon peddling milk or butter: *Miller v. Mayor of Birmingham*, 151 Ala.

469, 125 Am. St. Rep. 31, 44 South. 388; a fee of ten dollars a year for a wagon from which oils are handled: *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718; an annual fee of seven dollars and a half for each vehicle used to transport goods in a city: *Kentz v. Mobile*, 120 Ala. 823, 24 South. 952; an annual fee of hackmen of two dollars and fifty cents for each vehicle drawn by one horse and five dollars for each vehicle drawn by two horses: *Kissinger v. Hay* (Tex. Civ. App.), 113 S. W. 1005; a fee of one hundred dollars on an express company doing business in a city: *Hardee v. Brown* (Fla.), 47 South. 834; a fee of five dollars per annum on rowboats or skiffs kept for hire: *Poyer v. Village of Desplaines*, 22 Ill. App. 576; a fee of five dollars a day on auctioneers in a city: *Fretwell v. City of Troy*, 18 Kan. 271; a fee of twenty-five dollars on persons engaging laborers in another state: *State v. Hunt*, 129 N. C. 686, 85 Am. St. Rep. 758, 40 S. E. 216; a fee of twenty-five dollars on hotel-keepers: *Helena v. Miller*, 88 Ark. 263, 114 S. W. 237; a fee of fifty dollars a day on traveling venders of drugs who accompany their sales with public exhibitions in the streets: *Walla Walla v. Ferdon*, 21 Wash. 308, 57 Pac. 796; a fee of fifty dollars a year by a city on itinerant physicians: *Fairfield v. Shallenberger*, 135 Iowa, 615, 113 N. W. 459; a fee of one hundred and twenty-five dollars for six months on theatrical performances in a city: *Duluth v. Marsh*, 71 Minn. 248, 73 N. W. 962; a city tax of five dollars for every telephone pole erected and a yearly fee thereafter of one dollar a pole: *Western Union Tel. Co. v. City of Philadelphia* (Pa.), 12 Atl. 144 (see, also, *Fort Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51, 82 S. W. 163, 66 L. R. A. 238; *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161; *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 110 Am. St. Rep. 886, 104 N. W. 1009, 1 L. R. A., N. S., 581); two hundred and fifty dollars for each pool-table kept for hire: *Wyson v. Lebanon*, 163 Ind. 132, 71 N. E. 194.

e. Illustrations of Unreasonable Licenses.—The following license taxes have been held unreasonable or oppressive, and therefore unconstitutional: A fee of two thousand five hundred dollars on an auctioneer in a city as a police regulation: *Margolies v. Atlantic City*, 67 N. J. L. 82, 50 Atl. 367; twenty-five dollars on an auctioneer for each day that he conducts sales: *Sipe v. Murphy*, 49 Ohio St. 536, 31 N. E. 884, 17 L. R. A. 184; ten dollars a month on peddlers in a city: *State v. Angelo*, 71 N. H. 224, 51 Atl. 905; twenty-five dollars for issuing a license to a peddler: *State v. Bevins*, 70 Vt. 574, 41 Atl. 655; ten dollars for the first day and five dollars for each subsequent day on foot peddlers in a city, twenty dollars for the first day and fifteen dollars for each subsequent day on peddlers traveling with one horse, and twenty-five dollars for the first day and fifteen dollars for each subsequent day on peddlers who travel with two or more horses: *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633; two hundred dollars a month on itinerant or transient merchants in a city: *City of Peoria v. Gugenheim*, 61 Ill. App. 374; ten dollars a

day on itinerant merchants in a city: *City of Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; two hundred and fifty dollars a month or twenty-five dollars a day on transient merchants in a city: *City of Ottumwa v. Zekind*, 95 Iowa, 622, 58 Am. St. Rep. 447, 64 N. W. 646, 29 L. R. A. 734; three hundred dollars for maintaining a temporary store, regardless of the value of the stock and the length of time business is carried on: *Cincinnati v. Uhrlaub*, 72 Ohio St. 667, 76 N. E. 1121; fifty dollars a day on fire or bankrupt sales: *Springfield v. Jacobs*, 101 Mo. App. 339, 73 S. W. 1097; five hundred dollars on the business of loaning money on household furniture, wearing apparel and the like: *Morton v. Macon*, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485; ten dollars a month on venders of fresh meats in a city: *Chaddock v. Day*, 75 Mich. 527, 13 Am. St. Rep. 468, 42 N. W. 977, 4 L. R. A. 809; one hundred dollars on agents of packing-houses, with an additional tax of four hundred dollars to sell fresh meats, while on other persons selling fresh meats a much smaller tax is imposed: *Savannah v. Cooper*, 131 Ga. 670, 63 S. E. 138; five hundred dollars annually on a druggist selling intoxicating liquors, where his gross receipts are only one thousand dollars: *City of Lyons v. Cooper*, 39 Kan. 324, 18 Pac. 296; one thousand dollars on emigrant agents—that is, persons hiring laborers in one state to be employed without its boundaries: *State v. Moore*, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472.

III. Double Taxation.

a. **Tax on Property and Also on Occupation.**—Since a license tax is regarded as a tax on the occupation or business, and not on the property employed therein, it follows that an ad valorem tax may be levied on the property used in a business or occupation and at the same time a license tax imposed on the business or occupation, without offending the constitutional prohibition against double taxation. In other words, the fact that an ad valorem tax is levied on the property used in a calling does not preclude the imposition of a license tax upon the right to pursue the calling: *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888; *Carson v. City of Forsyth*, 94 Ga. 617, 20 S. E. 116; *State v. Jones*, 9 Idaho, 693, 75 Pac. 819; *Levy v. State*, 161 Ind. 251, 68 N. E. 172; *Scottish Union etc. Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; *Springfield v. Smith*, 138 Mo. 645, 60 Am. St. Rep. 569, 40 S. W. 747, 37 L. R. A. 446; *City of St. Louis v. Green*, 6 Mo. App. 591; *Troy v. Harris*, 102 Mo. App. 51, 76 S. W. 662; *City of Monett v. Hall*, 128 Mo. App. 91, 106 S. W. 579; *Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982; *Lincoln Traction Co. v. Lincoln (Neb.)*, 121 N. W. 435; *State v. French*, 109 N. C. 722, 26 Am. St. Rep. 590, 14 S. E. 383; *Jenkins v. Ewin*, 55 Tenn. (8 Heisk.) 456; *State v. Galveston etc. Ry. Co.*, 100 Tex. 153, 97 S. W. 71; *Dallas etc. Ry. Co. v. State (Tex. Civ. App.)*, 118 S. W. 879; *Newport etc. Elec. Co. v. City of Newport News*, 100

Va. 157, 40 S. E. 645; *Western Assur. Co. v. Halliday*, 127 Fed. 830. Thus an ad valorem tax may be levied on vehicles, while at the same time a license tax may be imposed on the privilege of using the vehicles in the public streets: *Fort Smith v. Scruggs*, 70 Ark. 549, 91 Am. St. Rep. 100, 69 S. W. 679, 58 L. R. A. 921; *Walker v. City of Springfield*, 94 Ill. 364; *Harder's etc. Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245; *City of Covington v. Woods*, 98 Ky. 344, 33 S. W. 84.

b. Tax on Each Occupation Pursued.—One engaged in several distinct occupations or businesses in the same city or town may be required to pay a license tax for each: *Rosenbaum v. City of Newbern*, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123; *F. S. Royster Guano Co. v. Tarboro*, 126 N. C. 68, 35 S. E. 231; *Washington v. Eureka Lumber Co.*, 145 N. C. 13, 58 S. E. 436; *Lasley v. District of Columbia*, 14 App. D. C. 407. And one who conducts a principal place of business and also a branch establishment may be compelled to pay a license fee for each: *Murrell v. Bokenfohr*, 108 La. 19, 32 South. 176. Merchants who carry on both a wholesaling and retailing business may be required to pay two license taxes: *City of Mobile v. Phillips*, 146 Ala. 158, 121 Am. St. Rep. 17, 40 South. 826; *City of New Orleans v. Koen*, 38 La. Ann. 328; and one conducting several laundries is liable to be taxed for each: *Commonwealth v. Pearl Laundry Co.*, 105 Ky. 259, 49 S. W. 26. A commission merchant who is also an agent for steamships and other vessels may be taxed for both occupations: *Wilder v. Savannah*, 70 Ga. 760, 48 Am. Rep. 598. It is not double taxation to require a license fee of both an insurance company and the agents who work for it: *Farmington v. Rutherford*, 94 Mo. App. 328, 68 S. W. 83. The payment of a tax imposed on all corporations within the state does not relieve hotel corporations from taxes imposed on hotel-keepers: *Cobb v. Commissioners of Durham County*, 122 N. C. 307, 30 S. E. 338; and a corporation engaged in brewing and paying a brewer's license is nevertheless liable for the corporation privilege tax: *Spira v. State*, 146 Ala. 177, 41 South. 465.

But while a person or corporation carrying on several occupations or businesses is subject to a license tax on each, operations constituting a mere incident to a business or occupation cannot be regarded as separate and independent therefrom: *Texas Co. v. Stephens*, 100 Tex. 628, 103 S. W. 481; *Taxing District v. Brackett*, 72 Tenn. (4 Lea) 323. When a city has exacted a license on the privilege of doing a general business, another license cannot be required for the privilege of doing a particular act or series of acts constituting an integral part of the business: *Gambill v. Endrich*, 143 Ala. 506, 39 South. 297. A statutory authority to a city to tax millinery establishments and persons engaged in merchandising of a mercantile character does not authorize the imposition of a tax on merchants selling millinery in addition to the merchants' license: *Tuscaloosa v. Holczstein*, 134 Ala. 636, 32 South. 1007. It is said to be double taxation to require

one who has paid a license for the privilege of using his wagon in peddling on the streets to pay an additional license for the same privilege under an ordinance taxing vehicles: *Newport v. Fitzer* (Ky.), 115 S. W. 742. One who has paid a license tax as a livery-stable keeper need not pay an additional license tax on his vehicles: *Williams v. Garignes*, 30 La. Ann. 1094; or for the privilege of hiring his vehicles: *Bell v. Watson*, 71 Tenn. (3 Lea) 328. But according to *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045, a city may impose a license tax on vehicles for use in particular occupations, in addition to that imposed for street use.

c. **Tax by Both State and City.**—The fact that the statute has required a license to be taken out for the privilege of pursuing an occupation, or has imposed a tax thereon, does not necessarily deprive a city in which the occupation is pursued of authority from requiring another license to be taken out or paid: *Wright v. City of Atlanta*, 54 Ga. 645; *Savannah v. Cooper*, 131 Ga. 670, 63 S. E. 138; *Fairfield v. Shallenberger*, 135 Iowa, 615, 113 N. W. 459; *State v. City of Columbia*, 6 Rich. (S. C.) 404; *Ex parte Henson*, 49 Tex. Cr. 177, 90 S. W. 874. A corporation may be liable to the state for a license tax and also to the county wherein it has its principal office: *Commissioners v. Armour Packing Co.*, 135 N. C. 62, 47 S. E. 411; and a life insurance company may be required to obtain a license in every municipality in which it does business, although it has obtained a general license to do business throughout the state: *Lake Charles v. Equitable Life Assur. Soc.*, 114 La. 836, 38 South. 578. Under the Illinois statute the city of Chicago may legally exact a license of a packing-house, although it has been licensed by a village situated within one mile of the city limits: *Chicago Packing & Provision Co. v. City of Chicago*, 88 Ill. 221, 30 Am. Rep. 545. The fact that the state does not impose a license tax on a profession or business does not prevent municipal corporations from doing so: *Ex parte City Council of Montgomery*, 64 Ala. 463; *Oil City v. Oil City Trust Co.*, 151 Pa. 454, 31 Am. St. Rep. 770, 25 Atl. 124; *Norfolk P. & N. N. Co. v. Norfolk*, 105 Va. 139, 52 S. E. 851.

IV. True Value as Basis of Taxation.

The rule expressed in many constitutions that taxation must be in proportion to the value of the property or according to its actual worth does not apply to license or occupation taxes, for they are not charges upon property: *McCaskell v. State*, 53 Ala. 510; *Fort Smith v. Scruggs*, 70 Ark. 549, 91 Am. St. Rep. 100, 69 S. W. 679, 58 L. R. A. 921; *Atlanta etc. Loan Assn. v. Stewart*, 109 Ga. 80, 35 S. E. 73; *Cole v. Hall*, 103 Ill. 30; *Rohr v. Gray*, 80 Md. 274, 30 Atl. 632; *Kansas City v. Richardson*, 90 Mo. App. 450; *Johnson v. Loper*, 46 N. J. L. 321; *Johnson v. Borough of Ashbury Park*, 58 N. J. L. 604, 33 Atl. 850; *State v. Powell*, 100 N. C. 525, 6 S. E. 424; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463; *In re Oliver*, 21 S. C. 318, 53 Am. Rep. 681; *Adams v. Town of Somerville*, 39 Tenn.

(2 Head) 363; Blackrock Copper etc. Co. v. Tingey, 34 Utah, 369, 98 Pac. 180; Hirsh v. Commonwealth (Va.), 21 Gratt. 785. Compare Stevens v. State, 2 Ark. 291, 35 Am. Dec. 72. And while such taxes are often graduated according to the income arising from the occupation or value of the property employed therein, there is no constitutional objection to imposing a license tax on an occupation or business regardless of the amount of business done or the receipts therefrom: See ante, p. 250.

V. Limit on Rate of Taxation.

License or occupation taxes are not within the constitutional rule limiting the rate of taxation: Boye v. Girardey, 28 La. Ann. 717; Producers' Oil Co. v. Stephens, 44 Tex. Civ. App. 327, 99 S. W. 157. Hence a license tax on wholesale petroleum dealers is not unconstitutional because, when taken with the ad valorem tax on property, it exceeds the constitutional rate of taxation. The fact that the amount of the tax is determinable by the value of the property employed or the magnitude of the business done does not make it a property tax: Texas Co. v. Stephens, 100 Tex. 628, 103 S. W. 481.

VI. Commerce Clause in Federal Constitution.

The imposition of license taxes as an interference with interstate commerce is a subject which, in itself, is of no inconsiderable magnitude. It is discussed at some length in the note to People v. Wemple, 27 Am. St. Rep. 559, and will not be touched upon, except incidentally in a few instances in the discussion of the constitutional limitations upon the power to impose license taxes in the present note.

VII. Imposition of License Taxes by Municipal Corporations.

a. Delegation of Power in General by State.—A state may delegate authority to municipal corporations to impose licenses and license taxes upon occupations pursued within their territorial limits. In so doing the legislature may confer power to impose licenses either for the purpose of police regulation or for the purpose of raising revenue. Municipal corporations may be invested with full authority in these respects, and be authorized to exact licenses of all occupations pursued therein which are properly the subject of police regulation, and to impose license taxes on all occupations carried on within their limits: Osborne v. City of Mobile, 44 Ala. 493; Van Hook v. City of Selma, 70 Ala. 361, 45 Am. Rep. 85; Nashville etc. Ry. v. Attalla, 118 Ala. 362, 24 South. 450; Town of Stamps v. Burk, 83 Ark. 351, 104 S. W. 153; Ex parte Mount, 66 Cal. 448, 6 Pac. 78; In re Guerrero, 69 Cal. 88, 10 Pac. 261; Ex parte Pfirman, 134 Cal. 143, 66 Pac. 205; Ex parte Braun, 141 Cal. 204, 74 Pac. 780; Ex parte Lemon, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946; Ex parte Diehl, 8 Cal. App. 51, 96 Pac. 98; Canova v. Williams, 41 Fla. 509, 27 South. 30; Home Ins. Co. of New York v. City of Augusta, 50 Ga. 530; Johnston v. City of Macon, 62 Ga. 645; Martin v. Statesboro, 100 Ga. 419, 23

S. E. 450; *Wiggins v. City of Chicago*, 68 Ill. 372; *United States Distilling Co. v. City of Chicago*, 112 Ill. 19, 1 N. E. 166; *Harder's etc. Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245; *Fretwell v. City of Troy*, 18 Kan. 271; *City of Newton v. Atchison*, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288; *In re Martin*, 62 Kan. 638, 64 Pac. 43; *Adams Express Co. v. City of Owensboro*, 85 Ky. 265, 3 S. W. 370; *Wilson v. Lexington*, 105 Ky. 765, 49 S. W. 806, 50 S. W. 834; *Otting v. Bellevue*, 32 Ky. Law Rep. 186, 105 S. W. 375; *State v. McVea*, 26 La. Ann. 151; *Mandeville v. Baudot*, 49 La. Ann. 236, 21 South. 258; *City of St. Paul v. Troyer*, 3 Minn. 291; *Lamar v. Adams*, 90 Mo. App. 35; *Troy v. Harris*, 102 Mo. App. 51, 76 S. W. 662; *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516, 32 L. R. A. 635; *Magneau v. City of Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436, 47 N. W. 280, 9 L. R. A. 786; *Templeton v. City of Tekamah*, 32 Neb. 542, 49 N. W. 373; *Atlantic City v. Brown*, 71 N. J. L. 81, 58 Atl. 110; *Buck v. Douglass*, 74 N. J. L. 300, 65 Atl. 848; *Morgan v. City of Orange*, 50 N. J. L. 389, 13 Atl. 240; *State v. Bean*, 91 N. C. 554; *Winston v. Taylor*, 99 N. C. 210, 6 S. E. 114; *City of Charleston v. Oliver*, 16 S. C. 47; *In re Jager*, 29 S. C. 438, 7 S. E. 605; *Adams v. Town of Somerville*, 2 Head (39 Tenn.), 363; *Gordon v. Newport News*, 102 Va. 649, 47 S. E. 828; *Garfinkle v. Sullivan*, 37 Wash. 650, 80 Pac. 188.

But while a municipal corporation may be granted authority to tax any or all occupations pursued therein, it is generally held that a delegation of authority to impose licenses for the purpose of regulating occupations does not authorize the municipality to impose a license tax for purposes of revenue: *Van Hook v. City of Selma*, 70 Ala. 361, 45 Am. Rep. 85; *City of St. Louis v. Boatmen's Ins. & Trust Co.*, 47 Mo. 150; *North Hudson County Ry. Co. v. Hoboken*, 41 N. J. L. 71; *Muhlenbrinck v. Long Branch Commrs.*, 42 N. J. L. 364, 36 Am. Dec. 518; *Clark v. City of New Brunswick*, 43 N. J. L. 175; *State v. Bevins*, 70 Vt. 574, 41 Atl. 655; *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 110 Am. St. Rep. 886, 104 N. W. 1009, 1 L. R. A., N. S., 581. This is in accordance with the rule which will be further considered in the following paragraph, that a grant to a city to impose licenses is to be construed strictly. Said the court in *State v. Foster*, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339, where municipalities have imposed license fees by virtue of legislative authority to regulate occupations and businesses, "the courts have held, in effect, that the authority granted was not for the purpose of taxation, but for police regulation merely, and that such grant of authority would not be construed to give the right to tax as well as regulate the business or calling. In other words, the decisions have been to the effect that the powers granted should be strictly construed, and that no tax should be levied thereunder unless the authority therefor was given either expressly or by necessary implication. To this general effect are *Caldwell v. Lincoln*, 19 Neb. 569, 27 N. W. 647; *Sipe v. Murphy*, 49 Ohio St. 536, 31 N. E. 884, 17 L. R. A. 184; *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W.

652; Chaddock v. Day, 75 Mich. 527, 13 Am. St. Rep. 468, 42 N. W. 977, 4 L. R. A. 809."

It is of course understood that a city has no inherent power to impose license taxes, and must look for such authority in its charter or other legislative grant: *Wilkie v. Chicago*, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004; *Ex parte Unger*, 1 Okl. Cr. Rep. 222, 98 Pac. 999; *Cache County v. Jensen*, 21 Utah, 207, 61 Pac. 303. The authority must be conferred expressly or by necessary implication. It is sometimes said that the grant must be in unmistakable terms, and that it will be construed strictly: *State v. Smith*, 67 Conn. 541, 52 Am. St. Rep. 301, 35 Atl. 506; *Ex parte Simms*, 40 Fla. 432, 25 South. 280; *Wilkie v. Chicago*, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004; *American Union Express Co. v. City of St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *Caldwell v. City of Lincoln*, 19 Neb. 569, 27 N. W. 647; *Ex parte Garza*, 28 Tex. App. 381, 19 Am. St. Rep. 845, 13 S. W. 779. "Yet if the power is clearly implied, it should not be impaired by strict construction. A strict construction must yet be a sensible construction, and be based upon the entire context": *Lachman v. Walker*, 52 Fla. 297, 42 South. 461. It may not here be out of place to call attention to the principle that all true statutory construction is liberal with a view to giving effect to the intention of the legislature.

b. Territorial Limits of Taxation.—The authority of a city to impose license taxes is usually confined to those occupations carried on within its territorial limits. Hence a city cannot impose a license tax for revenue upon a circus exhibiting beyond the municipal limits: *Robinson v. Norfolk*, 108 Va. 14, 128 Am. St. Rep. 934, 60 S. E. 762, 15 L. R. A., N. S., 294; nor can a city impose a tax on vehicles casually or occasionally driven in or through the city by the owner for purposes of pleasure or business: *Cary v. North Plainfield*, 49 N. J. L. 110, 7 Atl. 42; *Bennett v. Birmingham*, 31 Pa. 15; *Frommer v. Richmond*, 31 Gratt. 646, 31 Am. Rep. 746; *Dooley v. Bristol*, 102 Va. 232, 46 S. E. 296; *White Oak Coal Co. v. Manchester (Va.)*, 64 S. E. 944. But a vehicle tax imposed by a city applies to a manufacturer whose works are located without the city but who uses vehicles to deliver his wares and goods within the city: *Kentz v. Mobile*, 120 Ala. 623, 24 South. 952; *Memphis v. Battaile*, 55 Tenn. (8 Heisk.) 524, 24 Am. Rep. 285. And an express company may be taxed by a city, although it receives packages without the city to be delivered within it, and delivers packages from the city to places outside it, the traffic being carried on within the borders of the state: *Topeka v. Jones*, 74 Kan. 164, 86 Pac. 162, 87 Pac. 1133; *Leavenworth v. Ewing (Kan.)*, 101 Pac. 664.

VIII. Subjects of License Taxation.

a. In General.—The legislature of a state has authority, either directly or through a delegation of power to municipal corporations, to impose a license tax on all trades, occupations, businesses or call-

ings. It may tax all occupations, or it may tax some and spare others: *City of Rome v. McWilliams*, 52 Ga. 251; *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306, 61 N. E. 844, 55 L. R. A. 588; *Girard v. Bissell*, 45 Kan. 66, 25 Pac. 232; *In re Lipschitz*, 14 N. D. 622, 95 N. W. 157; *State v. Hume (Or.)*, 95 Pac. 808; *State v. Harrington*, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100. A constitutional provision giving the legislature authority to tax certain enumerated occupations for the purpose of raising revenue does not limit such power to the particular occupations specified: *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306, 61 N. E. 844, 55 L. R. A. 588. The power to levy license taxes has been exerted over a wide range of subjects. Besides those which are mentioned in succeeding pages, the following are here mentioned as proper subjects for license taxation: The newspaper business or the publication of newspapers: *Norfolk v. Norfolk L. Pub. Co.*, 95 Va. 564, 28 S. E. 959; the salary of a college professor: *Union County v. James*, 21 Pa. 525; the operation of a ferry: *Wiggins Ferry Co. v. City of East St. Louis*, 102 Ill. 560; the running of boats for hire: *Poyer v. Village of Desplaines*, 22 Ill. App. 576. Persons desirous of doing business in the state as nurserymen may be required to obtain a permit and pay a fee therefor: *Ex parte Hawley (S. D.)*, 115 N. W. 93. And one who is attorney in fact, guardian of the heirs of an estate, and manages the same, for which he receives a fixed compensation, has a taxable employment: *Lebanon County Commrs. v. Reynolds*, 7 Watts & S. 329.

b. Oil Producers and Dealers.—Persons or corporations operating oil wells may be required to pay a tax of one per cent on the gross products: *Texas Co. v. Stephens*, 100 Tex. 628, 103 S. W. 481. License tax may also be imposed for the privilege of storing oil: *Standard Oil Co. v. Commonwealth*, 26 Ky. Law Rep. 985, 82 S. W. 1020. Persons or corporations operating oil pipe-lines may be subjected to an occupation tax; and wholesale dealers in oil may be taxed a certain percentage on their gross receipts: *Producers' Oil Co. v. Stephens*, 44 Tex. Civ. App. 327, 99 S. W. 157. Dealers in oils, including those selling from wagons in the public streets, may be required to pay a license tax, but they should not be unreasonably discriminated against: *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 109 S. W. 293, 16 L. R. A., N. S., 1035; *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718; *Standard Oil Co. v. Spartanburg*, 66 S. C. 37, 44 S. E. 377; *Standard Oil Co. v. Fredericksburg*, 105 Va. 82, 52 S. E. 817. A person selling oil drawn from stationary tanks and from a wagon driven about town is a "merchant" within the meaning of the license laws: *Troy v. Harris*, 102 Mo. App. 51, 76 S. W. 662.

c. Mechanical Trades or Occupations.

1. Architects.—The occupation or business of an architect may be made the subject of a privilege tax: *Burke v. City of Memphis*, 94 Tenn. 692, 30 S. W. 742. To quote from this case: "It is said that the occupation or business of an architect cannot be made a taxable

privilege; that it is a profession requiring intelligence and brains, and these should not be taxed. Many of the occupations, if not all, that are taxed as privileges, require more or less of intelligence and brains to successfully conduct them. We see no reason to make an exception in favor of architects. A privilege is whatever the legislature chooses to declare and tax as such, and a positive prohibition or the power to prohibit is not essential to its validity." Where a city charter gives power to license a large number of enumerated occupations, and "other business, trades, avocations, or professions whatever," architects are included within the general clause: *City of St. Louis v. Herthel*, 88 Mo. 128, affirming 14 Mo. App. 467. The fact that an architect is not a resident of the city in which he has several contracts which call for his presence there from time to time, while he carries on the business of architecture in other places, does not exempt him from the city tax: *Wilson v. Greenville*, 65 S. C. 426, 43 S. E. 966.

2. **Contractors and Builders.**—It has been affirmed that a municipal ordinance requiring those engaged in contracting for public, municipal, railroad, or bridge work to pay a license fee is unconstitutional; and that an ordinance imposing a license tax on every person contracting to do public work is invalid so far as it applies to contractors for street improvements, since its tendency is to create a monopoly and to increase the burden of abutting proprietors: *Figg v. Thompson*, 105 Ky. 509, 88 Am. St. Rep. 316, 49 S. W. 202, 44 L. R. A. 135. As a general rule, however, there is no constitutional objection to exacting license taxes from builders or contractors: *State v. C. C. Hartwell Co.*, 117 La. 144, 41 South. 444; *City of New Orleans v. Lagman*, 43 La. Ann. 1180, 10 South. 244. A building contractor is one who contracts with the owner to become his builder, to erect his structure according to certain plans for a certain compensation. A bricklayer is therefore not such a contractor: *Wilson v. District of Columbia*, 26 App. D. C. 110; and certainly a wood and coal dealer, who in the course of his business contracts to furnish these commodities in large quantities, is not: *District of Columbia v. Chapman*, 25 App. D. C. 95.

3. **Plumbers.**—Scientific plumbing is supposed to bear such an intimate relation to the public health in large cities and crowded communities that there could seem to be no objection to requiring persons who desire to follow the occupation of plumbing to submit to an examination and procure a license or certificate of qualification: *United States v. MacFarland*, 28 App. D. C. 552; *Douglas v. People*, 225 Ill. 536, 116 Am. St. Rep. 162, 80 N. E. 341, 8 L. R. A., N. S., 1116; *Singer v. State*, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551; *People v. Warden*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *People v. O'Connell*, 1 App. Div. 110, 36 N. Y. Supp. 1092; *Bronold v. Engler*, 121 App. Div. 123, 105 N. Y. Supp. 508; *State v. Benzenberg*, 101 Wis. 172, 76 N. W. 345. But there are decisions which,

from the standpoint of authority, throw some doubt on this proposition: *People v. Decker*, 141 Mich. 304, 104 N. W. 615; *State v. Smith*, 42 Wash. 237, 114 Am. St. Rep. 114, 84 Pac. 851, 5 L. R. A., N. S., 674. A man who has not been registered as a plumber may engage in the business of plumbing provided he does not personally perform any of the manual work, but employs therefor duly examined and registered plumbers: *Davidson v. State*, 77 Md. 388, 26 Atl. 415. The legislature cannot prevent an association of persons in a partnership from carrying on the plumbing business because some of the partners, who have nothing to do with the plumbing work or its supervision, are not registered as plumbers: *Schnaier v. Navarre Hotel etc. Co.*, 182 N. Y. 83, 108 Am. St. Rep. 790, 74 N. E. 561, 70 L. R. A. 722. And a tax on one "doing a plumbing business" does not apply to individual plumbers working by the day or taking contracts for themselves alone: *Wilby v. State* (Miss.), 47 South. 465.

While the Ohio statute on this question has been held unconstitutional (*Harmon v. State*, 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618), no constitutional objection is apparent to the general rule that engineers operating steam boilers may be required to obtain a license or certificate of competency: *St. Louis v. Meyrose Lamp Mfg. Co.*, 139 Mo. 560, 61 Am. St. Rep. 474, 41 S. W. 244; *People v. Prillen*, 173 N. Y. 67, 65 N. E. 947. But it has been affirmed that ordinarily steam-heating plants used for heating buildings occupied for business and in part for residence purposes do not come within a statute providing for the licensing of persons operating "steam boilers and steam machinery": *State v. Justus*, 94 Minn. 207, 102 N. W. 452. That a state may require railway engineers to take an examination and procure a license, see *McDonald v. State*, 81 Ala. 279, 60 Am. Rep. 158, 2 South. 829.

4. **Horseshoers.**—It has been held, although we believe the doctrine is unsound, that horseshoers cannot be required to submit to examination and obtain a license of proficiency as a condition precedent to the right to follow their occupation: *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; *People v. Beattie*, 96 App. Div. 383, 89 N. Y. Supp. 193; *In re Aubrey*, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900. But however this may be, it is clear that the legislature may, either directly or through a delegation of authority to municipal corporations, impose a tax on the privilege of horseshoeing as a revenue measure and not as a regulation of the calling: *Ex parte Diehl*, 8 Cal. App. 51, 96 Pac. 98; *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

5. **Barbers.**—While the proposition seems doubtful on principle, it has nevertheless been announced that barbers may be required to procure a license or certificate of qualification as a condition to the right to ply their trade, on the theory that such regulation looks toward the protection of the health, comfort and well-being of society: *State v. Tag*, 100 Md. 588, 60 Atl. 465; *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 837; *State v. Walker*, 43

Wash. 8, 92 Pac. 775. Likewise one conducting a barber's school may be required to obtain a license: *State v. Briggs*, 45 Or. 366, 77 Pac. 750, 78 Pac. 361. The occupation of barbers may undoubtedly be taxed, and an ordinance requiring each shop to pay five dollars a year, and two dollars additional for each chair where there are more than two chairs used, is upheld in *Louisville v. Schnell* (Ky.), 114 S. W. 742. That a barber is engaged in a "mechanical pursuit," within the meaning of a constitutional provision exempting persons engaged in mechanical pursuits from an occupation tax, see *Jackson v. State* (Tex. Cr. App.), 117 S. W. 818.

d. Mercantile Pursuits.

1. **In General.**—Shopkeepers and merchants having an established place of business may be required to take out a license and pay an occupation tax for the privilege of pursuing their business. Their constitutional rights are not thereby encroached upon so long as the regulation and tax are made uniform upon all in the same class, and so long as the regulation and charge do not become unreasonable or oppressive. The legislature is competent to enact laws regulating and taxing the business of merchants, but perhaps ordinarily delegates its authority to municipal corporations wherein the business is carried on: *City and County of Sacramento v. Crocker*, 16 Cal. 119; *Ex parte Mount*, 66 Cal. 448, 6 Pac. 78; *Louisville v. Roberts*, 32 Ky. Law Rep. 182, 823, 105 S. W. 431, 106 S. W. 1197; *First Municipality v. Manuel*, 4 La. Ann. 328; *Iberia v. Chiapella*, 30 La. Ann. 1143; *Pitts v. City of Vicksburg*, 72 Miss. 181, 16 South. 418; *Craig v. Pattison*, 74 Miss. 881, 21 South. 756; *State v. Whittaker*, 33 Mo. 457; *Canton v. McDaniel*, 188 Mo. 207, 86 S. W. 1092; *State v. Chadbourn*, 80 N. C. 479, 30 Am. Rep. 94; *Commonwealth v. Teller*, 144 Pa. 545, 22 Atl. 922; *Commonwealth v. Gormly*, 173 Pa. 586, 34 Atl. 282; *Commonwealth v. Cover*, 215 Pa. 556, 64 Atl. 686; *State v. Smith*, 24 Tenn. (5 Humph.) 394; *Ayrnett v. Edmundson*, 68 Tenn. (9 Baxt.) 610; *Commonwealth v. Moore*, 25 Gratt. 951; *Washington v. Casanave*, Fed. Cas. No. 17,225, 5 Cranch C. C. 500. The tax may be graded according to the amount of annual sales or according to the value of the merchant's stock: *Goldsmith v. Huntsville*, 120 Ala. 182, 24 South. 509; *Kniseley v. Copperel*, 196 Pa. 614, 46 Atl. 861, 50 L. R. A. 86.

A planter or farmer keeping a store to furnish his tenants or employees has been held to keep a store or to be a dealer or retailer subject as such to a privilege tax: *Alcorn v. State*, 71 Miss. 464, 15 South. 37; *Thibaut v. Kearney*, 45 La. Ann. 149, 12 South. 139, 18 L. R. A. 596. So has a coal and mining company selling powder to its employees: *In re Delaware & H. Canal Co.*, 8 Pa. Co. Ct. Rep. 496. Licenses have been imposed upon grocers: *Henry v. State*, 26 Ark. 523; *Guerin v. Borough of Ashbury Park*, 57 N. J. L. 292, 30 Atl. 472; *French v. Baker*, 36 Tenn. (4 Sneed) 193; produce dealers: *Kansas City v. Lorber*, 64 Mo. App. 604; cotton-seed buyers: *Jones*

v. State, 69 Miss. 406, 13 South. 728; Johnson v. Jennings, 72 Miss. 349, 16 South. 791; ice dealers: City of Kansas v. Vindquist, 36 Mo. App. 584; State v. Worth, 116 N. C. 1007, 21 S. E. 204; bakers: City of Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; lumber dealers: Conklin Lumber Co. v. Chicago, 127 Ill. App. 103; Campbell v. City of Anthony, 40 Kan. 652, 20 Pac. 492; Folkes v. State, 63 Miss. 81; Gloster Oil Works v. Buckeye Cotton Oil Co., 87 Miss. 618, 40 South. 225; State v. Barnes, 126 N. C. 1063, 35 S. E. 605; and tailors or merchant tailors: Singleton v. Fritsch, 72 Tenn. (4 Lea) 93; Gordon v. Newport News, 102 Va. 649, 47 S. E. 828. A merchant tailor is a "merchant" or a person who "sells goods, wares and merchandise": State v. Johnson, 20 Mont. 367, 51 Pac. 820; Murray v. State, 79 Tenn. (11 Lea) 218. An ordinance imposing a tax of one hundred dollars for six months on persons selling damaged, fire sale, auction sale, or bankrupt stocks of goods is upheld in Emporia v. Endleman, 75 Kan. 428, 89 Pac. 685.

2. **Milk Venders and Dairymen.**—Municipal corporations may, when authority therefor has been delegated by the legislature, require dairymen and milk venders plying their trade within the city to take out a license and to pay an occupation tax. The tax may be assessed at a certain amount on each cow or on each vehicle used in making deliveries. Taxes and regulations of this nature do not contravene constitutional principles: Birmingham v. Goldstein, 151 Ala. 473, 125 Am. St. Rep. 33, 44 South. 113; State v. Tyrrell, 73 Conn. 407, 47 Atl. 686; Gray v. Wilmington (Del.), 2 Marv. 257, 43 Atl. 94; Police Jury of State v. Nelson, 66 Minn. 166, 61 Am. St. Rep. 399; Parish of Orleans v. Nougues, 11 La. Ann. 739, 68 N. W. 1066, 34 L. R. A. 318; St. Louis v. Liessing, 190 Mo. 464, 109 Am. St. Rep. 774, 89 S. W. 611, 1 L. R. A., N. S., 918; Littlefield v. State, 42 Neb. 223, 47 Am. St. Rep. 697, 60 N. W. 724, 28 L. R. A. 588; People v. Mulholland, 19 Hun, 548; Norfolk v. Flynn, 101 Va. 473, 99 Am. St. Rep. 918, 44 S. E. 717, 62 L. R. A. 771.

3. **Venders of Meats.**—Butchers and persons vending meats either from a shop or in the streets may be required to take out a license and to pay an occupation tax. Sometimes this burden or regulation is imposed directly by the legislature; more often, perhaps, they are imposed by the city in which the business is done, under a delegation of authority from the legislature. Enactments of this nature do not interfere with the constitutional rights of the persons affected: Henback v. State, 53 Ala. 523, 25 Am. Rep. 650; City of Jacksonville v. Ledwith, 26 Fla. 163, 23 Am. St. Rep. 558, 7 South. 885, 9 L. R. A. 69; Johnson v. Armour, 31 Fla. 413, 12 South. 842; Ash v. People, 11 Mich. 347, 83 Am. Dec. 740; City of St. Paul v. Colter, 12 Minn. 41 (Gil. 16), 90 Am. Dec. 278; City of St. Louis v. Freivogel, 95 Mo. 533, 8 S. W. 715; City of St. Louis v. Spiegel, 16 Mo. App. 210; City of Rockville v. Merchant, 60 Mo. App. 365; Buffalo v. Hill, 79 App. Div. 402, 79 N. Y. Supp. 449; State v. Yearby, 82 N. C. 561, 33 Am. Rep. 694; State v. Green, 126 N. C. 1032, 35 S. E.

462; *State v. Carter*, 129 N. C. 560, 40 S. E. 11; *City Council of Camden v. Roberts*, 55 S. C. 374, 33 S. E. 456; *Eastman v. Jackson*, 78 Tenn. (10 Lea) 162; *Sledd v. Commonwealth*, 19 Gratt. 813; *District of Columbia v. Oyster*, 15 D. C. (4 Mackey) 285, 54 Am. Rep. 275. In some cases, however, municipalities have exceeded their authority in matters of this kind: *Chaddock v. Day*, 75 Mich. 527, 13 Am. St. Rep. 468, 42 N. W. 977, 4 L. R. A. 809; *City of St. Paul v. Laidler*, 2 Minn. 190 (Gil. 159), 72 Am. Dec. 89. An ordinance taxing a peddler of meats "from a vehicle" at seventy-five dollars a quarter, and all other peddlers at ten dollars, irrespective of the commodities sold, is upheld in *Ex parte Heylman*, 92 Cal. 492, 28 Pac. 675.

4. **Venders of Weapons and Ammunition.**—There is no objection on constitutional grounds to imposing a license tax on dealers in revolvers, pistols, other weapons, and cartridges: *Porter v. State*, 58 Ala. 66; *Union Metallic Cartridge Co. v. Teague*, 83 Ala. 475, 3 South. 709; *Browne v. Selser*, 106 La. 691, 31 South. 290. A pawnbroker who sells a revolver taken in pledge is not a dealer in revolvers within the meaning of the license law: *Morningstar v. State*, 135 Ala. 66, 33 South. 485; *Graham v. State*, 71 Miss. 208, 13 South. 883. In Louisiana a tax on dealers in revolvers and cartridges has been held unconstitutional, because not graduated as required by the constitution: *State v. Rittenberg*, 112 La. 224, 36 South. 330.

5. **Dealers of Tobacco, Cigars and Cigarettes.**—There is no constitutional objection to placing dealers in tobacco or venders of cigars in a class and imposing upon them a license tax: *Carter v. State*, 44 Ala. 29; *City of Mobile v. Craft*, 94 Ala. 156, 10 South. 534; *Town of Winston v. Taylor*, 99 N. C. 210, 6 S. E. 114; *State v. Irvin*, 126 N. C. 989, 35 S. E. 430; *Knoxville Cigar Co. v. Cooper*, 99 Tenn. 472, 42 S. W. 687. But a manufacturer of cigars and smoking tobacco has been held not a "dealer" in maintaining his main factory: *Commonwealth v. Vetterlein*, 214 Pa. 21, 63 Atl. 192. Taxing the business of trafficking in cigars and cigarette wrappers is constitutional: *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; *Metz v. Hagerty*, 51 Ohio St. 521, 38 N. E. 11; *Hodge v. Muscatine County*, 196 U. S. 276, 25 Sup. Ct. Rep. 237, 49 L. ed. 477. In Iowa a mulct cigarette tax has been imposed, and has been upheld as constitutional by the supreme court of that state and also by the supreme court of the United States: *Hodge v. Muscatine County*, 121 Iowa, 482, 104 Am. St. Rep. 304, 96 N. W. 968, 67 L. R. A. 624, 196 U. S. 276, 25 Sup. Ct. Rep. 237, 49 L. ed. 477.

6. **Brewers and Venders of Nonintoxicating Liquors.**—There is no constitutional objection to imposing a privilege tax on brewers. Cities may be authorized by the legislature to impose such a tax on the breweries conducted within their limits: *Kiel v. Chicago*, 176 Ill. 137, 52 N. E. 29; *Schmidt v. Indianapolis*, 168 Ind. 631, 120 Am. St. Rep. 385, 80 N. E. 632, 10 L. R. A., N. S., 787; *State v. Volkmann*, 20 La. Ann. 585; *Charleston v. Charleston Brewing Co.*, 61

W. Va. 34, 56 S. E. 198. And persons manufacturing, selling or distributing imitations or substitutes for intoxicating liquors may be subject to a license tax: *Carroll v. Wright*, 131 Ga. 728, 63 S. E. 260; so may persons bottling, distributing and selling proprietary nonintoxicating drinks: *Coca-cola Co. v. Skillman*, 91 Miss. 677, 44 South. 985.

7. Hawkers and Peddlers.—The occupation of hawkers and peddlers is one which from early times has been deemed a proper subject for special legislative control and restriction, particularly in cities. The primary purpose for regulating this occupation should be to protect the public from imposition from dishonest traders. It is probable, however, that most regulations find their impulse in the demands of established shopkeepers for protection from competition with hawkers and peddlers. So that it may be said that the purpose of regulating the occupation of peddling is to protect, on the one hand, fair traders, especially established storekeepers residing permanently in cities and towns and there paying rent and taxes for the local privilege, from being undersold by itinerant persons, and, on the other hand, to guard the public from fraud and imposition not infrequently practiced by such traders who have no known residence or responsibility: *State v. Cederaski*, 80 Conn. 478, 69 Atl. 19; *State v. Looney* (Mo.), 97 S. W. 934; *Saulsbury v. State*, 43 Tex. Cr. 90, 96 Am. St. Rep. 837, 63 S. W. 568.

That persons who desire to peddle may be required to obtain a license and pay a fee therefor, or may be required to pay a tax for the privilege of following their occupation, is attested by numerous recent decisions. The license may be exacted or burden imposed by the legislature, or by the municipality wherein the occupation is carried on if the legislature has so delegated authority. Such regulation and taxation are valid, unless made impartial, unreasonable, oppressive or discriminatory: *City of Selma v. Till* (Ala.), 42 South. 405; *Ex parte Ah Toy*, 57 Cal. 92; *Kennedy v. People*, 9 Colo. App. 490, 49 Pac. 373; *Hall v. State*, 39 Fla. 637, 23 South. 119; *Justice v. Atlanta*, 122 Ga. 152, 50 S. E. 61; *Duncan v. State*, 105 Ga. 457, 30 S. E. 755; *Kimmel v. Americus*, 105 Ga. 694, 31 S. E. 623; *McDermott v. Lewistown*, 92 Ill. App. 474; *Huntington v. Cheesbro*, 57 Ind. 74; *Fallis v. Gas City*, 169 Ind. 508, 82 N. E. 1056; *City of Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625; *City of Carlisle v. Heckinger*, 103 Ky. 381, 45 S. W. 358; *Bohon's Assignee v. Brown* (Ky.), 49 S. W. 450; *West v. Mt. Sterling*, 23 Ky. Law Rep. 1670, 65 S. W. 120; *Coffey v. Hendrick*, 23 Ky. Law Rep. 1328, 65 S. W. 127; *Standard Oil Co. v. Commonwealth*, 26 Ky. Law Rep. 142, 80 S. W. 1150; *Kirkpatrick v. Davis Clock Co.*, 49 La. Ann. 871, 21 South. 591; *Grand Rapids v. Norman*, 110 Mich. 544, 68 N. W. 269; *People v. Baker*, 115 Mich. 199, 73 N. W. 115; *Muskegon v. Zeeryp*, 134 Mich. 181, 96 N. W. 502; *City of Alma v. Clow*, 146 Mich. 443, 109 N. W. 853; *People v. Smith*, 147 Mich. 391, 110 N. W. 1102; *Muskegon v. Hanes*, 149 Mich. 460, 112 N. W. 1077; *St. Paul v.*

Briggs, 85 Minn. 290, 89 Am. St. Rep. 554, 88 N. W. 984; *State v. Webber*, 214 Mo. 272, 113 S. W. 1054; *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922; *Territory v. Russell*, 13 N. M. 558, 86 Pac. 551; *Jones v. Foster*, 43 App. Div. 33, 59 N. Y. Supp. 738; *Collier v. Burgin*, 130 N. C. 632, 41 S. E. 874; *In re Lipschitz*, 14 N. D. 476, 95 N. W. 157; *Commonwealth v. Gardner*, 133 Pa. 284, 19 Am. St. Rep. 645, 19 Atl. 550, 7 L. R. A. 666; *Saulsbury v. State*, 43 Tex. Cr. 90, 96 Am. St. Rep. 837, 63 S. W. 568; *Needham v. State*, 51 Tex. Cr. 248, 103 S. W. 857; *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12.

There is no doubt, as the authorities in the preceding paragraph all recognize, that hawkers and peddlers may be placed in a class by themselves for license purposes; and the legislature may make a subclassification of peddlers according to their facilities for going from place to place and carrying their wares, rendering one class likely to reach more customers than another and to do a correspondingly greater amount of business both as to number of transactions and the amount of money involved: *Servonitz v. State*, 133 Wis. 231, 126 Am. St. Rep. 955, 113 N. W. 277.

The question as to what constitutes a peddler within the meaning of license laws is not always easy of solution. Generally, however, it may be said that a peddler is a vender who travels about carrying with him the goods that he sells. He sells and delivers the identical goods which he carries, rather than solicits orders from samples carried by him, for future deliveries: *Kennedy v. People*, 9 Colo. App. 490, 49 Pac. 373; *State v. Smithart*, 128 Iowa, 631, 105 N. W. 128; *State v. Bristow*, 131 Iowa, 664, 109 N. W. 199; *Pegues v. Ray*, 50 La. Ann. 574, 23 South. 904; *State v. Wells*, 69 N. H. 424, 45 Atl. 143, 48 L. R. A. 99; *State v. Frank*, 130 N. C. 724, 89 Am. St. Rep. 885, 41 S. E. 785; *Potts v. State*, 45 Tex. Cr. Rep. 45, 74 S. W. 31; *Chicago Portrait Co. v. Macon*, 147 Fed. 967.

A farmer who brings into town his own produce to peddle has in a number of instances been held not within an ordinance requiring peddlers to take out a license: *Ex parte Snyder*, 10 Idaho, 682, 79 Pac. 819, 68 L. R. A. 708; *Roy v. Schuff*, 51 La. Ann. 86, 24 South. 788; *St. Louis v. Meyer*, 185 Mo. 583, 84 S. W. 914. But an ordinance may be made to apply to such venders as peddlers, for the need of police regulation is the same in such a case as where one sells goods or produce which he purchased from another: *State v. Wagener*, 69 Minn. 206, 65 Am. St. Rep. 565, 72 N. W. 67, 38 L. R. A. 677; *State v. Jensen*, 93 Minn. 88, 100 N. W. 644; although, on the other hand, it has been held that a license tax on peddling is not unconstitutional in that it exempts peddlers, such as farmers, who vend their own productions: *Kansas City v. Overton*, 68 Kan. 560, 75 Pac. 549; *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922; *State v. Spaugh*, 129 N. C. 560, 40 S. E. 60.

A corporation may be punished for peddling without having obtained a license, because of sales made by its unlicensed agent,

notwithstanding a peddler's license cannot issue to a corporation save in the name of a designated agent who alone can sell thereunder: *Standard Oil Co. v. Commonwealth*, 107 Ky. 606, 55 S. W. 8.

8. **Canvassers and Solicitors.**—An occupation somewhat analogous to peddling is canvassing or soliciting sales; and the constitutional right of a legislature, or of a municipality to which the legislature has granted authority, to require solicitors or canvassers to take out a license and pay a fee therefor is undoubted: *Price Co. v. Atlanta*, 105 Ga. 358, 31 S. E. 619; *Kimmel v. Americus*, 105 Ga. 694, 31 S. E. 623; *Twining v. Elgin*, 38 Ill. App. 356; *Brookfield v. Kitchen*, 163 Mo. 546, 63 S. W. 825; *Territory v. Farnsworth*, 5 Mont. 303, 5 Pac. 869; *Ex parte Siebenhauer*, 14 Nev. 365; *State v. Miller*, 93 N. C. 511, 53 Am. Rep. 469; *State v. Caldwell*, 127 N. C. 521, 37 S. E. 138; *Borough of Warren v. Geer*, 117 Pa. 207, 11 Atl. 415; *City of Titusville v. Brennan*, 143 Pa. 642, 24 Am. St. Rep. 580, 22 Atl. 893, 14 L. R. A. 100; *Brownsack v. North Wales*, 194 Pa. 609, 45 Atl. 660, 49 L. R. A. 446; *Stockard v. Morgan*, 105 Tenn. 412, 58 S. W. 1061. Enactments imposing such burdens have been in some cases declared invalid (*State v. Washmood*, 58 Ark. 609, 26 S. W. 11; *Ex parte Taylor*, 58 Miss. 478, 38 Am. Rep. 336; *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721; *In re Nichols*, 48 Fed. 164), but not because the general principle of such regulation is repugnant to constitutional principles.

9. **Itinerant Venders and Transient Merchants.**—Statutes and ordinances imposing a license charge upon itinerant venders and transient merchants are upheld on the same principle that justifies licenses on peddlers and solicitors. Traders of this character are properly singled out for special regulation, and enactments looking toward that end are not open to constitutional objection so long as they bear equally on all persons within the same class and are not unreasonably burdensome: *Burr v. City of Atlanta*, 64 Ga. 225; *City of Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; *Levy v. State*, 161 Ind. 251, 68 N. E. 172; *Simoyan v. Rohan*, 36 Ind. App. 495, 76 N. E. 176; *State v. Wheelock*, 95 Iowa, 577, 58 Am. St. Rep. 442, 64 N. W. 620, 30 L. R. A. 429; *Lebanon v. Zanditon*, 75 Kan. 273, 89 Pac. 10; *Ottumwa v. Zekind*, 95 Iowa, 622, 58 Am. St. Rep. 447, 64 N. W. 646, 29 L. R. A. 734; *Commonwealth v. Crowell*, 156 Mass. 215, 30 N. E. 1015; *James v. Elder*, 23 Miss. 134; *Bangle v. Holden*, 52 Miss. 804; *Ex parte Siebenhauer*, 14 Nev. 365; *Wilmington Commissioners v. Roby*, 30 N. C. 250; *State v. Gorham*, 115 N. C. 721, 44 Am. St. Rep. 494, 20 S. E. 179, 25 L. R. A. 810; *State v. Foster*, 23 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; *State v. Harrington*, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100; *In re Sheffield*, 64 Fed. 833. Itinerant venders are usually defined as traders who go about exhibiting for sale and selling their goods, as distinguished from persons who simply take orders for goods to be delivered in the future: *Cedar Falls v. Gentzer*, 123 Iowa, 670, 99 N. W. 561; *State v. Nelson*, 128 Iowa, 740, 105 N. W. 327; *City*

of *Wausau v. Hideman*, 119 Wis. 244, 96 N. W. 549. A statute imposing a license tax on transient merchants is not unconstitutional in that it exempts sheriffs, assignees, and other public officers: *Levy v. State*, 161 Ind. 251, 68 N. E. 172.

10. **Pawnbrokers** are a proper subject for police regulation, and may be required, without any violation of their constitutional rights, to procure a license for the privilege of carrying on their business: *Launder v. Chicago*, 111 Ill. 291, 53 Am. Rep. 625; *Harrison v. People*, 121 Ill. App. 189; *Commonwealth v. Danziger*, 176 Mass. 290, 57 N. E. 461; *Grand Rapids v. Braudy*, 105 Mich. 670, 55 Am. St. Rep. 472, 64 N. W. 29, 32 L. R. A. 116; *St. Joseph v. Levin*, 128 Mo. 588, 49 Am. St. Rep. 577; *City of Butte v. Paltrovich*, 30 Mont. 18, 104 Am. St. Rep. 698, 75 Pac. 521; *Shelton v. Silverfield*, 104 Tenn. 67, 56 S. W. 1023. The legislature may classify cities, for the purpose of such regulation, so as to impose a license on pawnbrokers pursuing business in cities and towns of ten thousand or more inhabitants, while exempting those in smaller municipalities: *Commonwealth v. Danziger*, 176 Mass. 290, 57 N. E. 461.

11. **Second-hand and Junk Dealers.**—Junk dealers and dealers in second-hand articles are also a proper subject for police regulation. They may be classed with pawnbrokers, and compelled to take out a license and pay an occupation tax. It is well understood that junk shops and the like are frequently utilized as a place to dispose of illegally gotten goods; besides ordinary sanitary rules require that they be kept under supervision. Hence there is particular propriety in bringing them under the license laws: *Levi v. Anniston*, 155 Ala. 149, 46 South. 237; *State v. Rosenbaum*, 80 Conn. 327, 125 Am. St. Rep. 221, 68 Atl. 250, 15 L. R. A., N. S., 288; *Chicago v. Reinschreiber*, 121 Ill. App. 114; *Grossman v. Indianapolis (Ind.)*, 88 N. E. 945; *Commonwealth v. Schwartz*, 197 Mass. 107, 83 N. E. 326; *City of Duluth v. Bloom*, 55 Minn. 97, 56 N. W. 580, 21 L. R. A. 689; *Town of Kosciusko v. Slomberg*, 68 Miss. 469, 24 Am. St. Rep. 281, 9 South. 297, 12 L. R. A. 528; *State v. Cohen*, 73 N. H. 543, 63 Atl. 928; *New York v. Vanderwater*, 113 App. Div. 456, 99 N. Y. Supp. 306; *State v. Taft*, 118 N. C. 1190, 54 Am. St. Rep. 768, 23 S. E. 970, 32 L. R. A. 122; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463; *Shelton v. Silverfield*, 104 Tenn. 67, 56 S. W. 1023; *Lasley v. District of Columbia*, 14 App. D. C. 407. Persons dealing in second-hand furniture are second-hand dealers, who as such must obtain a license: *State v. Segel*, 60 Minn. 507, 62 N. W. 1134; so are dealers in old gold and silver: *Commonwealth v. Hood*, 183 Mass. 196, 66 N. E. 722. But booksellers who, in connection with their regular business, handle second-hand books have been held not "dealers in second-hand goods": *Eastman v. City of Chicago*, 79 Ill. 178. A junkshop has been defined as a place where old metal, ropes, rags, etc., are bought and sold; and a junk dealer is one who deals in such articles. Hence it has been held that one who buys, to sell again, from a certain number of carriage manufacturers who

are his customers, odds and ends of new iron left from large pieces in the manufacture of carriages and not available for further use in that line, is not a junk dealer: *Commonwealth v. Ringold*, 182 Mass. 308, 65 N. E. 374. An ordinance which forbids the business of collecting, storing, and dealing in old rags, old papers, or other such refuse material, within the thickly settled portions of the city, except when conducted by licensed persons, is reasonable and valid: *Commonwealth v. Hubley*, 172 Mass. 58, 70 Am. St. Rep. 242, 51 N. E. 448, 42 L. R. A. 403; so is an ordinance imposing a license tax on all persons dealing in second-hand clothing: *Rosenbaum v. Newbern*, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123.

e. Auctioneers, Agents, Brokers, and Money Loaners.

1. **Auctioneers** are usually required to take out a license and pay a license fee or tax for the privilege of conducting auction sales. Authority to exact such licenses is generally delegated by the legislature to municipal corporations; and there is no constitutional objection to this form of license taxation if the burden is not made oppressive or discriminatory: *Carroll v. City of Tuscaloosa*, 12 Ala. 173; *City of Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; *Town of Decorah v. Dunstan*, 38 Iowa, 96; *Iowa City v. Newell*, 115 Iowa, 55, 87 N. W. 739; *Fretwell v. City of Troy*, 18 Kan. 271; *New Orleans v. Turpin*, 13 La. Ann. 56; *Board of Administrators of Charity Hospital v. Girardey*, 36 La. Ann. 605; *Sewall v. Jones*, 26 Mass. (9 Pick.) 412; *Simpson v. Savage*, 1 Mo. 359; *Village of Deposit v. Pitts*, 18 Hun, 475; *Village of Port Jervis v. Close*, 53 Hun, 634, 6 N. Y. Supp. 211; *Ryan v. New York*, 40 Misc. Rep. 228, 81 N. Y. Supp. 685; *Atlantic City v. Freisinger*, 69 N. J. L. 132, 54 Atl. 249; *Adams v. Walker*, 100 Va. 770, 42 S. E. 866; *Stull v. Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892. One who sells his own goods at auction has been held an "auctioneer," who must obtain a license: *Goshen v. Korn*, 63 Ind. 468, 30 Am. Rep. 234.

2. **Brokers and Agents.**—The legislature has power to impose a license fee upon persons pursuing the business or calling of brokers, or it may delegate to municipal corporations authority to levy such fees upon brokers doing business within their limits: *Little Rock v. Barton*, 33 Ark. 436; *Braun v. Chicago*, 110 Ill. 186; *Murray v. Doud*, 167 Ill. 368, 59 Am. St. Rep. 297, 47 N. E. 717; *Banta v. Chicago*, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611; *Pittsburg v. Coyle*, 165 Pa. 61, 30 Atl. 452. Thus real estate brokers may be compelled to pay a license tax: *Walker v. Baldwin*, 103 Md. 352, 63 Atl. 362; *Wicks v. Carlisle*, 12 Okl. 337, 72 Pac. 377; *Commonwealth v. Black*, 223 Pa. 74, 72 Atl. 261; *Wiltse v. State*, 55 Tenn. (8 Heisk.) 544; *Pile v. Carpenter*, 118 Tenn. 288, 99 S. W. 360; *J. B. Watkins Land Mtg. Co. v. Thetford*, 43 Tex. Civ. App. 536, 96 S. W. 72; so may persons dealing in "futures": *Ware v. Mobile County*, 146 Ala. 163, 121 Am. St. Rep. 21, 41 South. 153, 14 L. R. A., N. S., 1081; *Alexander v. State*, 86 Ga. 246, 12 S. E. 408,

10 L. R. A. 859; *Memphis Brokerage Assn. v. Cullen*, 79 Tenn. (11 Lea) 75; persons dealing in railroad or steamship tickets: *State v. Orfila*, 116 La. 972, 41 South. 227; agents selling machines such as harvesting and sewing machines: *Miller v. Demory*, 64 Kan. 584, 67 Pac. 1105; *Sims v. Norfolk etc. R. R. Co.*, 130 N. C. 556, 41 S. E. 673; *St. Louis v. Bowler*, 94 Mo. 630, 7 S. W. 434; agents of packing-houses: *Stewart v. Kehrer*, 115 Ga. 184, 41 S. E. 680; *Leps v. State*, 120 Ga. 139, 47 S. E. 572; *Savannah v. Cooper*, 131 Ga. 670, 63 S. E. 138; and insurance agents, whether their principals are foreign or domestic companies: *Town of Dothan v. Hornsby*, 150 Ala. 498, 43 South. 714; *Smith v. Clark*, 122 Ga. 528, 50 S. E. 480; *People v. Thurber*, 13 Ill. 554; *Commonwealth v. Gregory*, 28 Ky. Law Rep. 217, 89 S. W. 168; *State v. Woods*, 40 La. Ann. 175, 3 South. 543; *Black v. Security Mut. Life Assn.*, 95 Me. 35, 49 Atl. 51, 54 L. R. A. 939; and an agent may be required to pay a separate tax for each insurance company he represents: *Simrall v. Covington*, 90 Ky. 444, 29 Am. St. Rep. 398, 14 S. W. 369, 9 L. R. A. 556.

3. Persons Loaning Money.—Persons making a business of loaning money may be singled out as a class and required to pay a license tax: *Vermont Loan & Trust Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 186, 49 Pac. 314, 37 L. R. A. 509; *State v. Tolman*, 106 La. 662, 31 South. 320. And the classification of persons loaning money upon personal property or personal security in a different class from chartered banks, negotiators of loans on realty, real estate agents, and dealers in stocks and bonds, and the imposition of a tax differing in amount upon such money lenders from that imposed upon such other classes is not so wanting in reason that the ordinance therefor providing will be declared void as arbitrary or discriminatory: *City Council of Augusta v. Clark*, 124 Ga. 254, 52 S. W. 881. A different view has been taken in Mississippi, however, where it has been thought that putting persons lending money on personal securities, such as household furniture and wearing apparel, in a class by themselves for purposes of license taxation, is unwarranted: *Rodge v. Kelly*, 88 Miss. 209, 117 Am. St. Rep. 733, 40 South. 552, 11 L. R. A., N. S., 635; *Hyland v. Sharp*, 88 Miss. 567, 41 South. 264; and in South Carolina it has been decided that persons loaning money on security of personal property cannot be required to pay a license when banks are exempted: *Cowart v. Greenville*, 67 S. C. 35, 45 S. E. 122. An ordinance taxing attorneys who loan money without taxing other money lenders, is pronounced void in *Beckett v. Savannah*, 118 Ga. 58, 44 S. E. 819.

4. Persons Taking Assignments.—Probably there is no constitutional objection to the imposition of a license tax upon persons taking assignments of salaries, discounting notes, and the like. But it has been decided that a city cannot levy a license charge upon the business of taking assignments of salaries of city officers, which assignments are contrary to public policy: *Bitzer v. Buckley*, 23 Ky. Law Rep. 2420, 67 S. W. 825; *Louisville v. Sam Simons & Co.*

(Ky.), 119 S. W. 185. And it has also been decided that an ordinance requiring a license tax for the privilege of buying claims is invalid so far as it applies to a person buying claims for himself and not as a broker (*Bitzer v. Thompson*, 105 Ky. 514, 49 S. W. 199, 44 L. R. A. 141); though that may be his business: *Gast v. Buckley*, 23 Ky. Law Rep. 992, 65 S. W. 632. A person who buys a bill or note on his own account, without holding himself out as a dealer in such paper, cannot be subjected to a tax therefor: *Portland v. O'Neill*, 1 Or. 218; *Trenham v. Moore*, 111 Tenn. 346, 76 S. W. 904; and a statute taxing "security dealers" and persons "shaving notes" does not apply to one who purchases a judgment on a note for less than the face value: *Mace v. Buchanan* (Tenn. Ch. App.), 52 S. W. 505. A statute taxing persons engaged in the business of taking assignments of wages not yet due, but exempting persons who take such assignments in payment or as security for the purchase price of necessities, insurance premiums and homesteads, has been held unconstitutional: *Owens v. State*, 53 Tex. Cr. 105, 126 Am. St. Rep. 772, 112 S. W. 1075.

5. Employment and Emigrant Agents.—The evils of fraud, imposition and extortion that have manifested themselves in the conduct of private employment agencies has moved the law-making branch of the government to provide for the licensing and the levying of an occupation tax on the privilege of conducting such agencies. There is no doubt that such regulations in the interests of unsuspecting employees and in the interests of the general public welfare are free from constitutional objection; and the legislature may delegate authority to municipal corporations to regulate such agencies: *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306, 61 N. E. 844, 55 L. R. A. 588; *Moore v. Minneapolis*, 43 Minn. 418, 45 N. W. 719; *People v. Warden*, 183 N. Y. 223, 76 N. E. 11, 2 L. R. A., N. S., 859; *Calugerovich v. Yuzzolino*, 110 N. Y. Supp. 984; *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 21 L. R. A., N. S., 263.

In some of the states a tax is imposed on persons hiring laborers in the state to be employed elsewhere. Statutes imposing such a burden on emigrant agents, as these persons are styled, have been upheld in a number of instances. The tax is neither a restriction upon interstate commerce nor an interference with the freedom of contract; nor does it deny the equal protection of the laws, because the business of hiring persons to labor within the state is not subjected to a like tax: *Kenderick v. State*, 142 Ala. 43, 39 South. 203; *Williams v. Fears*, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685; *State v. Hunt*, 129 N. C. 686, 85 Am. St. Rep. 753, 40 S. E. 216; *State v. Roberson*, 136 N. C. 587, 48 S. E. 595; *State v. Napier*, 63 S. C. 60, 41 S. E. 13. One who comes into the state and employs laborers to work for himself outside the state is not within the meaning of the law taxing "emigrant agents": *Theus v. State*, 114 Ga. 53, 39 S. E. 913; *Carr v. Commissioners of Duplin County*, 136 N. C. 125, 48 S. E. 597. Neither is a person who hires for a cor-

poration of which he is director and manager in respect to the work for which the hands are employed: *Lane v. Rowan County Commissioners*, 139 N. C. 443, 52 S. E. 140. And a day laborer employed by a railway construction company who is sent to a city to employ additional help, and there hires laborers to enter the service of the company, is not a "labor agent" who must obtain a license: *Watts v. Commonwealth*, 106 Va. 851, 56 S. E. 223. According to *Juniata Limestone Co. v. Fagley*, 187 Pa. 193, 67 Am. St. Rep. 579, 40 Atl. 977, 42 L. R. A. 442, a statute imposing a tax on the employers of foreign born, unnaturalized male persons, and regulating their employment, is unconstitutional as being in conflict with the fourteenth amendment of the federal constitution, and with a provision in a state constitution providing that all taxes shall be uniform upon the same class of subjects.

f. Innkeepers, Liverymen, and Owners of Vehicles.

1. Hotel and Restaurant Keepers.—One who keeps an inn or hotel may lawfully be required to obtain a license for the privilege and to pay a fee therefor: *Commonwealth v. Keathley*, 26 Ky. Law Rep. 493, 82 S. W. 232; *New Galt House Co. v. Louisville*, 33 Ky. Law Rep. 869, 111 S. W. 351; *Lord v. Jones*, 24 Me. 439, 41 Am. Dec. 391; *State v. Fletcher*, 5 N. H. 257; *Sights v. Yarnalls*, 12 Gratt. 292. And so may one who keeps a restaurant or eating-house: *Huttenstein v. State*, 37 Ala. 157; *State v. Hall*, 73 N. C. 252; *State v. Kane*, 15 R. I. 541, 9 Atl. 848. Authority to regulate and license such occupations is often delegated to the cities or towns in which they are pursued: *St. Louis v. Bircher*, 76 Mo. 431; *Smith v. Hightstown*, 71 N. J. L. 276, 57 Atl. 901; *Conover v. Atlantic City*, 73 N. J. L. 596, 64 Atl. 146; *Village of St. Johnsbury v. Thompson*, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571. A power of a city to regulate hotels includes the power to license them as a means of regulation and to exact a fee therefor: *Helena v. Miller*, 88 Ark. 263, 114 S. W. 237. A tax on hotels may be graduated according to the gross receipts of the business, and may exempt those whose annual receipts are less than one thousand dollars: *Cobb v. Commissioners of Durham County*, 122 N. C. 307, 30 S. E. 338; and an ordinance taxing hotel-keepers is not invalid in that it exempts those having less than ten rooms: *Fulgum v. Nashville*, 76 Tenn. (8 Lea) 635.

2. The Business of Livery and Sale Stables is a proper subject of police regulation both in the interest of the general public in order to secure the proper location and management of the stables, and in the interest of strangers and innocent customers likely to be imposed upon by unscrupulous liverymen: *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325, 44 N. E. 853, 35 L. R. A. 84; *Municipality No. 2 v. Dubois*, 10 La. Ann. 56; *Sherman v. Fall River I. W. Co.*, 87 Mass. (5 Allen) 213; *State v. Powell*, 100 N. C. 525, 6 S. E. 424; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463; *Spokane v.*

Camp, 50 Wash. 554, 126 Am. St. Rep. 913, 97 Pac. 770. The legislature may tax the occupation, or authorize cities and villages to do so: *Ex parte Jackson*, 143 Cal. 564, 77 Pac. 467; *Wilson v. Lexington*, 105 Ky. 765, 49 S. W. 806, 50 S. W. 834; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463. A charge may be imposed in proportion to the number of vehicles kept for hire: *Howland v. Chicago*, 108 Ill. 496.

Ordinances prohibiting a livery-stable to be opened and carried on in any block largely devoted to residence purposes, unless a majority of the property owners in the block consent thereto in writing, have been upheld as constitutional: *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325, 44 N. E. 853, 35 L. R. A. 84; *Spokane v. Camp*, 50 Wash. 554, 126 Am. St. Rep. 913, 97 Pac. 770. But ordinances of similar import, as applied to other businesses, have been declared unconstitutional by some courts: *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, 31 Pac. 245, 24 L. R. A. 195; *St. Louis v. Howard*, 119 Mo. 41, 41 Am. St. Rep. 630, 24 S. W. 770; *State v. Whitnell*, 78 Neb. 33, 126 Am. St. Rep. 586, 110 N. W. 680, 8 L. R. A., N. S., 978. A municipal ordinance requiring anyone desiring to engage in the livery-stable business to first obtain a permit from the city council, and the consent of a majority of the lot owners in the block, and exempting from its operation any livery-stable then in existence, is, as to one who has practically completed a livery-stable within the city limits, and made arrangements to operate it before the passage of the ordinance, void and inoperative as an unlawful discrimination between himself and others engaged in the same business at the time of the enactment of the ordinance: *City of Billings v. Cook*, 35 Mont. 95, 119 Am. St. Rep. 845, 88 Pac. 656.

3. Owners of Vehicles.—The law is well settled that the legislature may confer authority on municipalities to require persons who run vehicles for hire in carrying goods, baggage or passengers to obtain a license. This is a proper exercise of the police power for the purpose of preventing, as far as practicable, fraud and imposition on persons patronizing such means of transportation. The legislature may also authorize municipalities to impose a tax on vehicles used in the public streets. There is nothing unreasonable in such taxation, so long as it is not discriminatory nor so heavy as to be oppressive, for the use of vehicles tends to the detriment of streets, and in fact that is the occasion for their construction and maintenance. The tax is not, accurately speaking, on the vehicle, but on the privilege of using it in the street, and hence the tax is not open to attack as double taxation. Neither can it be assailed as an unwarranted interference with the right of citizens to use the public thoroughfares. Taxes of this kind are often graduated according to the number of horses required to haul the vehicle, or the number of passengers it carries; and there is no constitutional objection to this classification so long as it keeps within reason-

able bounds: *Brewster v. Pine Bluff*, 70 Ark. 28, 65 S. W. 934; *Heller v. City of Mobile*, 48 Ala. 218; *Fort Smith v. Scruggs*, 70 Ark. 549, 91 Am. St. Rep. 100, 69 S. W. 679, 58 L. R. A. 921; *Kenamer v. State*, 150 Ala. 74, 43 South. 482; *Browne v. Mobile*, 122 Ala. 159, 25 South. 223; *Gartside v. East St. Louis*, 43 Ill. 47; *Howland v. City of Chicago*, 108 Ill. 496; *Ayers v. Chicago*, 239 Ill. 237, 87 N. E. 1073; *City of Terre Haute v. Kersey*, 159 Ind. 300, 95 Am. St. Rep. 298, 64 N. E. 469; *Burlington v. Unterkircher*, 99 Iowa, 401, 68 N. W. 795; *Lebanon v. Welker*, 9 Kan. App. 887, 58 Pac. 1036; *Swetman v. Covington*, 26 Ky. Law Rep. 701, 82 S. W. 386; *Commonwealth v. Beck*, 194 Mass. 14, 79 N. E. 744; *State v. Robinson*, 42 Minn. 107, 43 N. W. 833, 6 L. R. A. 339; *St. Louis v. Green*, 70 Mo. 562; *City of St. Louis v. Woodruff*, 4 Mo. App. 169, affirmed 71 Mo. 92; *Kansas City v. Smith*, 93 Mo. App. 217; *Johnson v. Borough of Ashbury Park*, 58 N. J. L. 604, 33 Atl. 850; *Combs v. Lakewood*, 68 N. J. L. 582, 53 Atl. 697; *City of Brooklyn v. Breslin*, 57 N. Y. 591; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463; *Hagan v. Hardie*, 55 Tenn. (8 Heisk.) 812; *City of Knoxville v. Sanford*, 81 Tenn. (13 Lea) 545; *Washington etc. Transp. Co. v. District of Columbia*, 19 App. D. C. 462.

A city tax on vehicles used for hire is not unconstitutional in that it exempts those used in ordinary livery business: *Des Moines v. Bolton*, 128 Iowa, 108, 102 N. W. 1045. An ordinance imposing a tax may provide that the revenue derived therefrom may be set apart as a special fund for the repair and improvement of streets: *Harder's etc. Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245; *Mason v. Cumberland*, 92 Md. 451, 48 Atl. 136. It has been said that a city has no power to impose by ordinance a license fee by way of a tax on every person using wheeled vehicles on its streets for their individual use exclusively, in their own business or for their own pleasure, as a means of locomotion: *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907, 49 L. R. A. 408. But while taxes on the use of vehicles are perhaps usually limited to those used for hire (In re *City of Newport (Ky.)*, 113 S. W. 467; *City of Henderson v. Marshall*, 22 Ky. Law Rep. 671, 58 S. W. 518; *State v. Robinson*, 42 Minn. 107, 43 N. W. 833, 6 L. R. A. 339; *City of St. Louis v. Grone*, 46 Mo. 574; *City of Hannibal v. Price*, 29 Mo. App. 280; *McCauley v. State (Neb.)*, 119 N. W. 675), no valid reason is apparent why a tax for revenue may not be levied on the privilege of using all vehicles, whether private or public, whether used for hire or otherwise: *Johnson v. Macon*, 114 Ga. 426, 40 S. E. 322; *Terre Haute v. Kersey*, 159 Ind. 300, 95 Am. St. Rep. 298, 64 N. E. 469; *Hogan v. Indianapolis*, 159 Ind. 523, 65 N. E. 525. It is hardly necessary to state that a city cannot impose a vehicle tax of any sort if it has not been authorized to do so by the legislature: *Covington v. Dalheim*, 31 Ky. Law Rep. 466, 102 S. W. 829; *City of Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367; *City of Cincinnati v. Bryson*, 15 Ohio, 625, 45 Am. Dec. 593; *Borough*

of *Millerstown v. Bell*, 123 Pa. 151, 16 Atl. 612; *City of Reading v. Bitting*, 167 Pa. 21, 31 Atl. 359.

A vehicle tax imposed by a city applies to vehicles owned by a manufacturer whose works are located outside the city limits, but who uses vehicles to deliver his wares and goods within the city: *Kentz v. Mobile*, 120 Ala. 623, 24 South. 952; *City of Memphis v. Battaile*, 55 Tenn. (8 Heisk.) 524, 24 Am. Rep. 285. But it has been held, on the other hand, that a city authorized to license expressmen can license only those who carry on their business entirely within the city, and not those carrying parcels from a place without to a place within the city and vice versa: *City of Cairo v. Adams Express Co.*, 54 Ill. App. 87. The soundness of this holding, however, may be regarded as doubtful: See "Express Companies," post. It has been held that a license charge imposed by a city does not apply to merchants residing outside the state who use vehicles to deliver their goods within the city: *Dooley v. Bristol*, 102 Va. 232, 46 S. E. 296. A statute authorizing a license tax on vehicles used by a municipality does not authorize a city to impose a tax on vehicles temporarily and accidentally within its limits, for the situs of the business, and not temporary presence, determines the application of the tax: *Cary v. City of North Plainfield*, 49 N. J. L. 110, 7 Atl. 42; *City of North Plainfield v. Cary*, 50 N. J. L. 176, 17 Atl. 1103.

4. **Owners of Trading Cars.**—In Mississippi, the owner of "trading cars" is required to pay a license tax. This tax is construed as a charge on the occupation, rather than on each specific car: *Vicksburg & M. R. Co. v. State*, 62 Miss. 105; *Zemurray v. Bouldin*, 87 Miss. 583, 40 South. 15.

5. **Hackmen and Stage-drivers.**—Where the charter of a city authorizes it, the municipality may require persons keeping or driving hacks for hire to procure a license therefor and pay a reasonable fee: *Seudder v. Hinshaw*, 134 Ind. 56, 33 N. E. 791; *Commonwealth v. Walton*, 31 Ky. Law Rep. 916, 104 S. W. 323; *Commonwealth v. Page*, 155 Mass. 227, 29 N. E. 512; *New York v. Reesing*, 77 App. Div. 417, 79 N. Y. Supp. 331; *New York v. Reesing*, 38 Misc. Rep. 129, 77 N. Y. Supp. 82; *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516; *Kissinger v. Hay* (Tex. Civ. App.), 113 S. W. 1005; *Washington v. Wheaton*, Fed. Cas. No. 17,239, 1 Cranch C. C. 318. No constitutional objection can be made to such regulation or burden unless it is made oppressive or discriminatory: *State v. Finch*, 78 Minn. 118, 80 N. W. 856, 46 L. R. A. 437. An ordinance requiring the owner or driver of a stage used in the transportation of passengers to obtain a license therefor is within the authority given to borough councils by the New Jersey act of 1897 to license and regulate the use of stages: *Borough of Belmar v. Barkalow*, 67 N. J. L. 504, 52 Atl. 157.

6. **Operators of Automobiles.**—Statutes and ordinances requiring the registration of automobiles and the taking out of a license by

the owner or operator have been generally upheld as constitutional: *Commonwealth v. Boyd*, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; *Emerson Troy Granite Co. v. Pearson*, 74 N. H. 22, 64 Atl. 582; *Buffalo v. Lewis*, 192 N. Y. 196, 84 N. E. 809. It has been held, although the doctrine is perhaps unsound, that an ordinance of a city which requires the owners of automobiles to submit to examinations and take out licenses, as a condition precedent to operating them upon the streets of the city, in so far as it applies to owners of machines who use them for private business and pleasure only, is unconstitutional and void, as imposing a burden upon one class of citizens in the use of the streets which is not imposed upon others using the streets: *City of Chicago v. Banker*, 112 Ill. App. 94. A statute requiring persons who desire to operate automobiles outside city limits to obtain a license of the county clerk requires them to obtain a license in each county wherein they travel: *State v. Cobb*, 113 Mo. App. 156, 87 S. W. 551.

g. Corporations Doing Business Within State.

1. **In General.**—The practice is common of imposing a license or occupation tax on corporations doing business within the state. The tax is ordinarily graduated according to number of shares of stock, the amount of capital stock, the extent of business transacted, the gross receipts of the company, the amount of dividends declared or some other such standard; but the tax is not for that reason deemed a property tax. Rather it is a tax on the privilege of the corporation to exercise its franchise. Not being a tax on property, it is not subject to the constitutional limitations imposed in the case of property taxes: *Phoenix Carpet Co. v. State*, 118 Ala. 143, 72 Am. St. Rep. 143, 22 South. 627; *Southern Car & F. Co. v. State*, 133 Ala. 624, 32 South. 235; *Troy Fertilizer Co. v. State*, 134 Ala. 333, 32 South. 618; *Southern Car & F. Co. v. Calhoun County*, 141 Ala. 250, 37 South. 425; *American Smelting etc. Co. v. People*, 34 Colo. 240, 82 Pac. 531; *State v. Union Cent. Life Ins. Co.*, 8 Idaho, 240, 67 Pac. 647; *State v. Western Union Tel. Co.*, 75 Kan. 609, 90 Pac. 299; *City of New Orleans v. Orleans R. Co.*, 42 La. Ann. 4, 21 Am. St. Rep. 365, 7 South. 59; *Senatobia Oil Co. v. Poag*, 86 Miss. 457, 38 South. 741; *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733; *State v. Berry*, 52 N. J. L. 308, 19 Atl. 665; *Brewing Imp. Co. v. State Board of Assessors*, 65 N. J. L. 466, 47 Atl. 426; *Harkreader v. Lebanon & N. Turnpike Co.*, 101 Tenn. 680, 49 S. W. 751; *State v. Galveston etc. Ry. Co.*, 100 Tex. 153, 97 S. W. 71; *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135, 63 Pac. 1123; *Exposition Amusement Co. v. Empire State Surety Co.*, 49 Wash. 637, 96 Pac. 158, 97 Pac. 464; *State v. Chicago etc. Ry. Co.*, 128 Wis. 449, 108 N. W. 594; *Duryea v. American Woodworking Mach. Co.*, 133 Fed. 329. A municipal corporation may be authorized to levy an annual mileage tax on the pipes of a natural gas company in the city streets: *Kittanning v. Consolidated Nat. Gas Co.*, 219 Pa. 250, 68 Atl. 728.

2. **Foreign Corporations** do business in a state not as a matter of right, but by comity. A state may exclude them entirely from doing business therein, or it may permit them to transact business with its citizens on such terms and conditions as it chooses to prescribe: *Metropolitan Life Ins. Co. v. Board of Assessors*, 115 La. 698, 116 Am. St. Rep. 179, 39 South. 846, 9 L. R. A., N. S., 1240; *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413; *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10; *Cook v. Howland*, 74 Vt. 393, 93 Am. St. Rep. 912, 52 Atl. 973, 59 L. R. A. 338. It follows, therefore, that a state has a right, in consenting to allow foreign corporations to carry on business within her borders, to impose a license tax on the privilege: *American Smelting etc. Co. v. People*, 34 Colo. 240, 82 Pac. 531; *Western Union Tel. Co. v. Lieb*, 76 Ill. 172; *Walker v. Springfield*, 94 Ill. 364; *Gregory v. Commonwealth*, 28 Ky. Law Rep. 217, 89 S. W. 168; *Commonwealth v. Milton*, 12 B. Mon. 212, 54 Am. Dec. 522; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68, 96 Am. Dec. 331; *New Orleans v. Penn. Mut. Life Ins. Co.*, 106 La. 31, 30 South. 254; *People v. Fire Assn. of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380; *People v. Equitable Trust Co.*, 96 N. Y. 387; *People v. Miller*, 181 N. Y. 328, 73 N. E. 1102; *British-American Mortgage Co. v. Jones*, 77 S. C. 443, 58 S. E. 417; *Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 211, 58 S. E. 811; *Gaar v. Shannon* (Tex. Civ. App.), 115 S. W. 361; *International Textbook Co. v. Lynch*, 81 Vt. 101, 69 Atl. 541; *Western Union Tel. Co. v. City of Richmond*, 26 Gratt. 1; *Webber v. Commonwealth*, 33 Gratt. 898; *Liverpool etc. Ins. Co. v. Oliver*, 77 U. S. (10 Wall.) 566, 19 L. ed. 1029; *Pembina Consol. Silver Min. & Mill. Co. v. Commonwealth of Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737, 31 L. ed. 650. And it is no objection to the constitutionality of the statute imposing such taxes that it discriminates against foreign corporations as compared with domestic concerns: *City of Cullman v. Arndt*, 125 Ala. 581, 28 South. 70; *American Smelting etc. Co. v. People*, 34 Colo. 240, 82 Pac. 531; *Scottish etc. Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; *State v. Hammond Packing Co.*, 110 La. 180, 98 Am. St. Rep. 459, 34 South. 368; *Blue Jacket etc. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514; *Manchester Fire Ins. Co. v. Herriott*, 91 Fed. 711; although when a foreign corporation has been admitted to a state to do business on the same terms as domestic companies, the legislature cannot, during the time while such permission exists, discriminate against it by exacting a larger license fee than that imposed upon domestic corporations: *American S. & R. Co. v. People of Colorado*, 204 U. S. 103, 27 Sup. Ct. Rep. 198, 51 L. ed. 393.

3. **Insurance Companies.**—The rule that a state may impose a tax on a corporation for the privilege of transacting business within its borders is often applied in the case of insurance companies, and it is competent for the legislature to exact a license tax either of the

domestic or foreign insurance corporations: *Georgia Home Ins. Co. v. Boykin*, 137 Ala. 350, 34 South. 1012; *Illinois Mut. Fire Ins. Co. v. Peoria*, 29 Ill. 180; *Scottish etc. Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129 Iowa, 658, 106 N. W. 153; *Fidelity & Casualty Co. v. Louisville*, 106 Ky. 207, 50 S. W. 35; *State v. Liverpool L. & G. Ins. Co.*, 40 La. Ann. 463, 4 South. 504; *Metropolitan Life Ins. Co. v. Board of Assessors*, 115 La. 698, 116 Am. St. Rep. 179, 39 South. 846, 9 L. R. A., N. S., 1240; *Northwestern Mut. Life Ins. Co. v. Lewis & Clarke Co.*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982; *German-American Fire Ins. Co. v. Minden*, 51 Neb. 870, 71 N. W. 995; *Swing v. Dayton*, 124 App. Div. 58, 108 N. Y. Supp. 155; *Pacific Mut. Ins. Co. v. Insurance Department*, 144 N. C. 442, 57 S. E. 120. Further than this, the legislature may constitutionally classify insurance companies according to the character of their business, and impose different taxes on different kinds of companies: *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129 Iowa, 658, 106 N. W. 153.

4. Railroad Companies.—Railroad companies may properly be subjected to a license tax for the privilege of doing business within the state. The tax is perhaps usually assessed according to the gross earnings of the corporation: *Baltimore v. United Ry. etc. Co.*, 107 Md. 250, 68 Atl. 557; *State v. Cook*, 171 Mo. 348, 71 S. W. 829; *Knoxville & C. R. R. Co. v. Harris*, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; *State v. Missouri etc. Ry. Co. (Tex.)*, 100 S. W. 146; *State v. Chicago etc. Ry. Co.*, 132 Wis. 345, 112 N. W. 515. And a municipal corporation may, when the legislature has authorized it, impose a license tax on street railway companies operating within its limits. Taxes of this kind are often assessed at a certain amount annually on each car operated: *City of Anniston v. Southern Ry. Co.*, 112 Ala. 557, 20 South. 915; *Denver City Ry. Co. v. Denver*, 21 Colo. 350, 52 Am. St. Rep. 239, 41 Pac. 826, 29 L. R. A. 608; *Byrne v. Chicago Gen. Ry. Co.*, 169 Ill. 75, 48 N. E. 703; *Chicago Gen. Ry. Co. v. Chicago*, 176 Ill. 253, 68 Am. St. Rep. 188, 52 N. E. 880, 66 L. R. A. 959; *Bloomington Ry. etc. Co. v. Bloomington*, 123 Ill. App. 639; *Louisville v. Louisville City Ry.*, 27 Ky. Law Rep. 141, 84 S. W. 535; *Springfield v. Smith*, 138 Mo. 645, 60 Am. St. Rep. 569, 40 S. W. 757, 37 L. R. A. 446; *New York v. Third Avenue R. R. Co.*, 115 App. Div. 899, 101 N. Y. 1116; *Jersey City v. Jersey City etc. R. R. Co.*, 70 N. J. L. 360, 57 Atl. 445; *Norfolk & W. Ry. Co. v. Suffolk*, 103 Va. 498, 49 S. E. 658. A city may also be authorized to impose a privilege tax on railroad companies operating through it or between it and other points in the state. So long as this tax is confined to business done in the state it does not offend the interstate commerce clause of the federal constitution: *Nashville etc. Ry. Co. v. Alabama City*, 134 Ala. 414, 32 South. 731; *City of York v. Chicago etc. R. R. Co.*, 56 Neb. 572, 76 N. W. 1065. Of course a city cannot impose an occupation tax on railway corporations unless the legislature has

authorized it to do so: *Town of Arlington v. Central of Georgia Ry. Co.*, 127 Ga. 721, 56 S. E. 1015; but a general authorization is sufficient, if comprehensive in its scope. It is not necessary for the grant to specifically mention railway corporations. It is enough that the statute empowers the city to impose a tax on all privileges and occupations carried on within its limits: *City of Anniston v. Southern Ry. Co.*, 112 Ala. 557, 20 South. 915; *Denver City Ry. Co. v. Denver*, 21 Colo. 350, 52 Am. St. Rep. 239, 41 Pac. 826, 29 L. R. A. 608; *Norfolk & W. Ry. Co. v. Suffolk*, 103 Va. 498, 49 S. E. 658.

5. **Sleeping-car Companies.**—A statute imposing a privilege tax on all sleeping and palace car companies carrying passengers from one point to another within the state, and also a certain tax per mile "for each mile of railroad over which such company runs its cars," is not void as a regulation of, or license upon, interstate commerce, and the tax cannot be avoided by showing that the business is compulsory and done at a loss: *Pullman Co. v. Adams*, 78 Miss. 814, 84 Am. St. Rep. 647, 30 South. 757.

6. **Telephone and Telegraph Companies.**—Where telephone or telegraph companies, although engaged in interstate commerce, carry on their business so as to justify police supervision and inspection, a municipal corporation may exact reasonable license fees from them to defray the expenses of such supervision and inspection. These fees are usually fixed at a certain amount for each pole and for each mile of wire. They must not be so far in excess of the cost of inspection and supervision, at least as to interstate companies, as to render it evident that they are imposed, not to pay such expenses, but as a means of raising revenue: *Fort Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51, 82 S. W. 163, 66 L. R. A. 238; *Southern Bell Tel. & Tel. Co. v. D'Alemberte*, 39 Fla. 25, 21 South. 570; *Western Union Tel. Co. v. Wakefield*, 69 Neb. 272, 95 N. W. 659; *Borough of New Hope v. Postal Tel. etc. Co.*, 202 Pa. 532, 52 Atl. 127; *Borough of Taylor v. Postal Tel. etc. Co.*, 202 Pa. 583, 52 Atl. 128; *Delaware etc. Tel. Company's Petition*, 224 Pa. 55, 73 Atl. 175; *Postal Tel. Co. v. City of Richmond*, 99 Va. 102, 86 Am. St. Rep. 877, 37 S. E. 789; *Philadelphia v. Western Union Tel. Co.*, 81 Fed. 948; *Philadelphia v. Western Union Tel. Co.*, 89 Fed. 454, 32 C. C. A. 246; *Philadelphia v. Atlantic etc. Tel. Co.*, 102 Fed. 254, 42 C. C. A. 325; *Sunset Tel. etc. Co. v. Medford*, 115 Fed. 202. If the city has been so authorized by the legislature, it may impose an occupation tax as a revenue measure on telegraph or telephone companies, so long as interstate commerce is not thereby interfered with, but without such delegation of authority from the legislature it cannot impose such a tax: *Ogden v. Crossman*, 17 Utah, 66, 53 Pac. 985; *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 110 Am. St. Rep. 886, 104 N. W. 1009, 1 L. R. A. 581. In the Utah case, the tax was imposed on each telegraph instrument used in the city.

It is shown by the decisions of the supreme court of the United States and the appellate court of New York and Pennsylvania, to

quote from *Pensacola v. Southern Bell Tel. Co.*, 49 Fla. 161, 37 South. 820, "That municipalities which have the power and are charged with the duty of regulating the use of their streets may impose a reasonable charge, in the nature of a rental, for the occupation of certain portions of their streets by telegraph and telephone companies, and may also impose a reasonable charge in the enforcement of local governmental supervision, the latter being a police regulation." Said the court in *Atlantic & Pac. Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. Rep. 817, 47 L. ed. 995: "We hold that the city of Philadelphia had power to pass such an ordinance as this, requiring the company to pay a reasonable license fee for the enforcement of local governmental supervision. In other words, if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision."

7. Express Companies.—A city may be authorized to impose a tax on the business of express companies conducted therein, or between it and the points without the city but within the state: *Montgomery v. Shoemaker*, 51 Ala. 114; *Hardee v. Brown* (Fla.), 47 South. 834; *Topeka v. Jones*, 74 Kan. 164, 86 Pac. 162, 87 Pac. 1133.

8. Banking Concerns.—Banks may be made the subject of a privilege tax: *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 South. 219; and authority to levy the tax may be delegated to the municipal corporation in which the bank is located: *Macon v. Macon Sav. Bank*, 60 Ga. 133; *Hineckley v. Belleville*, 43 Ill. 183; *State v. Columbia*, 6 Rich. (S. C.) 404. A state has no authority to authorize its municipal corporations to exact license taxes from national banks: *Macon v. First Nat. Bank*, 59 Ga. 648; *Carthage v. First Nat. Bank*, 71 Mo. 508, 36 Am. Rep. 494; *National Bank of Chattanooga v. Chattanooga*, 8 Heisk. (55 Tenn.) 814; *Second Nat. Bank v. Caldwell*, 13 Fed. 429; but a statute imposing an occupation tax on all persons and concerns engaged in banking is not invalid because it cannot be enforced against national banks: *Brooks v. State* (Tex. Civ. App.), 58 S. W. 1032. A provision in the charter of the bank exempting its capital from taxation does not exempt it from liability to a license tax: *State v. Citizens' Bank*, 52 La. Ann. 1086, 27 South. 709. Where a tax is imposed on bank presidents, a person who is president of several banks may be required to pay a tax for each bank: *Withan v. Stewart*, 129 Ga. 48, 58 S. E. 463.

h. Professional Callings.

1. Attorneys at Law.—The legislature is undoubtedly competent to levy a license or occupation tax upon attorneys and impose a penalty for failure to pay it. The admission or license of an at-

torney to practice confers no immunity from such taxation; the license to practice, while a vested right, is nevertheless as legitimate a subject of taxation as is property to which the owner has a vested right: *Cousins v. State*, 50 Ala. 113, 20 Am. Rep. 290; *Young v. Thomas*, 17 Fla. 169, 35 Am. Rep. 93; *White v. Hixon* (Ga.), 64 S. E. 648; *State v. Waples*, 12 La. Ann. 343; *State v. Kink*, 21 La. Ann. 201; *Egan v. Charles County Court*, 3 Har. & McH. 169; *Simmons v. State*, 12 Mo. 268, 49 Am. Dec. 131; *Languille v. State*, 4 Tex. App. 312; *Hart v. State*, 21 Tex. App. 318, 17 S. W. 127; *Ex parte Williams*, 31 Tex. Cr. 262, 20 S. W. 580, 21 L. R. A. 783; *Trezvant v. State* (Tex. Cr.) 20 S. W. 582; *Fort Worth etc. Ry. Co. v. Carlock* (Tex. Civ. App.), 75 S. W. 931. The tax is not a poll tax: *State v. Gazlay*, 5 Ohio, 14; and a statute levying a tax of ten dollars on an attorney does not offend a constitutional provision that a poll tax shall not exceed one dollar: *State v. Hayne*, 4 S. C. 403. An early Tennessee statute taxing lawyers was condemned as invalid in *Re Lawyers' Tax Cases*, 8 Heisk. (55 Tenn.) 565.

The legislature may delegate its authority to tax attorneys to municipal corporations; and a municipal corporation to which such authority has been delegated may impose a tax on attorneys for the privilege of practicing law within its territorial limits, and provide a penalty for failure to pay the same. It cannot be urged against the validity of such taxation that the admission of an attorney to practice in the courts of the state exempts him from such burdens, or that the taxation impairs the obligation of his contract with the state: *Goldthwaite v. City Council of Montgomery*, 50 Ala. 486; *Ahlrichs v. Cullman*, 130 Ala. 439, 30 South. 415; *City of Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674; *Bullitt v. City of Paducah* (Ky.), 3 S. W. 802; *Elliott v. Louisville*, 101 Ky. 262, 40 S. W. 690; *Baker v. Lexington* (Ky.), 53 S. W. 16; *Yantis v. Lexington*, 29 Ky. Law Rep. 689, 94 S. W. 653; *St. Louis v. Sternberg*, 69 Mo. 289, 4 Mo. App. 453; *City of Wilmington v. Macks*, 86 N. C. 88, 41 Am. Rep. 443; *Blanchard v. Bristol*, 100 Va. 469, 41 S. W. 948.

"Lawyers have no more privileges than other citizens in the pursuit of their profession. The license to practice, granted to them under the law to pursue the profession of attorney, is only an evidence of character, fitness and ability. The privilege of pursuing the profession carries with it no exemption from the duties of citizenship, the sharing with others the expense of government, both state and municipal. If there is one thing more than any other which should impress itself upon the profession, it is the duty to aid and assist in the execution of the laws, and to bear the just proportion of expenses to make the government a vigorous and healthy instrumentality in the preservation of society and the protection of all citizens in all their rights and in the pursuit of their occupations": *State v. Fernandez*, 49 La. Ann. 764, 21 South. 591.

Clearly, a municipal corporation has no inherent power to tax the privilege of practicing law, but must find authority so to do in some

legislative grant; that is, the authority must appear in the charter or other statute either in express terms or by necessary implication. It would seem, however, that a grant of authority to tax all occupations and professions confers power to tax attorneys, although they are not expressly named: *Baker v. Lexington* (Ky.), 53 S. W. 16; *Lent v. Portland*, 42 Or. 488, 71 Pac. 645.

Under a general grant of authority to tax attorneys at law, a city may tax nonresident lawyers who have an office and practice in the city: *Petersburg v. Cocke*, 94 Va. 244, 26 S. E. 576, 36 L. R. A. 432. But an authorization to levy license taxes on attorneys residing in the city does not authorize the city to tax attorneys having offices and doing business therein but having their places of residence elsewhere: *City of Garden City v. Abbott*, 34 Kan. 283, 8 Pac. 473.

There is no constitutional objection to taxing each member of a law firm separately, and a tax on all practicing attorneys requires every member of a firm of attorneys to pay the same: *Jones v. Page*, 44 Ala. 657; *Blanchard v. State*, 30 Fla. 223, 11 South. 785, 18 L. R. A. 409; *Lanier v. City of Macon*, 59 Ga. 187; *Wilder v. City of Savannah*, 70 Ga. 760, 48 Am. Rep. 598. Yet a provision in a city ordinance levying a tax upon practicing attorneys, which provides that a firm shall pay but one tax, is proper: *City of Savannah v. Hines*, 53 Ga. 616.

2. **Physicians and Surgeons.**—It is well understood that the state, in the exercise of its police power, may prescribe qualifications which persons must possess in order lawfully to practice medicine and surgery, and may require persons desiring to enter such practice to obtain a license or certificate of proficiency: *Foo Lun v. State*, 84 Ark. 475, 106 S. W. 946; *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; *State v. Kendig*, 133 Iowa, 164, 110 N. W. 463; *Webster v. State* (Ky.), 113 S. W. 415; *Commonwealth v. Jewelle*, 199 Mass. 558, 85 N. E. 858; *State v. Davis*, 194 Mo. 485, 92 S. W. 484, 4 L. R. A., N. S., 1023; *State v. McCleary*, 130 Mo. App. 527, 109 S. W. 638; *Little v. State*, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. 717; *State v. Call*, 121 N. C. 643, 28 S. E. 517; *Gully v. Territory*, 19 Okl. 187, 91 Pac. 1037; *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 111 Am. St. Rep. 922, 2 L. R. A., N. S., 392. More than this the legislature may, either directly or indirectly through a delegation of authority to municipal corporations, impose a tax on the privilege of practicing medicine and surgery: *City of Savannah v. Hines*, 53 Ga. 616; *City of Girard v. Bissell*, 45 Kan. 66, 25 Pac. 232; *Steiner v. Liggett*, 67 Kan. 822, 72 Pac. 577; *Holland v. Isler*, 77 N. C. 1. Perhaps this authority is most frequently exercised in the case of itinerant practitioners or traveling specialists: *Moore v. Bradford County*, 148 Pa. 342, 23 Atl. 896; *Broiles v. State* (Tex. Cr. App.), 68 S. W. 685; *Adams v. State*, 45 Tex. Cr. 566, 78 S. W. 935; *Howe v. State* (Tex. Cr. App.), 78 S. W. 1064.

It seems that the taxation of physicians and surgeons has been less resorted to than the taxation of attorneys at law, and perhaps for the reason that the instincts of the former are less predatory than those of the latter.

3. The Position of Dentists is essentially the same as that of physicians and surgeons in the matter of the right to regulate and tax the privilege of pursuing their profession. There is no doubt that the state may, under the police power, require a dentist to obtain a license or certificate of proficiency as a condition precedent to his right to practice: *Ex parte Hornef*, 154 Cal. 355, 97 Pac. 891; *Kettles v. People*, 221 Ill. 221, 77 N. E. 472; *Ferner v. State*, 151 Ind. 247, 51 N. E. 360; *Commonwealth v. Porn*, 196 Mass. 326, 82 N. E. 31, 17 L. R. A., N. S., 94; *State v. Taylor*, 106 Minn. 218, 118 N. W. 1012, 19 L. R. A., N. S., 877; *State v. Doerring*, 194 Mo. 398, 92 S. W. 489; *State v. McIntosh*, 205 Mo. 616, 103 S. W. 1071; *State v. Hicks*, 143 N. C. 689, 57 S. E. 441; *State v. Thompson*, 48 Wash. 683, 94 Pac. 667. And no reason is apparent why the privilege of practicing dentistry may not constitutionally be taxed the same as the privilege of practicing law or medicine: *Odlin v. Woodruff*, 31 Fla. 160, 12 South. 227, 22 L. R. A. 699; *Savannah v. Hines*, 53 Ga. 616; *Johnson v. Great Falls (Mont.)*, 99 Pac. 1059.

4. Druggists and Pharmacists may be, and very generally are, required to obtain a license for the privilege of following their occupation or business: *Carter v. State*, 122 Ga. 175, 50 S. E. 64; *State v. Hovorka*, 100 Minn. 249, 110 N. W. 870, 8 L. R. A., N. S., 1272; *State v. Hamlett*, 212 Mo. 80, 110 S. W. 1082; *State v. Forcier*, 65 N. H. 42, 17 Atl. 577; *State v. Matthews*, 81 S. C. 414, 62 S. E. C95; *Bertram v. Commonwealth*, 108 Va. 902, 62 S. E. 969; *State v. Heinemann*, 80 Wis. 253, 27 Am. St. Rep. 34, 49 N. W. 818. Moreover, they may be subject to a license or occupation tax, and they can claim no exemption therefrom when this burden is imposed by city on the ground that they have obtained a license from the state board of pharmaceutical examiners: *In re Jager*, 29 S. C. 438, 7 S. E. 605; *Commonwealth v. Fowler*, 98 Ky. 648, 34 S. W. 21. Itinerant venders of drugs and nostrums may be required to pay a license tax, and a physician authorized to practice medicine is not exempt from such tax if he engages in that business: *State v. Gouss*, 85 Iowa, 21, 51 N. W. 1147. But a traveling minister of the gospel who sells three bottles of medicine is not pursuing the "occupation of vending medicine": *Love v. State*, 31 Tex. Cr. 469, 20 S. W. 978. A law requiring traveling persons who sell medicine to pay a tax, but exempting drummers and commercial travelers, is valid: *Huffman v. State (Tex. Cr. App.)*, 115 S. W. 578.

PULLMAN COMPANY v. GELLER.

[128 Ky. 72, 107 S. W. 271.]

MASTER AND SERVANT—Order to do Dangerous Work.—

The rule that an employé cannot recover for an injury where he undertakes or continues work when the danger of working in the place or with the tools provided is obvious or known to him is modified where the work is done in an emergency and by the direction of the master, or by his express command in the absence of an emergency, and he gives the employé to understand that he does not consider the risk one which a prudent man would refuse to undertake. (p. 297.)

MASTER AND SERVANT.—Where an Employé is Ordered by His Superior to immediately perform a task, but states that the work cannot safely be done with the appliances at hand, whereupon the superior insists that the employé must, because of the necessity for haste, at once go on with the work with such appliances as he has, it is not contributory negligence for the employé to obey the order if in his judgment there is a reasonable probability that the work can be safely done by using extraordinary care. (p. 298.)

Martin M. Durrett, for the appellant.

B. F. Graziani, for the appellee.

73 SETTLE, J. This is an appeal from a judgment of the Kenton circuit court entered upon a verdict awarding the appellee, Jacob Geller, nine hundred dollars damages against appellant, the Pullman Company, for personal injuries ⁷⁴ received by him while serving it as a blacksmith in its repair-shop in the city of Covington. Appellee's petition based his right to recover upon the alleged negligence of appellant and its servants, superior in authority to him, in failing to provide him with tongs reasonably safe for use in the work required of him. From the record we gather that appellee's injuries were sustained in the following manner: Appellee was approached in appellant's shop by McMillen, its assistant manager, and ordered to make a tool-holder and tools for use in connection with a wheel lathe in the shop. At the time of giving the order McMillen pointed out to appellee a steep, or iron axle, of considerable size and weight, which had been brought into the shop by some of the employés and thrown on the floor, and directed him to make the tools out of it. According to appellee's own testimony, McMillen told him, in substance, they needed the tools at once, were in a rush for them, and that he wanted appellee to make them right away. Appellee said to him that the axle could not be held with the tongs he had, to which McMillen replied that they were rushed for the tools and had to have them, and "You [meaning appellee] will have to do them with what

you have got. I will give you a chance later on to make the proper kind of tongs, for we need these tools right away." On the following day McMillen again went to appellee and inquired whether any of the tools were completed. Appellee told him they were not, and that he could not hold the axle with the tongs he had. Whereupon McMillen ordered him as before to make the tools, that they were badly needed, and that he would later give him time to make other tongs. Appellee then began to make the tools, one being a wrench. While at work on the wrench, and ⁷⁵ holding the heavy axle up with the tongs, they lost their hold, suddenly slipped from the axle, and flew upward with great swiftness and force, striking appellee on the jaw, mouth and cheek, and breaking or knocking out nearly all of the jaw teeth on that side of the face, cutting his lip and cheek, and otherwise injuring him. As a result of his wounds appellee came near bleeding to death, underwent much physical and mental suffering, lost considerable time from his work, and expended a considerable sum in surgical bills.

Appellant's answer denied that appellee's injuries were caused by its negligence or that of its employes, and averred that they were caused wholly by his own negligence. The plea of contributory negligence was controverted by reply. Appellee's testimony strongly conduced to prove the insufficiency of the tongs he was required to use in making the tools, and that their use for the purpose to which they were applied was attended with danger; that this fact was well known to appellant, and was in fact communicated by him to the assistant manager, McMillen, when the latter ordered him to make the tools. Appellant's testimony was to the effect that appellee was more familiar than was the assistant manager or any other servant of appellant with the risk and danger attending the use of the tongs in the work required of him; and much of it also tended to contradict appellee's version of what occurred between himself and the assistant manager at the time of the latter's directing him to make the tools. It is appellant's contention that, the danger attending appellee's work of making the tools and his use of the tongs for that purpose being well known to appellee, he must be regarded as having voluntarily assumed the risk, and ⁷⁶ therefore was not entitled to recover damages for the injuries sustained, and for this reason that the trial court upon the conclusion of the evidence should have peremptorily instructed the jury to find for appellant as it requested.

We do not think the peremptory instruction should have been given, and therefore the action of the lower court in refusing it was not error. There was some evidence to support appellee's version of what occurred between himself and appellant's assistant manager, which, if believed by the jury, was sufficient to place the responsibility for the injuries upon the negligence of the latter, and therefore the question of whether appellee in the matter of receiving his injuries was guilty of contributory negligence, but for which they would not have been received, was one to be determined by the jury. While the general rule is that the master must provide the servant with a reasonably safe place to work and reasonably safe tools with which to work, if the danger of working in the place or with the tools provided is so obvious, immediate or constant as to be known to the servant, and he nevertheless undertakes or continues the work and is injured in its performance, he cannot recover for such injury, this rule must, however, be applied with some modification, if the work is done in an emergency and by the direction of the master, or by his express command in the absence of an emergency, and the master gives the servant to understand that he does not consider the risk one which a prudent man would refuse to undertake; in such event the servant, notwithstanding his knowledge of the danger, has a right to rely on his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon the master's ⁷⁷ opinion: *Shearman & Redfield on Negligence*, sec. 186.

We understand this rule to have been recognized by this court in the case of *Long's Admr. v. Illinois Central R. R. Co.*, 24 Ky. Law Rep. 567, 68 S. W. 1095, 58 L. R. A. 237, which contains a very elaborate discussion of the subject and an exhaustive review of the authorities bearing thereon. In the opinion it is, in part, said: "In an exhaustive note on this subject to the case of *Dallemand v. Saalfeldt*, 175 Ill. 310, 67 Am. St. Rep. 214, 51 N. E. 645, 48 L. R. A. 753, the editor, after pointing out the conflict of authority on the question, says: 'Some judges, following out the analogy of the doctrine stated in the last section, have held that the rule by which contributory negligence is inferred as matter of law, from the undertaking or continuance of work which entails an abnormal risk of which the servant was aware, involves the corollary that the action of the element of a direct order will not prevent the defense from taking effect if the servant understood the perils to which he would be exposed in obeying that order. . . . But by almost all courts, in-

cluding those who apply the rule just inferred (Pennsylvania, Illinois, and North Carolina cases, cited *infra*), it is held that the fact of the servant's having been directly ordered to do the act which caused the injury introduces into the situation a differentiating circumstance which will render his contributory negligence a question for the jury in nearly every conceivable state of evidence. It does not follow that because the servant could justify a disobedience of the order he is guilty of negligence in obeying it. . . . Hence we find it laid down in a leading case that where, in obedience to an order, the servant performs a duty which, though dangerous, ⁷⁸ is not so dangerous as to threaten immediate injury, or where it is reasonably probable that the work may be safely done by using extraordinary skill, he may recover, if injured. . . . In other cases the same principle is expressed by a restrictive form of statement; the servant being held to obey a specific command of his superior without necessarily incurring the consequence of contributory negligence, unless the execution of that command involves a hazard which no ordinary person would have subjected himself to.' . . . These principles control this case": Louisville & N. R. R. Co. v. Ward's Admr., 19 Ky. Law Rep. 1900, 44 S. W. 1112; 1 Thompson on Negligence, secs. 192-442; 20 Am. & Eng. Ency. of Law, 2d ed., p. 120.

In the case at bar, according to appellee's testimony, he was ordered by his superior to immediately make certain tools. The superior, being advised by appellee that there was danger in using the tongs he had in the work required, nevertheless insisted that he must, because of the necessity for haste, at once go on with the work with the tongs and such other appliances as he had. In view of his knowledge of the danger, was it contributory negligence for appellee to obey the order, if, in his judgment, there was a reasonable probability that the work might be safely done by using extraordinary care? In view of the authorities, *supra*, we would say it was not. There was no evidence of negligence as to the manner in which appellee performed the work in question. On the contrary, it tends to prove that he used all the care possible, which was natural, and, no doubt, resulted from his knowledge of the danger attending the use of the defective tongs. These being the facts, no reason is apparent for appellant's complaint that the jury placed the responsibility for appellee's injuries ⁷⁹ upon its negligence in failing to provide him with reasonably safe tongs for use in the work required of him.

The instructions, which are too numerous to copy in the opinion, substantially conform to our view of the law, and, as they correctly presented every aspect of the law for the guidance of the jury, there was no error in the rejection by the circuit court of the instructions offered by appellant. Our examination of the record fails to disclose any material error in the admission or rejection of evidence, and the amount of the verdict is not excessive.

Judgment affirmed.

The Liability of an Employer Who Directs an Employé to Perform Extrahazardous Duties is discussed in the note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884. If a servant proceeds under the order of his master or superior employé in performing an act whereby he is exposed to unusual danger, the master is liable for the resulting injury to the servant, unless the risk is fully realized by the servant, or is so apparent that no man of ordinary prudence situated as he is would undertake it: *Long v. Illinois Cent. R. R. Co.*, 113 Ky. 806, 101 Am. St. Rep. 374; *Tuckett v. American Steam etc. Laundry*, 30 Utah, 273, 116 Am. St. Rep. 832; *Shirley v. Abbeville Furniture Co.*, 76 S. C. 452, 121 Am. St. Rep. 952. See, also, *Meier v. Way, Johnson, Lee & Co.*, 136 Iowa, 302, 125 Am. St. Rep. 254; *Kennedy v. Swift & Co.*, 234 Ill. 606, 123 Am. St. Rep. 113.

RICHARDSON v. McCHESNEY.

[128 Ky. 363, 108 S. W. 322.]

CONSTITUTIONAL LAW—Congressional Apportionment.—A legislative division of the state into congressional districts cannot be reviewed by the courts, where there is no constitutional limitation on the power of the legislature to make such apportionment. (p. 301.)

Wm. H. Holt, Geo. DuRelle, E. L. Worthington and W. C. Halbert, for the plaintiff.

C. H. Noggle, for the appellee.

365 CARROLL, J. This suit was brought by appellant for the purpose of having declared invalid the act of 1890 and the acts of 1898 dividing the state into congressional districts.

In 1890 the General Assembly, by an act approved May 26th (Acts 1889-90, p. 166, c. 1835), laid off the state into eleven congressional districts. In 1898, by an act approved March 12th (Acts 1898, p. 175, c. 67), the counties of Cumberland and Monroe were taken from the third congressional

district and added to the eleventh district, and the county of Metcalf was taken from the eleventh congressional district and added to ³⁶⁶ the third congressional district. By an act approved March 11, 1898 (Acts 1898, p. 179, c. 69), the county of Jackson was transferred from the eighth to the eleventh congressional district. The chief objection is to the apportionment made under the act of 1890. The ground upon which these acts were assailed is that the population of the districts is grossly unequal; the effect being to deny to the Republican party, who are the instigators of this suit, a fair and equal representation in the distribution of the state into congressional districts. In short, the charge in effect is that the state was "Gerrymandered" in the interest of the Democratic party. The apportionment complained of was made under the census of 1880. The census of 1890 had not been completed when it was made. The population of the state under the census of 1880 was 1,649,690, which divided by 11, would make the population of each district 149,881. The petition sets out that the population of the several districts in 1880 was as follows:

First District	149,740
Second District	152,960
Third District	156,658
Fourth District	188,124
Fifth District	146,010
Sixth District	144,160
Seventh District	130,003
Eighth District	128,656
Ninth District	164,985
Tenth District	114,024
Eleventh District	172,630

It will thus be seen that the population of the districts is not grossly unequal when compared with the apportionment, but this question is not material in the disposition of the case, as we are of the opinion that ³⁶⁷ it is not within the power of the courts to control the legislative department in the creation of congressional districts. There is no mention of congressional districts in the constitution of the state; nor is there in that instrument any direction to the General Assembly as to how the districts shall be laid off. In the matter of dividing the state into congressional districts the legislature, at least so far as the power and authority of this court extends, is supreme. This court has no control over its action. It would be exceeding the power granted us to undertake to revise or annul a legislative act relating to a subject

over which the legislature has absolute control. Except when limited by the constitution of the state, the General Assembly, especially in administrative and political affairs, is beyond the reach of the judiciary of the state. We have no authority to pass judgment upon its acts. In no case that has come under our notice have the courts undertaken to attempt to restrain the legislative departments, unless it violated some provision of the organic law of the state. If, in the matter of dividing the state into congressional districts, this court should undertake to declare invalid the apportionment made by the legislative department, it would simply result in setting up our judgment against the judgment of the members elected for the purpose of performing this duty. We would be putting up our opinion against those in whom the exclusive right to regulate this matter has been lodged, and be arrogating to ourselves wisdom, honesty and fairness superior to those charged by law with the control of these matters: *Moore v. City of Georgetown*, 127 Ky. 409, 128 Am. St. Rep. 349, 105 S. W. 905, 32 Ky. Law Rep. 323. When the legislature has exceeded its legitimate powers by enacting laws in conflict with the constitution or that are prohibited ³⁶⁸ by it, we have not hesitated to interpose the veto power lodged in the judiciary for the purpose of preserving the integrity of the organic law under which all departments of the state government were created and live, and to which all of them owe obedience. And so, when the General Assembly in the division of the state into senatorial and legislative districts grossly violated that provision of the constitution directing that the districts should be "as nearly equal in population as may be," we exercised the power vested in the judiciary to protect from invasion by whatever source the fundamental law of the state, and declared the act invalid: *Ragland v. Anderson*, 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865, 30 Ky. Law Rep. 1199. But in the matter of congressional districts we find nothing in our state constitution to guide us. There is nowhere any limitation upon the power of the legislature, and it would be assuming authority this court does not possess if we undertook to control a co-ordinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency or propriety of laws enacted by the General Assembly, unless they conflict with the constitution. Judge Cooley, in his work on Constitutional Limitations, page 200, thus states with great force and clearness the prevailing doctrine upon this subject: "The moment a court ventures

to substitute its own judgment for that of the legislature in any case where the constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference. The rule of law upon this subject appears to be that, except where the constitution has imposed ³⁶⁹ limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making power. Any legislative act which does not encroach upon the power apportioned to the other departments, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them."

Nor do we find in the constitution of the United States any direction to the states upon this subject. The only provisions in that instrument relating to it are these: Section 4, article 1, provides "the time, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." And the fourteenth amendment provides: "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." It will thus be seen that the constitution of ³⁷⁰ the United States has left matters relating to congressional districts to the disposition of the states. Nor has the Congress of the United States undertaken to legislate upon the subject, except to provide "that the number of congressmen to which each state may be entitled in Congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal

number of inhabitants. The said districts shall be equal to the number of representatives to which such state may be entitled in Congress, no one district electing more than one representative." What right, if any, Congress has to control or supervise the action of state legislatures in the division of the states into congressional districts, we need express no opinion in the absence of a judicial determination by the supreme court of the United States of the power of Congress to control the states in this matter.

Wherefore the judgment of the lower court is affirmed.

Whether a Statute Redistricting a State into representative districts makes a division so unequal as to violate the constitutional provision that such division must be in proportion to the population is not so essentially a political question as to be beyond the jurisdiction of the courts: *Ragland v. Anderson*, 125 Ky. 141, 128 Am. St. Rep. 242. See further *State v. Cunningham*, 83 Wis. 90, 35 Am. St. Rep. 27, and note. In New York the constitution expressly confers authority on the supreme court to consider and determine the validity of an apportionment act dividing the state into senatorial districts: *Sherrill v. O'Brien*, 188 N. Y. 185, 117 Am. St. Rep. 841. The action of city councilmen in dividing the municipality into wards and allotting a number of councilmen to be elected from each ward is not subject to review by the courts upon the theory that the division violates fundamental principles of equality in representative government in giving the residents of one locality more power than the same number in another locality: *Moore v. Georgetown*, 127 Ky. 409, 128 Am. St. Rep. 349.

BINDELL v. KENTON COUNTY ASSESSMENT FIRE INSURANCE COMPANY.

[128 Ky. 389, 108 S. W. 325.]

FIRE INSURANCE.—The Destruction of the Property by the assured relieves the insurer from liability, though there is no stipulation to that effect in the policy. (p. 304.)

FIRE INSURANCE.—Destruction by Lunatic.—A fire insurance company cannot escape liability for loss on the ground that the insured, when insane, destroyed the property, if the policy makes no exemption in such cases. (p. 305.)

Schmidt & Holmes, for the appellant.

Frank M. Tracy, for the appellee.

³⁹⁰ CARROLL, J. In this action to recover upon a policy of fire insurance the defense was that the property insured was destroyed by the voluntary act of the insured, who died

before the case came on for trial. His personal representatives filed the following reply to this answer: "(1) They deny that the fire which destroyed said barn was started by said Charles Bindell, deceased, or the said barn was destroyed as a result of the voluntary act of the said decedent. (2) They state that if the fire which destroyed said barn was started by said Bindell, or if said barn was destroyed as a result of any act of said decedent, he was at the time temporarily insane and incapable of forming any wrongful or fraudulent design. They state that one of said defenses is true, but that they do not know which of them is true." The lower court sustained a demurrer to the second paragraph of this reply, and of this ruling appellants complain.

There is no clause in the policy of insurance providing that the company should not be liable if the property was destroyed by the insured. The absence, however, of such a stipulation would not render the company liable if the destruction of the property was caused by the voluntary, fraudulent, corrupt or wrongful act of the insured. The paragraph of the reply in question is not aptly pleaded. It would have been more in accordance with the rules of good pleading if it had stated that Bindell, if he burned the barn, did not at the time have mind enough to know the nature or quality of his act, and was laboring under such defect of reason as not to be responsible for his conduct, or that, as a result of mental unsoundness, he did not have sufficient will power to know right from wrong or govern his actions. But, although technically defective, we are not prepared to say that the pleading ³⁹¹ was not sufficient, and will therefore treat the paragraph as if it averred in apt language the insanity of the insured at the time he burned the barn. We have not found any Kentucky case dealing with the question here presented, although it has been often considered in life insurance cases; and in such cases, where the policy exempted the company from liability if the insured should die by his own hand, it has been ruled that self-destruction did not void the policy when the insured who took his own life was at the time insane. In other words to avoid the policy, the act of self-destruction must have been voluntary: *St. Louis Mutual Life Ins. Co. v. Graves*, 6 Bush, 268; *Manhattan Life Ins. Co. v. Beard*, 112 Ky. 455, 66 S. W. 35, 23 Ky. Law Rep. 1747. A different rule has obtained where the policy contained a stipulation that if the insured should take his own life while insane, or if his act be voluntary or involuntary while sane or insane. The cases construing these last-mentioned provi-

sions may be found in *Manhattan Life Ins. Co. v. Beard*, 112 Ky. 455, 66 S. W. 35, 23 Ky. Law Rep. 1747, and it is not necessary to further mention them here.

If Bindell, while insane, destroyed the insured property, the company cannot under the conditions of this policy escape liability for the loss upon this ground. Unless Bindell's act in destroying the property was fraudulent, voluntary or intentional, the company is bound. It is well settled that, although the negligence or carelessness of the insured may cause or result in the destruction of his property, the company will be liable, unless the carelessness or negligence is of such a character as to amount to fraud or willful misconduct on his part: *Ostrander on Insurance*, p. 192; 1 *Wood on Insurance*, p. 274. In 19 Cyc., page 831, the rule is thus stated: "In the absence of fraud or design on ³⁹² the part of the insured, or some stipulation in the policy, the insurer is not relieved from liability by mere negligence or carelessness of the insured or his servants, although directly contributing to or causing the loss; but, on the other hand, even in the absence of stipulations in the policy, the failure of the insured to take reasonable care to avoid loss, or the doing of wrongful acts directly calculated to bring about the loss, may be such as to defeat a recovery under the policy." The text is supported by numerous authorities, including *Scottish Union Ins. Co. v. Strain*, 24 Ky. Law Rep. 958, 70 S. W. 274, where this court said: "The law is well settled that insurance companies are responsible for losses caused by a risk insured against, notwithstanding such loss may be directly contributed to by the negligence or carelessness of the assured or its agent." There is no conflict in the authorities upon this proposition. It will thus be seen that to relieve the insurer from liability, the destruction of the property must have been caused or brought about by the fraudulent design, voluntary act, or intentional misconduct of the insured. Accepting this doctrine as sound, it necessarily follows that if the insured did not at the time have mind enough to know the nature or quality of his act, and was laboring under such a defect of reason as not to be responsible for his conduct, or as a result of mental unsoundness he did not have sufficient will power to know right from wrong or govern his actions, the destruction of the property by him would not relieve the company. Under the conditions stated, the act of the insured could not have been fraudulent because there can be no actual fraud in the absence of an intent to commit it. It

could not be voluntary or intentional because he did not have sufficient mind and memory to do a voluntary ³⁹³ or intentional act. The acts of an insane person are not voluntary or intentional in the sense that they impose responsibilities that ordinarily flow from the consequences of a voluntary or intentional act committed by a sane person; or, to put it in another way, assuming that Bindell destroyed the property, and at the time he was insane within the definition heretofore given, he was not capable of forming any judgment as to the consequences of his act, and hence the wrongful intent necessary to constitute a fraudulent purpose, a voluntary or willful or an intentional act, was lacking. An insane person acts without design, has no will of his own, and is influenced by no motive. So an insane person can form no wrongful or fraudulent design in destroying his own property so far as the insurers are concerned, and the insurers are liable although the insured himself burns the property when insane. In *Autremont v. Fire Assn.*, 65 Hun, 475, 20 N. Y. Supp. 344, which was an action to recover on a fire insurance policy, it appears that the insured while insane set fire to the building, and upon this ground the company resisted a recovery; but the court said: "We are unable to see that an insane person can form a fraudulent or wrongful design in the destruction of his own property so as to defeat a policy of insurance thereon any more than he can form a criminal intent in the commission of crime. Mere negligence, however great the degree, is not sufficient to defeat a recovery, provided it does not reach the point of a wrongful or fraudulent purpose, or a wanton disregard of others." To the same effect is *Karow v. Continental Ins. Co.*, 57 Wis. 56, 46 Am. Rep. 17, 15 N. W. 27. It has been suggested that although an insane person is not criminally liable for his acts, and ³⁹⁴ although a policy of fire insurance will not be avoided if the property is destroyed by the insured while insane, yet that insane persons are responsible to the extent of compensatory damages for any injury done by them, and hence, if Bindell damaged the insurance company by his own insane act, his estate should be required to compensate it for any loss sustained thereby. Generally speaking, a lunatic or insane person is liable for the actual damage resulting from his wrongful acts: *Cooley on Torts*, p. 99; *Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743, 38 N. E. 449, 26 L. R. A. 153. In 1 *Shearman & Redfield on Negligence*, section 121, it is said the liability of lunatics to a civil action for the damages caused by their torts rests

“not upon the usual principle of personal fault, for there may be none, but upon the broad ground that, when one of two innocent persons must bear a loss, he must bear it whose act caused it.” This question was fully considered by the Wisconsin court in the Karow case (57 Wis. 56, 46 Am. Rep. 17, 15 N. W. 27), and the conclusion reached that although, if the insured while insane had burned the house of another person, he would be liable for the value thereof, yet the fact that he burned his own house did not relieve the company from liability; and in support of this doctrine a number of cases are cited in the opinion. The reason for the distinction, which is not entirely satisfactory, is rested upon the ground that, as the company cannot escape liability upon the policy of insurance for the insane act of the insured, it would be in effect enabling it to do so if it could in an independent action require his estate to compensate it for the loss, or could set it up as a defense to defeat an action brought to recover the amount of the policy. In short, the doctrine seems to be that the company ought not to be allowed by this indirect ³⁹⁵ means to defeat a recovery on the policy when it could not have succeeded solely upon the ground that the insured burned it, if, in fact, he was at the time insane. To permit the company to recover from the insured would be going through the idle ceremony or form of paying him the amount of the policy with one hand, and at the same time taking it away from him with the other. If insurance companies do not desire to be responsible in cases of this character, they should so stipulate in their policies.

For the error in sustaining the demurrer to the reply, the judgment must be reversed, with directions for a new trial not inconsistent with this opinion.

Where an Insured Person Takes His Life While Insane, this does not relieve the insurance company from liability to pay the amount of the policy on his life unless the contract so stipulates: *Lange v. Royal Highlanders*, 75 Neb. 188, 121 Am. St. Rep. 786; note to *Supreme Conclave etc. v. Miles*, 84 Am. St. Rep. 541.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
v. McNARY'S ADMINISTRATOR.

[128 Ky. 408, 108 S. W. 898.]

RAILROADS—Duty to Trespassers on Track.—A railroad company ordinarily owes no duty to a trespasser until his peril is discovered, and is not liable to him unless, after discovering his peril, it could with proper care avoid injury. (pp. 310, 311.)

RAILROADS—Duty to Persons on or Near Track.—In Cities and Towns it is the duty of those operating a railroad to moderate the speed of trains, to give notice of their approach, to keep a lookout, and to take such other precautions as the occasion demands for the proper security of human life. (p. 311.)

RAILROADS.—A Person About to Cross a Railroad Track has a right to assume that notice of the approach of trains will be given. (p. 315.)

RAILROADS—Going upon Track Without Looking.—A pedestrian is not guilty, as a matter of law, of contributory negligence in going upon a railroad track without stopping, looking or listening for approaching trains. (p. 315.)

RAILROADS—Lookout for Persons on Track.—In Crowded Localities, where the presence of persons on a railroad track is to be anticipated, a lookout is required of those operating a train, notice of its approach, and such moderation of speed as will make lookout and signals available for the safety of the public. (pp. 315, 316.)

RAILROADS.—A Person Crossing Railroad Track by Private Path in a town near the station is not guilty of contributory negligence, as a matter of law, in not stopping, looking and listening for approaching trains. (p. 316.)

RAILROADS—Precaution Where Train Emerges from Cut.—It is peculiarly necessary that adequate notice of the approach of a train should be given, and that its speed should be such that the lookout by those in charge will not be idle, where the train passes through a cut and emerges from a curve within a town so close to the station that the presence of persons on or near the track may reasonably be expected. (p. 316.)

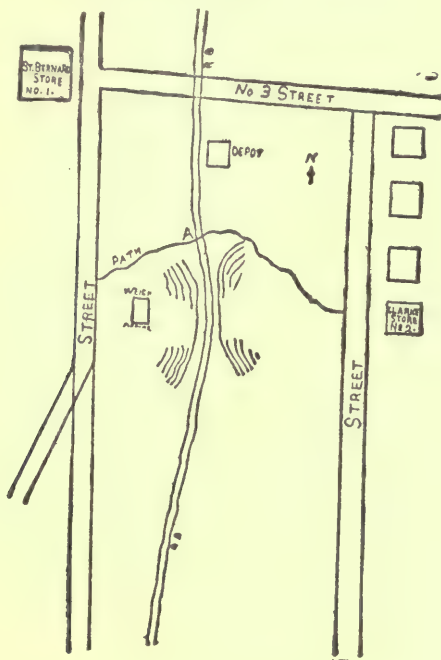
RAILROADS—Contributory Negligence in Crossing.—A pedestrian who fails to use ordinary care in crossing a track in front of a train, but for which he would not have been injured, cannot recover from the railroad company notwithstanding its negligence. (p. 317.)

Benjamin D. Warfield and Waddill & Dempsey, for the appellant.

Yost & Laffoon, for the appellee.

⁴¹¹ HOBSON, J. Barnsley, Kentucky, is a town of the sixth class. It has from four hundred to five hundred inhabitants. It is a mining town. The Louisville and Nashville Railroad runs through it. There are two stores—one on one side of the railroad, and one on the other. A path runs from one of these stores directly across the railroad to a street on the opposite side, the town lying about equally on each side of the railroad. This path was considerably used by the people of the town in passing to and fro, from fifty

to one hundred people passing along it every day. There was a street crossing over the railroad about two hundred feet north of the path, and about midway between the path and the street was the railroad station. About eight hundred feet south of the path there was another crossing. In April, 1905, Mary McNary, a woman about seventy years old, was walking along this path going east toward Clark's store. She had on a bonnet, and was not looking out for the train, and just as she got on the 412 track she was struck and killed by a fast passenger train coming from the south, and running forty or fifty miles an hour. The train was a through express, which stopped at only three or four points in the state, and did not check its speed at Barnsley. Persons in the northern part of the town in going to the depot were accustomed to walk along the street north of it until they came to the railroad crossing, and then to walk along the railroad track to the depot. Persons in the southern part of the town followed the path to the railroad track, and then walked along the track to the depot. The path was also used by persons on one side of the railroad to go to the other side. The situation is shown by the following plot, on which A indicates the point where the woman was struck:



⁴¹³ The only witness for the plaintiff who saw the occurrence was at the house next to Clark's store, and thus states what occurred: "Me and Dona Thomason was there, and when I came to the door I seen this old lady coming along the dirt road. She was over six feet from the railroad track, and she was coming on across, and the train was coming down here about thirty feet from here. Mrs. Young and her two little boys and I were looking and I never seen the train blow a whistle or ring a bell until it hit her. It hit her, and come on up to a telephone post, and whistled two little short whistles, cleared the crossing, and whistled five times."

Mrs. Young's testimony was introduced by the defendant, and was as follows: "I saw Mary McNary killed. The accident occurred right in front of my dwelling. I lived in Barnesley on the east side of the point of accident about thirty or forty yards from the track. My house was the nearest house to the track. I saw Mary McNary come upon the track from the west side to the track just opposite my house. Just as she stepped to the track the train whistled, and she ran across the track, but before she got across she was struck and pitched on the east side of the track. When she came upon the track she had on a bonnet, and did not look up or down the track, but was looking down to the ground. If she had looked up the track when or before she stepped upon the track she could have seen the approaching train for a long distance."

The track, as shown by the map, makes a slight curve just north of the path, and passes through a cut. The engineer of the train testified that the fireman called his attention to the woman, and almost simultaneously with his exclamation she appeared on ⁴¹⁴ his side. The fireman being on the left side would naturally see her first, and as shown on the plot neither of them could see her until they were very close to her. The train was running at its usual speed at that point. There was considerable proof for the plaintiff by witnesses who testified that there were no signals given of the approach of the train, and, on the other hand, there was proof for the defendant by a number of witnesses that the signals were given. The jury found for the plaintiff, fixing the damages at twelve hundred and thirty-five dollars. The railroad company appeals.

It is very evident from the proof that those in charge of the train did not see the woman, and could not have seen her in time to avoid striking her. She was hid from them by the cut until they were so close to her that nothing could

be done. She was evidently on the track when they saw her, and they were then so close to her that she was struck by the train before she could get out of the way. She was not on a public crossing. It was simply a path across the railroad, similar to many others on all railroads used by people in the vicinity. The railroad men testify that they did not know anything of the path. This court has laid down in a long line of opinions that the railroad company ordinarily owes no duty to a trespasser until his peril is discovered, and that it is not liable for an injury to him, unless after his peril is discovered the injury to him may be avoided with proper care. This rule has been applied in all cases where the injury occurred in the country: *Louisville & N. R. R. Co. v. Howard's Admr.*, 82 Ky. 212, 6 Ky. Law Rep. 163; *Shackelford's Admr. v. Louisville & N. R. Co.*, 84 Ky. 43, 4 Am. St. Rep. 189, 7 Ky. Law Rep. 729; *Brown's Admr. v. Louisville & N. R. Co.*, 97 Ky. 228, 30 S. W. 639, 17 Ky. Law Rep. 145; *Goodman's* ⁴¹⁵ *Admr. v. Louisville & N. R. R. Co.*, 116 Ky. 900, 77 S. W. 174, 25 Ky. Law Rep. 1086, 63 L. R. A. 657; *Chesapeake & O. R. Co. v. See's Admr.*, 25 Ky. Law Rep. 1995, 79 S. W. 252, and cases cited.

On the other hand, in cities and towns where the population is dense, and from the number of persons passing the danger to life is great, a different rule applies; and in such localities it is the duty of those operating railroad trains to moderate the speed of the train, to give notice of its approach, to keep a lookout and take such precautions as the circumstances demand for the proper security of human life. Thus in *Shelby's Admr. v. Cincinnati etc. R. Co.*, 85 Ky. 225, 3 S. W. 157, 8 Ky. Law Rep. 928, the intestate a few hours before his death had been employed by the owner to water hogs in a box-car of a freight train. At the time he was killed he was in the yard to solicit employment by the same person in watering cattle in a car of another train, and was standing on the sidetrack opposite the cattle car waiting for the owner who was in it. While he was standing there some cars were kicked in on that track without any signal and with no one upon them to control them. Those cars ran over him and killed him. The accident happened at Junction City, a place of four hundred persons. About twenty families resided south of the railroad and were accustomed to pass along the sidetrack at this point in going to the part of the town north of the road. It was held that the plaintiff could recover. The court said: "There is some conflict of authority as to the extent of duty which a railroad

company owes to pedestrians who, by license or custom, use its track to travel on. But unquestionably such fact should enhance the duty of the servants of the company to exercise caution and ⁴¹⁶ prudence in the operation of its road at such place: 1 Thompson on Negligence, 453. And in our opinion the full performance of duty requires that neither a train or single car should be moved at such place without some servant is in a position to give warning of its approach and control its movements." In *Louisville & N. R. Co. v. Schuster*, 10 Ky. Law Rep. 65, 7 S. W. 874, the plaintiff was hurt on the track of the Louisville and Nashville Railroad between Beargrass creek and its depot in the city of Louisville. There was at the place a fill twenty or thirty feet high, and about twenty-three feet wide at the top. On this fill there were two tracks. Buchanan street had been constructed to within one hundred and fifty or two hundred feet of this fill on the south side, but no street passed the fill or came nearer than this. The plaintiff and a companion came along Buchanan street, and then followed a path over the railroad fill. When they got upon the top of the fill a train was passing them on one track, and while they were standing upon the other track waiting for this train to pass Schuster was struck by a train going in the opposite direction on the track on which he was standing. Many persons lived and worked in the vicinity, and there was much passing along the railroad track at this point. It was held that he could recover. The court said: "The degree of care to be exercised by a railroad company must necessarily depend upon the location and the circumstances of the case. At places not frequented by the public, either by right or the permission, express or implied, of the company, and in localities where people are not constantly passing about, and where they cannot reasonably be expected to be, those in charge of a train are not required by law to be on the lookout for them. In such cases the company is entitled to the exclusive ⁴¹⁷ use of its track, and those upon it are trespassers, and those in charge of a train are only required to avoid injury to them if they can do so upon becoming aware of their peril. In a place thickly populated, however, and where many persons are known to be constantly passing about and across the road, as in a city like Louisville, the public interest and regard for the safety of human life require a different rule. In such a case those in charge of such a dangerous agency as a railroad train must be on the lookout for persons upon and crossing its tracks, and must, by the customary signals, warn them of the approaching dan-

ger. This rule should be rigidly enforced." In Conley's Admr. v. Cincinnati etc. R. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. Law Rep. 602, Conley was killed at Burgin, Kentucky, a place of about two hundred people. A train pulling into Burgin was cut in two about a mile north of the station, the engine running rapidly forward with a part of the cars, and leaving the hinder part of the train to follow on more slowly by its own momentum. It was at night, and dark. There was no light upon the hinder part of the train, and no signal given of its approach. After the engine with its cars had passed the station Conley undertook to walk from the depot across to the section-house either on the path leading from one to the other or near the patch, and while doing so was struck by the hinder part of the train which had no light upon it, and gave no warning of its approach. It was held that he could recover. In Gunn v. Felton, 108 Ky. 561, 57 S. W. 15, 22 Ky. Law Rep. 268, a child thirteen years of age suffering from headache fell asleep in the yard of the railroad at Danville. One of his arms rested upon the railroad track. While lying there in this position he was run over by a ⁴¹⁸ train. The place at which he was hurt was one where the presence of persons on the track was to be anticipated. It was held that it was the duty of the defendant to be on the lookout and use ordinary care for the protection of such persons. In Chesapeake & O. R. Co. v. Perkins, 20 Ky. Law Rep. 608, 47 S. W. 259, Perkins lived in Lexington, and was walking along the railroad track east of Ellerslie avenue, and between it and the Winchester pike. The roadway along there was much used by people in passing to and fro. He was struck by a train coming up behind him, and a recovery was sustained on the ground that a proper lookout was not maintained. In Louisville & N. R. Co. v. McCombs, 21 Ky. Law Rep. 1232, 54 S. W. 179, McCombs was following a path across the railroad track in the city of Hopkinsville. There were two cross-streets with regular crossings, but he left the public way and undertook to cut across a lot by following the path which was much used by persons in that vicinity. He crawled under a freight train on one track, and was afterward struck by a passenger train on another track running at a very high rate of speed. It was held the case should go to the jury, upon the ground that it was the duty of the railroad to moderate the speed of its trains in localities such as that. In Chesapeake & O. R. Co. v. Keelin's Admr., 22 Ky. Law Rep. 1942, 62 S. W. 261, the intestate was killed in Catlettsburg at a point where many persons walked upon

the railroad track, while he was standing on one track waiting for a train on the other track to pass. A recovery was sustained. The principles involved in these cases have been followed in a number of subsequent opinions: See *Louisville & N. R. Co. v. Potts*, 92 Ky. 30, 17 S. W. 185, 13 Ky. Law Rep. 344; *Louisville & N. R. Co. v. Cummins' Admr.*, 111 Ky. 333, 63 S. W. 594, 23 Ky. Law ⁴¹⁹ Rep. 681; *Louisville & N. R. Co. v. Lowe*, 118 Ky. 260, 25 Ky. Law Rep. 2317, 80 S. W. 768, 65 L. R. A. 122; *Illinois C. R. Co. v. Murphy's Admr.*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A., N. S. 352; *Rader's Admr. v. Louisville & N. R. Co.*, 126 Ky. 722, 104 S. W. 774, 31 Ky. Law Rep. 1105; *Louisville & N. R. Co. v. Taylor's Admr. (Ky.)*, 31 Ky. Law Rep. 1142, 104 S. W. 776, and cases cited.

The court here instructed the jury in effect that, if the place was habitually used by the public with the knowledge of the defendant, and the presence of persons on the track there was reasonably to be anticipated by it, it was its duty to keep a lookout for them, to give such signals of the approach of the train as were reasonably necessary, and to run its train at such speed as ordinary care for their safety required; that if it failed to do this, and by reason of such failure the intestate was killed, they should find for the plaintiff; but that, although there was negligence on the part of the defendant, yet, if the intestate failed to use ordinary care for her own safety, they should find for the defendant. He also instructed the jury that they should find for the defendant if a signal of the approach of the train was given which was ordinarily sufficient to give notice thereof to persons exercising ordinary care for their own safety. The finding of the jury for the plaintiff under the instructions was necessarily a finding that the train did not give notice of its approach ordinarily sufficient to warn persons who were exercising ordinary care for their own safety, and that the intestate did exercise ordinary care for her own safety. The evidence was very conflicting as to the signals given by the train; but the jury were warranted from all the evidence in concluding that the train whistled for ⁴²⁰ the crossing eight hundred feet south of the pathway at which the plaintiff was crossing, but that it did not whistle any more or give any other signal of its approach until about the time it struck the woman. The sounds may have been deflected by the sides of the cut so that the woman as she approached the railroad track heard neither the whistle nor the noise of the approaching train. It was running so rapidly that it covered the distance in a

very few seconds. The woman manifestly could have seen the train if she had looked in that direction just before she went upon the track, but she had a right to assume that notice of the approach of a train would be given; and where proper signals are not given this court has held in a number of cases that the question whether the traveler used ordinary care is for the jury: *Cahill v. Cincinnati etc. R. R. Co.*, 92 Ky. 345, 18 S. W. 2, 13 Ky. Law Rep. 714; *Louisville & N. R. Co. v. Cooper*, 21 Ky. Law Rep. 1644, 56 S. W. 144; *Louisville & N. R. Co. v. Lucas' Admr.*, 30 Ky. Law Rep. 359, 539, 98 S. W. 309, 99 S. W. 959, and cases cited above. To hold as a matter of law that the footman is guilty of contributory negligence barring a recovery for his injury whenever he goes upon a railroad track without stopping, looking or listening would be practically to exempt railroads from all responsibility in cases of this sort; for there are few cases indeed where the footman if he stopped, looked or listened could not save himself by stepping to one side and waiting for the train to pass. But the fact is that a person thinking of his own business is sometimes unmindful of where he is, and will get on the railroad track before he is aware of it, or he will from other causes be endangered from passing trains. So it is that in crowded localities, when the presence of persons on the track is to be anticipated, a lookout ⁴²¹ is required of those operating trains, and notice of their approach and such moderation of speed as will make a lookout and signals of the train's approach available for the safety of the traveling public. In each case the question whether the traveler used proper care will depend on a number of circumstances, such as the number of trains passing, the warning of the train's approach, and the circumstances surrounding him. In this state if there is any evidence the question is for the jury, and the scintilla rule applies to questions of contributory negligence no less than to other questions. Where the scintilla rule does not prevail, a different conclusion is reached by the courts; but where the scintilla rule is followed, the cases are in the main in accord with the conclusion stated above, for the reason that whether the traveler exercised such care as may be ordinarily expected of the common run of persons being a question depending on a number of circumstances, to each of which different men may give different weight, is a matter peculiarly for the jury.

If the carrier had shunted cars down this track in the night-time, with no light upon them, and with nobody on the cars to control them, and had thus run over the woman at

the path crossing, under the authorities above referred to, it would have been liable. But to run a train along there without sufficient notice of its approach at such speed that those in charge of it were powerless to accomplish anything by a lookout after they rounded the curve in the cut was just as great a menace to human life as to have shunted the cars along the track in the dark in the manner supposed. While the men in charge of the train naturally knew nothing about the path at this station, where they did not stop, the defendant was charged with ⁴²² the knowledge that Barnsley was an incorporated town of four hundred or five hundred people. It was also charged with the knowledge that its depot was approached both on the north and on the south by persons walking along the railroad track, there being no other adequate way to get to it; and so it was charged with knowledge that this was a place at which the presence of persons on the track might reasonably be anticipated. If the woman had been killed at the street crossing, under the proof before us, it could hardly be maintained that the company would not be liable. But it is insisted that the fact that she was at a private crossing, and was not going to the station, exempts it from liability. This would be true but for the fact that the private crossing was in a town where the presence of persons on the track was to be anticipated, and where the defendant was required to keep a lookout for them, and to give adequate notice of the approach of the train. It was peculiarly necessary that adequate notice of the approach of the train should be given, and that the speed of the train be such that the lookout would not be idle, as the train passed through the cut and emerged from a curve within the town, and so close to the station, where the presence of persons on the track or about it was reasonably to be expected.

We therefore conclude that the court did not err in refusing to instruct the jury peremptorily to find for the defendant; but there was nothing in the evidence to warrant an instruction on punitive damages, and the court erred in submitting to the jury the question of punitive damages or of gross negligence. On another trial, in lieu of the instructions given the court will instruct the jury as follows: “(1) The court instructs the jury that if they believe from the evidence ⁴²³ that the track of the defendant in the town of Barnsley at and about the pathway shown by the testimony was frequently and habitually used by the public as a footway, with the knowledge and acquiescence of the defendant, and was a place where the presence of persons on the track was

to be anticipated, then it was the duty of the defendant's agents, when moving cars on that part of the track, to keep a lookout for persons using it as a footway, and to give reasonable signals and warnings of the movements of its cars when approaching said place, and to run its cars and trains at such speed as ordinary care for the safety of such persons required: and if the jury believe from the evidence that the defendant's agents in charge of its train mentioned by the witnesses negligently failed to perform any of these duties in the movement of said train of cars, and that by reason thereof the plaintiff's intestate, Mary McNary, while so upon the track at said place, was run upon and killed by said train, and that she was at the time using ordinary care for her own safety, the law is for the plaintiff, and the jury will so find. If they find for the plaintiff, they will award such a sum in damages as they believe from the evidence will reasonably compensate the estate of Mary McNary for the destruction of her power to earn money. (2) A signal of the train's approach was reasonable which was ordinarily sufficient to give notice of its coming to persons who were themselves exercising ordinary care for their own safety and in possession of their ordinary faculties. (3) Unless the defendant's servants in charge of the train were negligent as defined in No. 1, the jury should find for the defendant; and although there was such negligence on the part of the defendant's servants, yet if in going on the railroad track as she ⁴²⁴ did, the deceased failed to use ordinary care for her own safety, and but for this would not have been injured, then the jury will find for the defendant notwithstanding such negligence on its part." These instructions, with Nos. 4 and 5 given by the court, defining negligence and ordinary care, cover the whole law of the case, and no other instructions are necessary.

On another trial the evidence in regard to the defendant's putting dirt on the top of the dump will be omitted.

Judgment reversed, and cause remanded for a new trial.

The Failure to Look and Listen Before Crossing a Railroad Track is thought by some authorities to be negligence as a matter of law: *Price v. Rhode Island Co.*, 28 R. I. 220, 125 Am. St. Rep. 736. It would seem, however, that this is too strict a rule: *Birmingham Ry. etc. Co. v. Landrum*, 153 Ala. 192, 127 Am. St. Rep. 25; *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161; *Scott v. St. Louis etc. Ry. Co.*, 79 Ark. 137, 116 Am. St. Rep. 67; *Smith v. Boston etc. R. R.*, 70 N. H. 53, 85 Am. St. Rep. 596.

The Law Requires Railroad Companies to Give Notice and Warning of trains approaching a crossing. What such notice and warning shall be will depend to some extent upon the circumstances of each case,

but some suitable means must be adopted and applied which will apprise travelers of the danger of the situation: See *Bickel v. Pennsylvania R. R. Co.*, 217 Pa. 456, 118 Am. St. Rep. 926; *Queen Anne's R. R. Co. v. Reed*, 5 Penne. (Del.) 226, 119 Am. St. Rep. 301; *Weaver v. Southern Ry. Co.*, 76 S. C. 49, 121 Am. St. Rep. 934. It would seem that one approaching a railroad crossing has a right to assume that the railroad company will give reasonable, necessary and statutory signals of coming trains: See *Mitchell v. Illinois Cent. R. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472, and cases cited in the cross-reference note thereto. It has been held, however, that the negligence of a railway corporation in failing to whistle or ring the bell as a train approaches a crossing is excused by negligence on the part of a person about to cross in not using his senses to discover the danger: *Carlson v. Chicago etc. Ry. Co.*, 96 Minn. 504, 113 Am. St. Rep. 655; *Rogers v. Rio Grande Western Ry. Co.*, 32 Utah, 367, 125 Am. St. Rep. 876.

The Duty of a Railway Company to Modify Its Speed and Maintain a Lookout in Cities and crowded localities is considered in *Haley v. Missouri Pac. Ry. Co.*, 197 Mo. 15, 114 Am. St. Rep. 743, and authorities cited in the cross-reference note thereto; *Serano v. New York etc. R. R. Co.*, 188 N. Y. 156, 117 Am. St. Rep. 833.

IRONS v. UNITED STATES LIFE INSURANCE COMPANY OF NEW YORK.

[128 Ky. 640, 108 S. W. 964.]

LIFE INSURANCE.—The Purchaser of a Policy on the life of another in which he has no insurable interest except as creditor holds the proceeds of the policy, over and above the debt, in trust for the beneficiaries of the policy. (p. 320.)

CONSTRUCTIVE TRUST—Purchaser at Judicial Sale.—The doctrine of constructive trusts applies no less to judicial than to private sales. If the purchaser at a private sale will hold the property in trust for another, the purchaser at a judicial sale, under like circumstances, will so hold it. (p. 320.)

LIFE INSURANCE—Judicial Sale—Confirmation.—When a judicial sale of a life insurance policy is reported for confirmation, the court does not inquire of its own motion whether the purchaser has an insurable interest, and the order of confirmation does not establish that he takes title absolutely and not as trustee for beneficiaries named in policy. (p. 321.)

LIFE INSURANCE—Rights of Purchaser at Judicial Sale.—Where a paid-up life insurance policy in favor of the sister of the insured and her minor children is sold under order of court to raise money for the support of the children to a purchaser having no insurable interest in the life of the insured, he does not acquire absolute title upon confirmation made without objection, but must account to the children for the surplus after deducting what he pays at the sale. (p. 321.)

J. S. Wortham, for the appellants.

Morton K. Yonts and Augustus E. Willson, for the appellee.

⁶⁴⁶ LASSING, J. In 1890 Benjamin Wells, an unmarried man, caused his life to be insured for the sum of two thousand five hundred dollars in the United States Life Insurance Company of New York, the premiums to be paid in ten annual installments, and the money, at his death, to go and be payable to his sister, Lydia Spriggs Bunch, and her surviving children, share and share alike. At that time Mrs. ⁶⁴⁷ Bunch was a widow, with three small children, six, eight and ten years old, and all dependent upon her brother, Benjamin Wells, for a support. The premiums were regularly paid, when due, during each year until the year 1900, when the last of the ten payments called for under the terms of the policy was paid, and the policy became a paid-up policy. At that time the children of Mrs. Bunch were sixteen, eighteen and twenty years of age, respectively. They had no estate whatever; and their mother, for the alleged purpose of raising money to complete their education and to support them, instituted an equitable action in the Grayson circuit court for the purpose of securing an order for the sale of the paid-up policy of insurance. Prior to the institution of this suit she had appeared in the Grayson county court, and had been, on her motion, appointed and qualified as guardian for her three children. She caused her brother, Benjamin Wells, and the United States Life Insurance Company of New York, to be made parties defendant to this equitable action. In this equitable suit she set forth fully the needs and necessities of her children, alleged that the policy of insurance was the only estate of any kind whatever owned by them, and that a sale of it was necessary in order to raise the funds needed to support and educate them. Her brother, Benjamin Wells, filed an answer, consenting to said sale, and joining in the prayer of the petition. The insurance company answered, asking that its interest be protected. Proof was taken by affidavits in support of the allegations of the petition, and it was also shown by the affidavit of Lydia Sprigg Bunch that she was forty-five years of age, and had passed the change of life, and could not bear further issue. Thereafter the case was submitted, and judgment was rendered in conformity with the prayer ⁶⁴⁸ of the petition. The plaintiff, Lydia Spriggs Bunch, was appointed a special commissioner for the purpose of selling the policy. At the following term of court, she, as special commissioner, filed her report, setting forth the fact that she had sold the same to appellees Gosnell and Jones for the sum of seven hundred and thirty-one dollars and eighteen cents. No exceptions having been

filed to this report of sale, it was confirmed, and, acting under the direction given in the judgment ordering the sale, the company transferred to Gosnell and Jones as purchasers the policy of insurance. In May, 1906, Benjamin Wells died. Proofs of loss were promptly furnished the company by Gosnell and Jones, and on the 17th of May, 1906, the insurance company paid to them in satisfaction and settlement of the policy the sum of two thousand five hundred dollars, the full face value thereof. On August 16, 1906, Mary E. Irons, Minnie M. Dense and Benjamin Bunch brought suit in the Grayson circuit court against the United States Life Insurance Company of New York, Jess T. Gosnell, W. O. Jones and their mother, Lydia Spriggs Stevenson, she having married again, setting up the facts as to the issuing of the policy of insurance in their favor, the judgment of the Grayson circuit court directing its sale, and the sale and transfer thereof to appellees Gosnell and Jones, the death of their uncle, Benjamin Wells, and the payment of the money, as above recited, to them. The circuit court dismissed the petition, and the plaintiffs appeal.

Neither Gosnell nor Jones, when they purchased the policy, had any insurable interest in the life of Benjamin Wells. In a long line of decisions this court held that the purchaser of a policy of insurance on the life of another in which he has no insurable interest except as creditor will hold the proceeds of the policy over and above his debt in trust for the ⁶⁴⁹ beneficiaries of the policy; and that, where he has no insurable interest, the assignment will operate at most only as a pledge, and that he will hold the proceeds of the policy over and above the amount that he has paid for it, with interest, in trust for the beneficiaries of the policy: *Basye v. Adams*, 81 Ky. 368, 5 Ky. Law Rep. 91; *Barbour's Admr. v. Larue's Assignee*, 106 Ky. 546, 51 S. W. 5, 21 Ky. Law Rep. 94; *Lee v. Mutual Life Ins. Co.*, 26 Ky. Law Rep. 577, 82 S. W. 258; *New York Life Ins. Co. v. Brown's Admr.*, 23 Ky. Law Rep. 2070, 66 S. W. 613; *Baldwin v. Haydon*, 24 Ky. Law Rep. 900, 70 S. W. 300; *Schlamp v. Berner's Admr.*, 21 Ky. Law Rep. 324, 51 S. W. 312; *Bramblett v. Hargis*, 29 Ky. Law Rep. 610, 94 S. W. 20. The doctrine of constructive trusts applies no less to judicial sales than to private sales. If the purchaser at a private sale will hold the property in trust for another, the purchaser at a judicial sale under like circumstances will equally so hold it. If the property is impressed with a trust, the trust is enforceable as well against the purchaser at a judicial sale as at a private sale: *Miller's*

Heirs v. Antle, 2 Bush, 407, 92 Am. Dec. 495; Roach v. Hudson, 8 Bush, 410; 2 Pomeroy's Equity, sec. 1052. If the appellants had been of age and had sold this policy to Gosnell and Jones, the latter, under the above authorities, would only take an interest in the policy to the extent of the amount which they paid for it and interest. The court was applied to simply because the children were not of age. The action of the court supplied the want of capacity in the children by reason of their nonage, but the court only did for the children what they might have done themselves if of age. What Gosnell and Jones took under their purchase is to be determined, not alone from the judgment of the court, but from their capacity to take. The court transferred the policy to them, ⁶⁵⁰ but the effect of the transfer is to be determined by the law which regulates what interest they could take in such a policy. The transaction having been made under an order of the court, which had all the parties before it, Gosnell and Jones must be adjudged entitled out of the policy to the amount they paid with interest. To give it greater effect would be entirely to ignore the rule that where a purchaser at a private sale would hold as trustee, he equally holds as trustee where he purchases at a judicial sale under like circumstances; the reason for the rule being that his title in both cases depends upon his capacity to take, and that, if he cannot take the title in one case absolutely, he cannot take it in the other. When a proposed purchaser is reported to the court, it does not consider whether he has capacity to take the property or what interest he can take, unless the question is raised by exception to the sale. This is a matter which he is to see to for himself. The court, unless objection is made, does not consider whether he is trustee for the parties and will hold the property for them. In the case of a sale of a life insurance policy the court does not inquire *sua sponte* whether the purchaser has an insurable interest in the life of the assured. The order confirming the sale where no exceptions are filed does not establish the fact that the purchaser is not a trustee for the parties or that he has capacity to take the property absolutely. If, in fact, he has capacity only to take a limited estate in it and holds the remainder in trust for the parties, to show this fact in a subsequent suit in no wise impeaches the judgment in the former case. The question is what he took under that judgment, and he could not take any greater interest than he had capacity to take. If he had no insurable interest in the life of the ⁶⁵¹ assured,

the law allowed no greater interest to be vested in him by his purchase than a lien for his money with interest. Every reason for the rule exists in sales made by order of court as in private sales; for there is the same temptation in each case to wrong-doing and a mere gaming venture.

We have not referred to section 678, Kentucky Statutes of 1903, as that is in the division of the statute applicable to co-operative insurance, and there is nothing in the section to show that it was intended to apply to other policies. The right of the mother cannot be adjudicated in this action, as she has brought no suit.

Judgment reversed as to Gosnell and Jones, and cause remanded, with directions to the circuit court to adjudge Gosnell and Jones out of the proceeds of the policy seven hundred and thirty-one dollars and eighteen cents with interest at six per cent from May 10, 1900, and to adjudge to the plaintiffs three-fourths of the remainder, and for further proceedings consistent herewith. As to the insurance company, the judgment is affirmed.

Petition by appellants for modification of opinion overruled.

The Effect of the Assignment of a Life Insurance Policy to one without an insurable interest is discussed in the note to Chamberlain v. Butler, 87 Am. St. Rep. 506.

COMINGOR v. LOUISVILLE TRUST COMPANY.

[128 Ky. 697, 108 S. W. 950, 111 S. W. 681.]

ASSIGNEE FOR CREDITORS—Liability for Breach of Duty.—

An assignee for the benefit of creditors is bound to exercise the same care that an ordinarily prudent person would use in his own affairs under like circumstances, and for losses, deficiencies or injuries occasioned by his affirmative or negative violation of this rule he is answerable. (p. 329.)

ASSIGNEE FOR CREDITORS—Loss of Right to Compensation.

An assignee for creditors, guilty of fraud or misconduct in the management of the estate, is not entitled to compensation. (p. 329.)

JURY TRIAL.—The Constitution Secures to a Litigant the Right of trial by jury only in those cases where the right existed at common law. (p. 329.)

ASSIGNEE FOR CREDITORS.—In an Action to Compel an Accounting and settlement by an assignee for creditors, the exclusive jurisdiction of the chancellor carries power to decide, without the intervention of a jury, all other issues raised, such as the fraud or misconduct of the assignee. (p. 329.)

TRUSTEE IN BANKRUPTCY—Compelling Assignee for Creditors to Account.—A trustee in bankruptcy may, in pursuance of an order of the federal court, require the bankrupt's assignee for creditors to settle his account and pay over the amount belonging to the estate; and an objection that the trustee has failed to comply with the statutory requirement as to demand and affidavit purging his claim must, to be available, be made before defense on the merits is interposed. (pp. 330, 331.)

Alfred Selligman and W. M. Smith, for the appellant.

George Weissinger Smith and Tyler Barnett, for trustee for creditors.

700 SETTLE, J. On December 5, 1898, the firm of Simonson, Whiteson & Co., composed of D. G. Simonson, I. Whiteson, and Leo Stern, conducting a mercantile business in the city of Louisville in a house known as the "Mammoth," made a deed of assignment to their bookkeeper, the appellant, L. Comingor, conveying him for **701** the benefit of their creditors the stock of merchandise and fixtures in the Mammoth store. The latter at once accepted the trust, executed bond with approved security, and duly qualified as such trustee, thereby undertaking to perform in a legal manner the duties required of him in that capacity. At the time of the assignment the cash value of merchandise owned by the firm of Simonson, Whiteson & Co. was between \$100,000 and \$138,000, the fixtures and electric plant in and connected with the store about \$12,000, and there was due the firm in open accounts about \$7,000. Probably it would not be overstating the mark to say that the total assets of the firm then approximated \$150,000, and that its liabilities were nearly as great. Appellant immediately procured the appointment of appraisers to appraise the assigned property. The appraisers completed their work in four days, placing the value of the property at the sum of \$71,656.56, which was much less than its actual value. Three days after the filing of the deed of assignment, appellant brought suit in equity to settle his accounts as assignee. Only a few of the firm's creditors were made parties to this action. One of the largest creditors, the Louisville Banking Company, though conducting business just across the street from the Mammoth store, was not made a party to the action. Summons was executed upon only the members of the firm in question, but later and by amended petition two other creditors were made parties and served with summons. On December 10, 1898, the assignee opened the store, and commenced the sale by retail of the assigned property. Later he filed two petitions to obtain advice of the

court. By the first he asked permission to sell the stock of goods by retail. By the second he reported large sales at prices ⁷⁰² above the values fixed by the appraisers, and averred that he still had on hand over \$5,000 worth of the assigned property. As a matter of fact, according to the weight of the evidence, the goods then on hand were reasonably worth as much as or more than \$70,000. On January 25, 1899, appellant in another petition, then filed, again asked advice of the chancellor, and averred that there were only "remnants, odds and ends" left of the stock, a sale of which as a whole would redound to the benefit of his assignors and their creditors. The order of sale was granted by the court, though none of the creditors, even those who were parties to the action, had notice of the request or order. The law firm of Kohn, Baird & Spindle, who represented a few creditors, not parties of record, had such notice, but did not concern themselves about it, as their clients had theretofore agreed with appellant and Simonson, Whiteson & Co., to accept fifty cents on the dollar in settlement of their demands.

The assignee thereupon caused to be inserted in small type and in an obscure column of the "Louisville Evening Times," between a notice relating to false hair and another to false teeth, an abbreviated advertisement of the time and place of the sale to be made of the assigned merchandise and fixtures. The "Times" foreman was directed by the assignee to insert the advertisement without display. It appeared in the "Times" on Friday and Saturday, January 27 and 28, 1899, and the sale occurred on January 30th, which was Monday of the following week. As there was no issue of the "Times" on Sunday, the advertisement was published but two days—Friday and Saturday. The goods and fixtures sold were purchased by Henry Stern of New York at the price of \$15,000. Henry ⁷⁰³ Stern is a brother of Leo Stern, who was a member of the firm of Simonson, Whiteson & Co., at the time of the assignment to Cominger. Shortly before the sale the three members of the firm of Simonson, Whiteson & Co. made an agreement in regard thereto with Henry Stern, which was reduced to writing by their attorney, and signed by the parties several months later. That writing reads as follows: "We have agreed to divide equally between us all that may be left out of the assets of Simonson, Whiteson and Co., and what we may save from the wreck after paying the indebtedness of said firm to D. L. Newborg & Son, and Stern, Falk & Co. Louisville, Ky., June 14th, '99. D. G. Simonson, I. Whiteson. Leo Stern." Under the verbal agreement en-

tered into before the sale, Henry Stern was to come to Louisville and bid for the stock and fixtures not less than \$15,000, nor more than \$20,000. On the day of the sale, and at the hour named in the advertisement, to wit, 10 o'clock A. M., Henry Stern was on hand pursuant to the agreement referred to, and at 10:30 o'clock the goods and fixtures were knocked down to him at the price of \$15,000, which he at once paid to the assignee. The sale was consummated under unusual circumstances. The store was closed to the hour fixed for the sale, and neither at the time indicated, previous thereto, or during the sale was there any effort to attract the notice of the public either by the customary ringing of an auction bell, the hanging out of a red flag, distribution of handbills, or posting of a notice on the store door. While conducting the sale the auctioneer stood on the stairway leading from the first to the second floor of the store. In from five to twenty minutes after the auctioneer reached the store the sale was consummated. Though ⁷⁰⁴ all the time present, neither the assignors or assignee exhibited the goods, called attention to their quality or value, or did anything to encourage bidding. All the while the goods on the first floor remained covered, and those in the basement and on the second, third and fourth floors were never shown the few persons, besides the parties in interest, present. The auctioneer did not have, nor had the assignee furnished him, an inventory of the property sold. There was no offer to sell the goods in lines or by lots, or to make a separate sale of the fixtures. But few persons were present, and Henry Stern was practically the only bidder. According to the testimony of some of the persons in attendance, one or two of the spectators would have made bids, but Whiteson deterred them from doing so by requesting them not to take away his bread and meat. One prospective bidder was threatened with a choking if he persisted in bidding, and yet another was given a note of several hundred dollars he was owing Simonson, Whiteson & Co., to keep him from bidding. On the day of the sale, and upon his paying the assignee the amount of his bid, Henry Stern took possession of the goods, and two days later placed them in possession of Leo Stern, Simonson and Whiteson, the first as manager, immediately following which Henry Stern returned to New York, where he has since remained. While in charge of the goods and business left with him by his brother Henry, Leo Stern replenished the stock to the amount of \$15,000, and during the six months of his management of the business he deposited in the German Bank of Louisville \$82,138.16,

realized from the sale of the goods his brother purchased of the assignee of Simonson, Whiteson & Co., and the \$15,000 further stock, added thereto, under his (Leo Stern's) management of the ⁷⁰⁵ business. On February 1, 1899, or two days after the sale to Henry Stern of the goods and fixtures of Simonson, Whiteson & Co. by the assignee, the Louisville Banking Company, principal creditor of the firm, brought suit to set aside the sale of the property to Henry Stern, and to subject the same to the payment of the firm's debts, and shortly thereafter other creditors of the firm filed in the United States district court for the western district of Kentucky a petition in involuntary bankruptcy against Simonson, Whiteson & Co. and each member of the firm, and the company and members thereof were later duly adjudged bankrupts. Following this adjudication, the referee in bankruptcy issued rules against Comingor, assignee of Simonson, Whiteson & Co. and his attorneys to show cause why the assignee should not pay to the trustee in bankruptcy \$3,398.90, the amount claimed by the assignee as commissions, also \$6,766.53, balance of the assets of the estate of his assignors admitted by him to be in his hands, and the further sum of \$3,000 which he claimed to have paid as a fee to his attorneys. The rule being made absolute as to the \$6,766.55, that sum was paid by the assignee into the federal court, but upon appeal to the circuit court of appeals, and later to the supreme court, these tribunals reversed the judgment of the district court, upon the ground that the assignee had a right to have his accounts settled in the state court in which was still pending the action brought by him to obtain a settlement of his accounts: *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. Rep. 293, 46 L. ed. 413.

Upon the conclusion of the litigation in the federal courts, the Louisville Trust Company, trustee in bankruptcy, by supplemental answer, cross-petition and ⁷⁰⁶ counterclaim filed in the action in the Jefferson circuit court asked to enforce a settlement of Comingor's accounts as assignee of Simonson, Whiteson & Co., and to recover of him the amount he had or should have in his hands belonging to the estate of his assignors. The circuit court, being of opinion that the questions of law and fact raised by the pleadings could be determined by the court without the cost and delay arising from a reference to the commissioner, refused to order such reference. On the hearing, the court below rendered judgment in favor of the Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co. against Comingor, as-

signee of the same firm, for \$10,706, with six per cent interest from July 5, 1900, upon the ground that his fraud or negligence caused a loss to the estate of that amount; and for the further sum of \$3,398.90, with six per cent interest from the fifth day of July, 1900; the sum last mentioned being the amount of commissions retained by him for services claimed to have been rendered as assignee, but which the court held he was not entitled to on the ground that his negligence caused a loss to the estate of his assignors to that amount, in addition to the larger sum first named. Comingor complains of the judgment, hence the appeal; and, as appellee, Louisville Trust Company, was claiming in its answer and counterclaim a much larger sum than was recovered, it took a cross-appeal because of the failure of the circuit court to give judgment in its favor for the full sum claimed.

We are of opinion that the evidence appearing in the record clearly shows that there was a fraudulent agreement, entered into before the public sale of January 30, 1899, between Simonson, Whiteson and Leo Stern on the one part, and Henry Stern on the other, ⁷⁰⁷ pursuant to which the stock of assigned goods and fixtures of the former were to be sold to the latter at greatly less than their value, to wit, \$15,000, or not exceeding \$20,000, and that, after being purchased by Henry Stern, they were to be sold and the proceeds divided among Simonson, Whiteson and Leo Stern, after paying the claims of the preferred creditors named in the writing subsequently drawn to evidence the agreement. Appellant's knowledge of the agreement and participation in the consequent fraud is, we think, also established by the evidence. His position as bookkeeper of Simonson, Whiteson & Co. necessarily made him familiar with their business, and rendered it practically impossible for them to execute the agreement in question without his knowledge and assistance. As the assignment was necessary to carry out the fraudulent agreement, it is most natural that the firm should have selected their bookkeeper and confidential friend to act as assignee, if, as the evidence in the record tends to show was the case, they knew he would further their purposes. One of his first acts as assignee was to put it out of the power of the appraisers to fairly value the property and assets that came to his hands, for he and his assignors so arranged and concealed the goods and fixtures and juggled inventories and price lists as to prevent a fair appraisalment. The circumstances attending the advertisement and sale of the goods and fixtures to Henry Stern could not have been accidental, and

would not have prevailed without appellant's assistance or connivance. No surer means could have been adopted to carry out the fraudulent scheme contemplated by his assignors and Henry Stern than those resorted to by appellant in procuring from the court, without notice to the creditors, and by a suppression ⁷⁰⁸ of the true facts in respect to the value of the goods, the order of sale, and the illegal manner of advertising and conducting the sale. In the petition filed by appellant for "advice" and to obtain of the court the order of sale, he admitted phenomenal sales of the assigned goods, and represented that he still had in the store "over \$5,000" worth of goods which he wished to sell as "remnants, odds, and ends." When the petition was filed, he knew that the goods, fixtures and accounts then in the store amounted in value to not less than \$70,000. In addition, it appears from the record that appellant's attorney who advised him in all matters connected with the assignment wrote the agreement in question. It further appears from the evidence that appellant did not file in the county court or clerk's office an inventory of the assigned estate, or schedule of the debts of his assignors. From all the evidence before us we cannot doubt appellant's knowledge of the fraudulent agreement, or his participation in its execution. If he did not know of the fraudulent agreement and the manner in which it was consummated, he was extraordinarily negligent, for the evidences thereof manifested themselves in his presence and in connection with his duties as assignee from the time of his appointment down to the beginning of this litigation, in view of which his failure to detect it is inexplicable and unpardonable. In our opinion appellant should have realized a much larger sum from the sale of the goods and fixtures than he received.

Without adopting the estimate of any particular witness, we are satisfied that the great weight of the evidence is to the effect that the stock of goods sold by appellant to Henry Stern was at the time of the sale worth at cost prices not less than \$50,000 and ⁷⁰⁹ the fixtures not less than \$10,000, making the total value of goods and fixtures \$60,000. Deduct from this amount forty per cent, or \$24,000, for depreciation in the value of the stock and fixtures, and the \$15,000 received by appellant in the sale to Henry Stern, and there will be left \$21,000 with which appellant is justly chargeable. In addition, he should be charged with \$3,398.90, the commissions retained by him for services rendered as assignee, making a total of \$24,398.90, for which, with interest from July 5, 1900, appellee should have recovered judgment

in the court below. No doctrine is better settled than that an assignee, or other trustee, in the management of the estate intrusted to him, is bound to exercise the same care that an ordinarily prudent person would use in his own affairs under like circumstances, and for such losses, deficiencies or injuries as may be occasioned by his affirmative or negative violation of this rule, and the duties it imposes, he is answerable for the loss thereby inflicted: *Perry on Trusts*, sec. 770; *Pomeroy's Equity Jurisprudence*, sec. 1070. In *Pomeroy's Equity Jurisprudence*, section 1079, it is said: "It might be supposed that the term 'breach of trust' was confined to willful and fraudulent acts which have a quasi-criminal character, even if they have not been made actual crimes by statute. The term has, however, a broader and more technical meaning. It is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of duty." Upon the facts furnished by the record before us, and under an application of the just rule above stated, appellant's management of the estate intrusted to him was highly reprehensible and such as to manifest bad ⁷¹⁰ faith and gross misconduct, which this court cannot ignore or condone, even to the extent of allowing him compensation for any part of the services he claims to have rendered as assignee. The circuit court's action in refusing him compensation was, therefore, proper, for a trustee guilty of fraud or misconduct in the management of the estate is not entitled to compensation: *Perry on Trusts*, sec. 919; 4 *Cyc.* 257.

We do not think appellant's contention that he should have had a trial by jury of the questions of fact raised by the pleadings is tenable. The constitution secures to a litigant the right of trial by jury only in cases where such right existed at common law: *O'Connor v. Henderson Bridge Co.*, 95 Ky. 643, 27 S. W. 251, 983, 16 Ky. Law Rep. 244; *Ford v. Ellis*, 21 Ky. Law Rep. 1837, 56 S. W. 512; *Carder v. Weisenburgh*, 95 Ky. 135, 23 S. W. 964, 15 Ky. Law Rep. 497; *Reese's Admr. v. Youtsey*, 113 Ky. 839, 69 S. W. 708, 24 Ky. Law Rep. 603. In view of expensive testimony having been taken by deposition in the case as prepared, it would have been an abuse of discretion on the part of the lower court to direct an issue out of chancery. Moreover, the action is not one on appellant's bond, but to settle his accounts as assignee. The issues of fact as to the questions of fraud and value were but incidental to the main purpose of the action, which was

to compel an accounting and settlement of the assignee, and, the chancellor having exclusive jurisdiction thereof, such jurisdiction carried with it the power to decide all other issues raised, without the intervention of a jury.

Appellant's contention that appellee Louisville Trust Company, trustee in bankruptcy, has no right to assert in this action the claim in controversy, is without merit. Its right to do so was recognized by ⁷¹¹ the supreme court in the case of *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. Rep. 293, 46 L. ed. 413; and it would be an anomalous change of base to permit appellant, after defeating appellee in the federal courts upon the ground that he has the right to settle his accounts as assignee in the state court, to insist that appellee cannot assert its right of action against him in the latter court, where he forced it to go. Section 21, Civil Code of Practice, allows a trustee in bankruptcy to sue in his own name without joining the beneficiary. Manifestly, if in this case there should be a recovery against appellant, it should be applied to the payment of the debts of Simonson, Whiteson & Co.; and the trustee in bankruptcy, as the representatives of the firm's creditors, would be and is entitled to receive it, for which reason it had the right to enter its appearance in the action to assert its rights. In addition, appellee was expressly authorized by an order of the federal district court to sue and recover of appellant the claim herein litigated, and section 47 of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stats. 557 [U. S. Comp. Stats. 1901, p. 3438]) made it its duty to do so.

Appellant has no just ground of complaint to the action of the circuit court in overruling his exceptions to the depositions of appellee. Under section 1008, Kentucky Statutes, and rule 12 adopted by the Jefferson circuit court, the depositions were properly taken upon interrogatories. As Simonson's deposition seems to have been taken after the filing of the answer, and not within twenty days from the service of summons, and he is not united in interest with appellee, and the deposition was not taken in his own behalf, under the rule in question it was properly admitted in evidence.

Appellant further complains that there does not ⁷¹² appear in the record the statutory affidavit purging appellee's claim. Obviously the objection comes too late. The cause of action stated by appellee's pleadings against appellant was complete without an allegation that payment of the claim sought to be recovered had been demanded of appellant before suit, or that such demand had been accompanied by the statutory

affidavit as to the absence of usury, etc. Failure of the plaintiff to comply with the statutory requisition as to affidavit and demand must be objected to by the defendant before he interposes his defense on the merits of the case by filing an affidavit showing that the preliminary proof and demand had not been made by the plaintiff, and then asking a rule against him to produce evidence of his compliance with the necessary prerequisites. If such evidence be not produced in response to the rule, the court will dismiss the action: *Thomas' Exr. v. Thomas*, 15 B. Mon. 178; *Grough's Admr. v. Alvey & Co.*, 10 Ky. Law Rep. 590; *Rigney v. Peely's Admr.*, 13 Ky. Law Rep. 93; *Cockrill v. Mize*, 11 Ky. Law Rep. 637, 12 S. W. 1040; *Rogers v. Mitchell's Exr.*, 1 Met. 22; *Lyon's Exr. v. Logan County Bank's Assignee*, 25 Ky. Law Rep. 1668, 78 S. W. 454. Appellant did not pursue the course above indicated, and, having allowed the case to proceed to judgment, he is estopped to complain of appellee's failure to comply with the statutory requisition of affidavit and demand.

For the reasons indicated the judgment is affirmed on the original, and reversed on the cross, appeal and cause remanded, with directions to the lower court to enter judgment in appellee's behalf against appellant for \$24,398.90, with interest from July 5, 1900; and for further proceedings consistent with this opinion.

ON REHEARING.

713 Appellee's petition for modification and extension of opinion herein insists that this court on the cross-appeal should, in reversing the judgment of the circuit court, have directed the entering in that court of a judgment in its behalf against appellant for \$48,000, instead of the amount named in the opinion. We have concluded to adhere to the conclusion expressed in the opinion. Appellee's contention on this point is based on the amount realized for the stock of Simonson, Whiteson & Co. after its purchase by Henry Stern under the fraudulent arrangement with them. This is not a fair criterion, as the sum thus realized for the goods was obtained by disposing of them in the usual course of trade, and by making such additions to the stock as would enable them to be sold to the best advantage. A fairer basis of valuation was that adopted by the opinion which fixed the value as of the date of sale at what the stock and fixtures, in view of their condition at that time, should reasonably be expected to bring at a forced sale, such as was ordered. The valuation

thus made should stand, as we have not been convinced by anything said in the petition that it was not approximately correct.

It is further insisted by appellee that the affirmance of the judgment on the original appeal entitled it, under section 764, Civil Code of Practice, to ten per cent damages on the amount thereof. In this we concur. The section, *supra*, seems to give damages upon an affirmance, as a matter of right in money judgments to the extent that they have been superseded for the purpose of appeal. On this appeal, prosecuted by appellant, Comingor, the judgment of the circuit court which he superseded was affirmed. The effect of ⁷¹⁴ which was that the judgment was proper as far as it went. The appeal and supersedeas prevented appellee from taking out an execution on the judgment pending the appeal. Th affirmance of that judgment in view of its having been superseded entitled appellee to ten per cent damages upon the amount thereof, and the right to such damages is not affected by the additional or increased amount to which appellees will be entitled upon the return of the case to the lower court by reason of the reversal of the same judgment upon their cross-appeal.

The case of *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633, 27 S. W. 251, 983, 16 Ky. Law Rep. 244, and *Henderson Bridge Co. v. O'Connor & McCulloch*, *Id.*, is in point. *O'Connor* and *McCulloch* were original appellants and the *Henderson Bridge Company* cross-appellant. In response to the petition for rehearing, filed by the *Henderson Bridge Company*, the court said: "Section 757, Civil Code of Practice, as amended March 24, 1888, provided: 'When a party recovers judgment for only part of the demand or property he sued for, the enforcement of such judgment shall not prevent him from prosecuting an appeal therefrom as to so much of the demand or property sued for that he did not recover.' " So that the contractors were entitled to an execution upon the judgment of the lower court for \$61,536.55 at the same time prosecuting an appeal therefrom as to so much of the demand sued for that they did not recover, but the company prevented them obtaining an execution and thereby collecting the amount of the judgment by a separate appeal and execution of the supersedeas bond, whereby it covenanted to pay to the contractor appellees, all costs and damages adjudged against appellants on that appeal, and also ⁷¹⁵ satisfy the judgment appealed from, if affirmed. The decision of this court was that on the appeal of the contractors they did not

recover all the demand sued for they are entitled to, and that the judgment pro tanto be reversed. But upon the appeal of the company the judgment had to be necessarily affirmed, because it was not erroneous to its prejudice. And, as a consequence, under section 764, ten per cent damages on amount of the judgment superseded had to be awarded.

The petition of appellee as to the claim for ten per cent damages is sustained, and the damages allowed. In other respects it is overruled.

The Degree of Care Exacted of an Assignee for the benefit of creditors is discussed in Hutchinson v. Lord, 1 Wis. 286, 60 Am. Dec. 381. See in this connection Parks v. McDaniel, 75 S. C. 7, 117 Am. St. Rep. 878. If a trustee, such as an assignee for the benefit of creditors, has been guilty of fraud, willful default, or gross negligence in the management of the trust estate, compensation for his services will be denied to him whether he claims it under the rule of equity or the statute relating to fees of assignees and their attorneys in insolvency proceedings, for the statute and the rule are not inconsistent, and the former does not abrogate the latter: Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 79 Am. St. Rep. 400.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY v. BEAN'S EXECUTOR.

[128 Ky. 758, 109 S. W. 323.]

APPEAL.—A Defendant Who Pays Off the Judgment may nevertheless prosecute an appeal from it, and have restitution of what he has paid with interest if he secures a reversal. (p. 334.)

APPEAL.—Where the Defendant Replevies a Money Judgment by executing a bond, and thereby stays it for three months, this merges the judgment in the replevin bond but it does not affect his right of appeal. (p. 335.)

H. D. Gregory, for the appellant.

James Breathitt, attorney general, and Thos. B. Blakey, assistant attorney general, for the commonwealth.

758 O'REAR, C. J. Appellee recovered a judgment for money against appellant. Without superseding the judgment, appellant has prosecuted this appeal.

759 Appellee having caused an execution to issue upon the judgment and to be levied upon certain of appellant's property, the latter replevied the judgment by executing bond as authorized by sections 1667-1669, Kentucky Statutes of 1903. The judgment was replevied after the appeal

was granted and transcript filed in this court. Appellee has filed an answer in bar of the appeal, based upon section 757 of the Civil Code of Practice, which provides that the appeal shall be dismissed if the appellant's right to further prosecute it had ceased. He contends that as the code provides for a stay of proceedings upon a judgment appealed from by supersedeas only (section 747, Civil Code of Practice), and as the effect of the replevy is to merge the judgment, it is a voluntary waiver by appellant of its right to appeal, as holding otherwise would be a stay of a judgment on appeal by replevy in addition to supersedeas. A defendant in a judgment may prosecute an appeal from it, although he may have paid it: *Eldridge v. Wilson*, 4 Ky. Law Rep. 982; *Figg v. Richardson*, 5 Ky. Law Rep. 510; *Shannon v. Padgett*, 24 Ky. Law Rep. 1281, 71 S. W. 487; *Pike, Morgan & Co. v. Wathen*, 25 Ky. Law Rep. 1264, 78 S. W. 137; *Kellar v. Williams*, 10 Bush, 216.

The appeal does not affect the judgment until it is reversed. Hence, if the appellant were unable to give the supersedeas bond required by the code in order to obtain a stay of the execution pending the appeal, he would be under the necessity of suffering his property to be seized and sold by the sheriff, with added costs and possible sacrifices. Yet in that event his right of appeal would not be affected, as otherwise the right of appeal would be valuable only to the rich, who could make the supersedeas bond, and to the very poor, who were execution proof. What one may be ⁷⁶⁰compelled to do, he may do without compulsion, without impairing his legal rights. So it is held, if he pays off the judgment, he may nevertheless prosecute an appeal from it, and, if it is reversed, may have restitution of what he has paid, with interest. The statute allows any judgment for money (except in certain instances not here involved) to be stayed for three months by replevy. This is not only a privilege, but it is a legal right of the defendant, as much as it is the right of the plaintiff to have an execution against the defendant's property issue upon the judgment. The judgment is subject to that right of the defendant. The latter may appeal from it, if the amount gives the appellate court jurisdiction. That is also an incident of the law which gives the judgment. There is no prohibition upon the right of appeal, either because the defendant pays off the judgment or replevies it.

Nor is there perceived any sound reason why there should be a distinction in favor of those who pay as against those

who replevy. It is said for appellee that the execution of the replevin bond merges the judgment; and so it does. Likewise the payment satisfies it. A judgment merged into a replevin bond is no more beyond the corrective process of the appellate court than one discharged by payment. It is argued by way of illustration that the execution of a replevin bond by one of the judgment debtors would operate to discharge a surety upon the debt not signing the bond, or to discharge a lien securing the debt. So would the payment of the judgment. We think the analogy is clear and the principle just that the replevy and payment alike do not affect the defendant's right of appeal: *Kellar v. Williams*, 10 Bush, 216.

⁷⁶¹ The demurrer to the answer of appellee is sustained, and his motion to dismiss the appeal is overruled.

That a Defendant does not Lose His Right of Appeal from a Judgment by paying it, see Warner Brothers Co. v. Freud, 131 Cal. 639, 82 Am. St. Rep. 400; Hayes v. Nourse, 107 N. Y. 577, 1 Am. St. Rep. 891; Burrows v. Mickler, 22 Fla. 572, 1 Am. St. Rep. 217; note to State v. Conkling, 45 Am. St. Rep. 272.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE v. LEECH.

[119 La. 522, 44 South. 285.]

INTERSTATE COMMERCE—Navigable Waters.—The power given to the Congress of the United States to regulate commerce includes jurisdiction over the avenues and vehicles of commerce, and hence extends to all navigable waters of the country irrespective of state lines. (By the editor.) (p. 338.)

NAVIGABLE WATERS, Power of One State to Regulate the Waters of Another.—One state cannot regulate the use of the waterways of another. (By the editor.) (p. 338.)

PILOTS AND PILOTAGE—Adoption of State Laws Respecting.—The laws of the several states governing pilotage were, in effect, adopted by the Congress of the United States, with the modification that where the waters constitute the boundary between two states, a pilot might be employed if authorized or licensed under the laws of either state. (By the editor.) (p. 338.)

PILOTS—Laws of One State cannot Regulate as to Waters in Another.—Whilst the act of Congress of March 2, 1837, chapter 22, 5 Statutes at Large, 153, provides that either of two states, having a water boundary "between" them, may license persons to pilot vessels to and from "any port situate" thereon (i. e., on the "waters which are the boundary between" the two states), the waters of the Mississippi river, at South Pass, thence to New Orleans, and thence to the Mississippi state line, lie wholly within the state of Louisiana, and are no more the boundary between that state and the state of Mississippi than between Louisiana and any other state which the Mississippi river, or its tributaries, may pass through, or touch, on their way to the Gulf of Mexico. Hence the act of Congress does not, and the law of the state of Mississippi could not, furnish authority for the licensing of a person to pilot vessels in such waters. (p. 343.)

PILOTS—Laws of Mississippi not Intended to Affect Other States.—An examination of the law of Mississippi does not lead to the conclusion that it was the intention of the legislature to authorize the issuance of licenses to persons to engage in piloting in waters wholly outside that state and wholly within the limits of the state of Louisiana. (p. 343.)

(Syllabi by the court except where stated to be by the editor.)

Prosecution and conviction of piloting foreign vessel without being authorized so to do by the laws of Louisiana. The defendant applied for a writ of certiorari and prohibition. His application was denied and the proceedings dismissed.

George Hitchings Terriberry and Robert Hardin Marr, for the relator.

James Wilkinson, district attorney, for the respondent judge.

523 MONROE, J. Relator complains that he was prosecuted under section 2 of Act No. 63, page 103, of 1877, Extra Session, in the district court for the parish of Plaquemines, by an information charging that, not being a duly licensed, appointed and qualified branch pilot for the port of New Orleans, he had piloted a certain foreign vessel from the Gulf of Mexico through the South Pass of **524** the Mississippi river; and that, by way of demurrer, motion to quash, and motion in arrest of judgment, he set up the following defense, to wit: That under article 1 of the constitution of the United States, Congress has power to regulate commerce with foreign nations and among the several states; that, in the exercise of that power, Congress enacted the law approved March 2, 1837 (5 Stats. 153, c. 22), which provides that it shall be lawful for the master of any vessel coming into or going out of any port situate upon waters which are the boundary between two states to employ a pilot, duly licensed or authorized by the laws of either of the states bounded by such waters to pilot such vessel to or from such port, any law, usage or custom to the contrary, notwithstanding; that under the laws of the state of Mississippi which is bounded by waters upon which the port of New Orleans is situated, the board of harbor commissioners of the port of Natchez is authorized to issue licenses permitting persons to act as pilots upon the waters of Natchez Harbor and of all passes leading thereto and leading to and from the sea; that at the date laid in the information against him, and now, relator held, and holds, such license, and was, and is, entitled to all the rights thereby conferred; and that any statute of the state of Louisiana which pretends to confer upon the officers of the state power to prosecute persons acting as pilots, who have been authorized so to act by such states as are described in the act of Congress aforemen-

tioned, is, to that extent, void, as repugnant to said act, and that said court is without right or jurisdiction to enforce such statute. The demurrer (which sets up that the information is defective, in failing to charge that relator, when acting as pilot, was not licensed by the laws of Mississippi), the motion to quash, and the motion in arrest, having been overruled, and relator ⁵²⁵ having been found guilty, as charged, and having no right of appeal, he has made this application (invoking the supervisory jurisdiction of this court) for writs of certiorari and prohibition.

It is well settled that the states, upon entering the Union (including not only the original members, but those which have entered since), retained ownership of, and sovereignty over, the lands lying under the navigable waters within their respective limits, and it was at one time supposed (by some persons) that the same rights were retained with respect to the waters. The supreme court of the United States, however, held, as soon as the question was presented to it, that the power to regulate commerce, which is conferred by the constitution on Congress, "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the constitution," and that to the extent necessary for such full and complete exercise it includes jurisdiction over the avenues and vehicles of commerce, and hence extends to the navigable waters of the country, irrespective of state lines. Apart from the limitations so established and recognized, the waters lying within the limits of a state are as much subject to its exclusive dominion as the land. It is therefore as inconceivable that one state should undertake to regulate the use of the waterways of another as that it should assume to regulate the highways by land, and it is equally inconceivable that Congress should assume to vest in one state, with respect to another, a power, which, though possessing, it has never itself seen fit to exercise. The first Congress enacted a law (Act Aug. 7, 1789, c. 9, 1 Stats. 53) declaring: "That all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with existing ⁵²⁶ laws of the states, respectively, wherein such pilots may be, or with such laws as the states may, respectively, hereafter, adopt for the purpose, until further legislative provision shall be made by Congress."

Referring to this law, Marshall, C. J., in a case to which we have already alluded, said: "When the government of

the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress": *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

And again it has been said: "The act of 1789 contains a clear and authoritative declaration by the first Congress that the nature of this subject is such that, until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; and that it is likely to be the best provided for, not by one system or plan of regulations, but by many, as the legislative discretion of the states should deem applicable to the local peculiarities of the ports within their limits": *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. (U. S.) 299, 13 L. ed. 996.

In the course of a few years, however, it was found that troubles were arising from, and the interests of commerce were being prejudicially affected by, conflicting claims to jurisdiction, asserted by states over navigable waters constituting the boundaries between them. Thus, New York harbor and Hudson river lie between the states of New York and New Jersey, Delaware bay and the Delaware river lie between New Jersey and Delaware, the Delaware river lies between New Jersey and Pennsylvania; and those states were each asserting the right to regulate pilotage on the waters common to both, and at times denying that right to the other. Congress, accordingly, not from any desire to exercise or to delegate its authority, but from necessity, interposed and enacted a law (Act March 2, 1837) which reads: "That it shall be, and may be, lawful for the master or commander of any vessel coming into or going out of any port situate upon waters ⁵²⁷ which are the boundary between two states, to employ any pilot, duly licensed or authorized by the laws of either of the states bounded on the waters, to pilot said vessel to or from said port; any law, usage, or custom, to the contrary, notwithstanding."

The specific charge against relator is that he, "not being a duly licensed, appointed and qualified branch pilot of the port of New Orleans, state of Louisiana, and having no right or authority to pilot any vessel inward or outward bound to or from the port of New Orleans or through the duly established pilotage grounds at the mouth of the Mississippi as es-

established by the laws of the state, did knowingly go on board a certain foreign steam vessel, called the 'Evona,' while the said vessel was bound from the Gulf of Mexico to the city of New Orleans, on, over and through said pilotage grounds so established at the mouth of the Mississippi river, and on and through the South Pass, at the mouth of said river, and did, willfully and wrongfully, and without a branch pilot's license, so do, as aforesaid, pilot said vessel in from the Gulf of Mexico through such pass to the head of the passes of aforesaid river, contrary to the form of the statutes of the state of Louisiana," etc.

The statute under which the charge is made is Act No. 63 of 1877, Extra Session, section 2, which reads: "That whoever shall be guilty of acting or attempting to act as pilot to any vessel, inward or outward bound to and from the port of New Orleans, who is not a duly licensed branch pilot, shall suffer fine not exceeding one hundred dollars, or imprisonment, not exceeding two months, or both, at the discretion of the court."

It is clear that the information charges an offense within the meaning of the statute, and we think it equally clear that the matter is in no wise affected by the act of Congress of 1837, above quoted. Since, whilst that act provides that either of two states having a water boundary "between" them may license persons to pilot vessels to and from "any port situate" thereon, i. e., on the "waters ⁵²⁸ which are the boundary between (the) two states," the waters of the Mississippi river, at South Pass, thence to New Orleans, and thence to the Mississippi state line, lie wholly within the state of Louisiana, and are no more the boundary "between" Louisiana and Mississippi than between Louisiana and any other state which the Mississippi river or any of its tributaries may pass through or touch on their way to the Gulf of Mexico.

This we understand to have been the construction placed upon the law in the case of *The Glenearne* (D. C.), 7 Saw. 200, 7 Fed. 604, in which it was held that a pilot, licensed under the law of Washington Territory to operate on the Columbia river (lying between that territory and Oregon), had no right to pilot a vessel through the Willamette river (a tributary of the Columbia, lying wholly within the state of Oregon), a distance of twelve miles, to Portland, Oregon. It is true that in the case of *The Clymene* (D. C.), 9 Fed. 164, and (C. C.) 12 Fed. 346, it was held that a Delaware pilot was authorized to pilot a vessel through Delaware bay

and river, to Philadelphia; but in comparing that case with this, it will be noted that the Delaware pilot boarded, in waters constituting the boundary between Delaware and New Jersey, a vessel bound (through those waters and through waters constituting the boundary between Pennsylvania and New Jersey) upon an interstate voyage, whereas, in the instant case, the relator boarded, in Louisiana waters, a vessel bound, through Louisiana waters, to a Louisiana port. Again, the case of *The Clymene* was a suit for compensation for services rendered; whereas the case before us is a prosecution by the state of Louisiana for an alleged violation of a state law. And, still again, we venture to think that a broader interpretation has been placed upon the act of 1837 in the *Clymene* case than is warranted by the act, or by the attitude of the general government, since its organization,⁵²⁹ or by the jurisprudence of the supreme court of the United States in relation to the subject matter. In 1852 Congress passed a law (Aug. 30, 1852, c. 106, 10 Stats. 61) containing various provisions in regard to fire, pumps, boats, life-preservers, the carriage and storage of dangerous articles, etc., and also providing for the appointment of two inspectors, one of whom was to possess a practical knowledge of shipbuilding and the uses of steam in navigation, and the other to possess knowledge of, and experience in, the duties of an engineer of steam vessels, and of the construction and use of boilers and machinery and appurtenances connected with them; and the two were required to make an examination of the hulls of vessels, to inspect and test the boilers and machinery, and to require licenses to be obtained before dangerous articles could be taken aboard. There were also some provisions in the act relating to pilots, and it was contended (in the case from the report of which we obtain the foregoing information) that the act conflicted with and controlled the pilotage law enacted by the state of California in 1861. In considering the question, however, the supreme court of the United States said: "The act [referring to the act of Congress] contains few provisions relating to pilots. Indeed, it was not directed to the remedy of any evil of the local pilot system. There were no complaints against the port pilots. On the contrary, they were the subjects of just praise for their skill, energy and efficiency. . . . The term 'pilots' is equally applicable to two classes of persons—to those whose employment is to guide vessels in and out of ports, and to those who are intrusted with the management of the helm and the direction of the vessel on her voyage. To the first class, for the proper perform-

ance of their duties, a thorough knowledge of the port in which they are employed is essential, with its channel, currents and tides, and its bars, shoals and rocks, and the various fluctuations and changes to which it is subject. To the second class, knowledge of entirely different character is necessary. Yet the act in question does not require the inspectors, who are to license pilots under its provisions, to possess any knowledge of the harbors for which, under the theory of the plaintiff in error, pilots ⁵³⁰ are to be licensed, or to exact any such knowledge from the pilots themselves. . . . The act does not purport to establish regulations for port pilotage, and we cannot suppose that, in a measure intended to give greater security to life, Congress would have swept away all the safeguards in this respect, provided by state legislation, without substituting anything in their place. Under the act, the ports may be left entirely without resident or local pilots, for it does not require the appointment of such pilots, though the necessity for them must have been obvious": *Pacific M. Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450, 17 L. ed. 805.

The legislation of the state of Louisiana upon the subject is elaborate in the extreme, and its effect has been the establishment and maintenance of a system which is most satisfactory in its operation, and of an organized body of men whose worth, capacity and loyalty is beyond praise. The law provides that the number of bar pilots for the port of New Orleans shall not be less than thirty. A bar (or "branch") pilot must be a qualified elector of the state; he must have served in a pilot boat, at the mouth of the river, for twelve months next preceding his appointment by the governor, and he must be recommended for the appointment by a state board of examiners consisting of three branch pilots; he must give a bond of two thousand dollars, approved by the master and wardens of the port of New Orleans; he must not absent himself from his station for more than seven days without leave, granted by the governor upon the written recommendation of the board of examiners; he may be suspended or removed by the governor; he must be owner or part owner of at least one decked pilot boat, of not less than fifty tons burden, which must be kept employed as a pilot boat; he is liable to suspension, fine and imprisonment if he refuses or neglects to board a ship when called.

In 1871 Congress passed another act (Act Feb. 28, 1871, c. 100, 16 Stats. 440), which, in repealing the act of 1852, provided that: "Nothing in this act shall be construed to annul or affect any regulation, established by ⁵³¹ the laws of any

state, requiring vessels entering or leaving a port of any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state."

In June, 1874, still another act was passed (Act June 1, 1874, c. 201, 18 Stats. 50, pt. 3), authorizing the Secretary of War to assume full control "over the particular channel [the South Pass] at the mouth of the Mississippi river, in the course of excavation or improvement by the government of the United States," so far as might be necessary to the carrying on and the protection of such work, and one Williams, holding a license as pilot from the local inspectors of the port of New Orleans, and assuming to act under it, having been prosecuted for so doing, under the statute of 1877 which is here called in question, defended, on the ground that the act of Congress of 1874 had deprived the state of its pilotage jurisdiction quoad the channel, or pass, referred to in that act. This court, however, held that the act had no such purpose or effect, and that there had been no legislation by Congress which repealed or superseded the pilotage laws of the state: *State v. Judge*, 36 La. Ann. 122.

We are of opinion that the view thus expressed is entirely applicable to the present situation. In conclusion, we may say that we have examined the law of Mississippi upon which relator relies (Ann. Code Miss. 1892, secs. 2252-2296, as amended by Acts 1896, p. 140, c. 128), and we do not conclude therefrom that it was the intention of the legislature of that state to authorize the issuance of licenses to persons to engage in piloting in waters lying wholly outside of the state of Mississippi and wholly inside the state of Louisiana, and we doubt very much whether the license as issued to the relator was intended to be so used.

It is therefore ordered, adjudged and decreed ⁵³² that the restraining order herein made be rescinded; that the writ of prohibition prayed for by relator be denied; and that this proceeding be dismissed at relator's cost.

The Defendant Prosecuted a Writ of Error to the supreme court of the United States, where the judgment of the Louisiana court was affirmed in an opinion as follows:

"This is an information charging the plaintiff in error with piloting a foreign vessel from the Gulf of Mexico to New Orleans, the port to which she was bound, he not being a duly qualified pilot under the laws of Louisiana. He was convicted after a trial, and the supreme court of the state pronounced the judgment correct: 119 La. 522, ante, p. 336, 44 South. 285. By demurrer, motion to quash, and

motion in arrest of judgment, he raised the objection that the power of Louisiana was not exclusive, and that a license from the board of pilot commissioners for the harbor of Natchez, Mississippi, was a sufficient authority under the act of Congress of March 2, 1837, chapter 22, 5 Statutes at Large, 153, Revised Statutes, section 4236, United States Compiled Statutes of 1901, page 2903.

"The Mississippi river, it will be remembered, is a boundary between Mississippi and Louisiana from below the port of Natchez as far north as Louisiana extends. On the other hand, all the southernmost portion of the river is wholly within Louisiana. The destination of the vessel which the plaintiff in error undertook to pilot was to a point within this southernmost portion—New Orleans—as the information charged. For the purposes of decision it may be assumed, although it is disputed, that the state of Mississippi has attempted to authorize the plaintiff in error to do what he did, while Louisiana has made his conduct criminal if it has power to do so under the United States law.

"The section of the Revised Statutes reads as follows: 'The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two states may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters, to pilot the vessels to or from such port.'

"The case for the plaintiff in error depends upon the assumption that the 'waters which are the boundary between two states' are, in this case, the whole Mississippi river so far as navigable. We are of opinion that the assumption is wrong, and that the limit of the waters referred to is the point at which they cease to be a boundary between two states. Neither continuity of water nor identity of name will carry them beyond that point. If the plaintiff in error had undertaken to pilot from the Gulf to Natchez, a different question would have been presented, and it may be that in that case the Mississippi license would have been good. But New Orleans, although upon the Mississippi, is not situate upon waters which are the boundary between two states, and therefore the section relied upon does not apply. That being out of the way, Louisiana had power to pass her local regulations: Rev. Stats., sec. 4235, Act of August 7, 1789, c. 9, sec. 4; 1 Stats. at Large, 54; U. S. Comp. Stats. 1901, p. 2903": *Leech v. State*, 214 U. S. 175, 29 Sup. Ct. Rep. 552, 53 L. ed. 000.

SHREVEPORT TRACTION COMPANY v. SHREVEPORT.

[122 La. 1, 47 South. 40.]

CONSTITUTIONAL LAW—Protection of Corporations.—Corporations and individuals are entitled to the same protection under the contract clause of the federal constitution.

CONSTITUTIONAL LAW—Municipal Ordinance, When Regarded as a Contract.—An ordinance granting a right accepted and acted upon by the grantee becomes an irrevocable contract. The right cannot be amended or diminished without the consent of the grantee.

CONSTITUTIONAL LAW—Surrender of Governmental Powers.—It is generally true of governmental power, especially the police power, that it cannot be surrendered or alienated.

CONSTITUTIONAL LAW—Grant by Municipality, Power to Change.—The power retained after the grant does not include the authority to repeal, change, or modify the right granted.

STREET RAILWAYS, Change by Municipality in Franchise of.—An ordinance, granting the right to a street railway company to run its cars on terms and conditions stated, by its acceptance confers a right, and thereafter the city council cannot lower the fare to be charged over the objection of the company.

If it were to do so it would impair the obligation of the contract: *Cleveland v. Cleveland City R. R.*, 194 U. S. 517, 24 Sup. Ct. Rep. 756, 48 L. ed. 1102; *Detroit v. Detroit*, 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46 L. ed. 592; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 23 Sup. Ct. Rep. 531, 47 L. ed. 887.

The first authority cited directly reaffirms the other two; all three are pertinent. They announce the rule laid down by the supreme court of the United States.

In each of these decisions the agreement between the municipality and the street railway was treated as binding. (p. 347.)

STREET RAILWAYS, Regulation of, What does not Include.—The right "to regulate" cannot be held to affect the contract right transferred by the ordinance and accepted by the company. (p. 350.)

STREET RAILWAYS, Grants to, When Operate as an Exemption from the Regulation of Fares.—The contract in effect exempts the street railway from the municipal regulation of rates. (p. 354.)

MUNICIPALITIES have No Right to Change Their Contracts. (By the editor.) (p. 349.)

STREET RAILWAYS, Municipal Power to Establish Rates for.—A statute prohibiting the construction of street railways without the consent of the municipal council and giving it general power to regulate the use of streets gives the municipality power to establish rates by contract or agreement. (By the editor.) (p. 353.)

(Syllabi by the court except where stated to be by the editor.)

We find no language in the opinion corresponding to syllabi numbers 1, 2, 3, and 4, and hence are unable to indicate the pages of the opinion affirming them.

Ruffin Golson Pleasant, city attorney, and Hall & Jack, for the appellants.

Wise, Randolph & Randall, for the appellee.

3 BREAUX, C. J. The city of Shreveport seeks by an ordinance adopted by its council to compel the plaintiff company to issue transfer tickets to passengers on its street-cars.

This ordinance provides that any passenger who shall have paid his fare on any street-car or any vehicle on defendants' line shall, on his request, be entitled to a transfer ticket to be carried on any one line adjoining to, connecting with, or crossing the roads of defendant.

One of the conditions under the ordinance upon which the passenger may obtain this ticket is that the transfer ticket shall be used in the next car going on the way of a continuous trip. If the first car is overcrowded, then it may be used on a later car at the point or place at which the transfer was issued.

There is another section of the ordinance imposing a penalty on defendant companies in case they do not comply.

4 The plaintiff proceeded by injunction to prevent the defendant from executing the ordinance.

The defendant makes no defense on the ground that plaintiff had no right to an injunction. It admits that if the ordinance is illegal the plaintiff is entitled to an injunction, but not otherwise.

The injunction is only referred to in passing. It is a mere incident of the case.

The following shows the extent of the power delegated by the state, as relates to the point at issue, to the city of Shreveport, as contained in its charter. Quoting from the charter: "The council shall have power to pass such ordinances as are necessary to regulate the government of carts, drays, wagons, and other vehicles, freight, locomotive, passengers, and street-cars."

The grant by the city of Shreveport of franchises to the plaintiff was for a stated number of years, to wit, fifty.

A bond issue has been made and recorded of two hundred thousand dollars; the lines of defendant are operating under one management; the cars on each line do not run on other lines. The indebtedness of plaintiff is suggestive of the necessity of revenues for paying its debts, if for nothing else.

In its answer the defendant admits that the city had authority to grant the franchise to occupy the streets, but alleged that the city had no authority to grant away the sovereign right to regulate and fix rates from time to time as necessity and justice might require, and that the right to fix and regulate the rates includes the right to require transfer tickets.

The grant of the city to plaintiff consisted of a right of way to lay tracks on certain streets of the city and to maintain and operate by electricity a street railway overhead trolley system.

There were three grants of franchises made by defendant to plaintiff.

⁵ In the first grant, dated September 7, 1897, it was provided "that the fare should be five cents on each belt; the school children, however, were charged three cents with the privilege of going to and from school."

The next grant is dated July 22, 1903, and was to the West Shreveport line. The limit in that grant was "one fare on either of said lines of railway at five cents between 5:45 A. M. and 11:30 P. M.; school children to pay three cents."

The next grant is dated September 22, 1904. That was to the Hyland Park Company, and limited the fare not to exceed "five cents for passengers from one end of the line to the other or any part of the distance. The Geneveive Orphans shall be carried free and school children at half rate."

The contention on the part of defendant is that the city never intended to abandon its right to control and fix rates.

We will here state that (as it were preliminarily), if such was the intention, it is strange that it did not insist upon inserting something to indicate the intention.

No evidence was offered in support of the contention that the business of plaintiffs' line would be operated at a loss in case the court holds that the transfer tickets should be issued. The plaintiffs rest their case on the right they had acquired under the original contract granting to them the franchise they hold.

The defendant certainly did fix the fare, and voluntarily entered into an agreement whereby plaintiff acquired the right, after expending required capital, to build its road and operate its cars in the streets of Shreveport.

Defendant has received a consideration, or that which is usually taken as full consideration for a franchise. The improvement of the city is a consideration in itself.

The power to regulate and its extent presents the all-important question.

⁶ We do not think that the city of Shreveport has the power of regulating to the extent of reducing the amount of the fare.

The city of Shreveport's contention is that by making the grant it did not abandon the sovereign right of exercising its authority and control over rates, while, on the other hand,

among other grounds, the plaintiff's contention is that the council had no right to prescribe penalty as it has attempted to do. Plaintiff invoked the several ordinances under which it holds its franchises as distinct contracts between plaintiff and defendant.

The judge of the district court, in a carefully written opinion, considered only one of plaintiff's grounds, which we abbreviate as follows: That grants are contracts which cannot be impaired without violating the organic law. This ground was sustained in the lower court and judgment pronounced in favor of plaintiff.

The contract was complete; it was an absolute contract; the stipulations were clearly stated and nothing is wanting to prevent it being considered as a complete and binding contract. It has all of the elements of a contract.

But defendant interposed the objection, and strongly argued that the right to regulate must be written in the contract; that the right to regulate had not been abandoned; and that the right to regulate includes the right to alter rates.

We do not find it possible to agree with that view. The power to regulate did not, written as it is in the charter of the city, confer on the defendant city the right to reduce the fare. The city has parted with its franchises.

The defendant is no longer in a position to recall and repeal the ordinance fixing the fare to be charged, and thereby affect and reduce the fare stipulated between the parties at the date in question.

One of defendant's contentions is that it ⁷ did not barter away the grant on condition that no change would thereafter be made in the rate of fare, and that it (defendant) was not bound by the contract to the extent claimed by plaintiff railway, unless it was made evident by plaintiff that by the terms of the ordinance it appears that the municipality expressed the intention to make no changes in the rates during the grant of the franchise.

It strikes us that the city could more properly be held to the necessity of declaring in its ordinance that there was no intention of abandoning its right to reduce the fare if it should deem it proper. The city never intimated anything of the kind. On the contrary, as relates to one of the grants, we are informed by the testimony that plaintiff expressed its unwillingness to accept the grant if it contained the stipulation that transfer tickets would in time be required.

It may be that the law-making authority directed by legislation or through a railroad commission can regulate carriers

and their charges, for all we know, but municipalities have no right to change their contracts. We have not found a single decision holding directly and expressly that the essentials of a contract may be changed or modified by the municipality in matter of revenue, as relates to a franchise parted in express terms.

But, to return to the power of regulation, it includes all that the word implies, but it does not include the power to regulate fares. Such contracts as here under consideration should not be violated. That was substantially the opinion expressed in the case of *Forman v. New Orleans & C. R. R. Co.*, 40 La. Ann. 446, 4 South. 246. In another decision, this court said: "The contract having been accepted and carried into execution is irrevocable, and must remain in force unless in some way there is a violation of its terms": *East Louisiana R. R. Co. v. City of New Orleans*, 46 La. Ann. 526, 15 South. 157.

A decision cited by learned counsel for defendant ⁸ does not sustain its contention. On the contrary, it was held that there was a contract between the city of New Orleans and the defendant company to which full force and effect was given: *Robira v. New Orleans & C. R. R. Co.*, 45 La. Ann. 1363, 14 South. 214.

There are pertinent decisions of the federal supreme court.

With confidence, learned counsel for defendant quoted the following from *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191, 29 L. ed. 636, in which Chief Justice Waite for the court said: "This power of regulation is a power of government continuing in its nature, and that if it can be bartered away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt it must be resolved in favor of the existence of power."

We have no reason to disagree from the expression just quoted. There must not be an unreasonable construction placed upon the grant such as would deprive the municipality of all authority, and if any doubt arises in regard to the extent of the power it should be resolved in favor of the municipality.

All of the foregoing is entirely correct. But here, different from the decisions just referred to, there are words of positive grant.

The point of difference between plaintiff and defendant relates to the meaning to be given to the word "regulate," as expressed in the city charter.

According to defendant, it includes the right to change the rate of fare. According to plaintiff, it does not extend that far.

We are of opinion that to regulate means such restrictions as may be necessary to protect the public from harm; it does not mean the least confiscation of any right or anything that will affect the revenues of the grantee. The right to "regulate" is to prescribe rules for the government of the cars in the city. It applies also to the means by which they are propelled. *Ex vi termini* it includes the right ⁹ to "regulate" the speed and other similar rights: 7 Words and Phrases, p. 6043.

These rights to regulate do not affect the revenues.

According to *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. Rep. 224, 50 L. ed. 353, cited by learned counsel for defendant, the public body that is charged with public duty in matter affecting the general interest "cannot be held upon mere implication or presumption to have divested itself of its powers."

To this view there can be no good objection. Here, however, there is nothing left to mere implication and presumption. As before stated, the grant is clear and direct. The amount of the fare is fixed and the time during which it should be collected.

The next case cited by defendant also deals with the necessity of using clear language in matter of grants: *Winchester & L. T. R. Co. v. Croxton*, 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177.

The decision in the case of *Georgia R. & Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. Rep. 47, 32 L. ed. 377, also cited by defendant, is not controlling in this case. We do not find it quite pertinent. At any rate, it does not afford ground for another conclusion than that we have reached. We do not think it conflicts in the least with our view of the law of the case. As in the other cases we reviewed, it was a matter of construction resolved in favor of the municipality. In construing the grant the court determined that the power claimed had not been transferred.

This is different from our case.

In *Detroit v. Detroit etc. St. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46 L. ed. 592, we find much that is pertinent. In that case, the rate of fare having been fixed under proper authority, it was held, as we hold in our case, that it was not open to alteration by the common council by whom the grant had been made.

The federal supreme court said in the last-cited case:
 10 "Can it be possible [referring to the language of the grant] that under this language permitting consent upon such terms and conditions as the city might from time to time prescribe, the power was reserved to make a rate of fare that might ruin the whole enterprise? Will it be believed that the parties thus understood the meaning of that provision? It would hardly be credible that capitalists about to invest money in that which was then a somewhat uncertain venture, while procuring the consent of the city to lay its rails and operate its roads through the streets in language which as to the rate of fare amounted to a contract and gave the company the right to charge a rate deemed essential for the financial success of the enterprise, would at the same time consent that such rate agreed upon should be subject to change from time to time by the sole decision of the town council."

The whole decision is replete with utterances that are pertinent here. As, for instance, one of the points of the defendant was that inasmuch as, in the grant under consideration, the rate of fare for one passenger "was not to be more than five cents," the court in said case held that the words "more than five cents" did not have the effect of retaining for the city the right to reduce the rate below the five cents established by the company without a special agreement with the company and without its consent.

Another of defendant's points, in the case from which we have quoted, was that the municipality could not bind as proposed succeeding administrations of the municipality. The court held in the Detroit case just cited (184 U. S. 368, 22 Sup. Ct. Rep. 410, 46 L. ed. 592) that within the bounds of reason such grants might be made.

We are led to state that while it is true that one generation should be careful not to fasten burdens without ample consideration on succeeding generations, none the less, when it is manifest that there is valid consideration extending far into the future, the grant may be made.

The legislature (unless prohibited by constitutional provision) may authorize the municipal corporation to contract with a street railway company as to rates of fare, and bind, during a specified period, any common council ¹¹ from altering or in any way interfering with such contract: *Id.*

A number of decisions are cited in the Detroit case. The first cited in said case is *New Orleans Gas Light Co. v.*

Louisiana Light etc. Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252, 29 L. ed. 516.

In another decision, entitled *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 21 Sup. Ct. Rep. 493, 45 L. ed. 679, the court held that the city council was authorized to contract to construct and maintain waterworks at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; that the words "fixed by ordinance" might be construed to mean by ordinance during the whole period of thirty years, or it might be construed to mean a change or alteration possible on the part of the council. The word "fix" was made to apply to the rate instead of to the time. It was certainly a debatable question. The decision does not impress us as being controlling in our case. In the case here, different from the cited case, the contention on one branch of the argument (although the grant was complete) is that the word "regulate" performed the service of retaining full right in the city to alter the rate of fare, a contention with which we have not found it possible to agree. The *Detroit* case was reaffirmed in *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. Rep. 756, 48 L. ed. 1102, and has some support in *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. Rep. 18, 49 L. ed. 169.

Learned counsel for the defendant city propounds the inquiry, Did the city council possess the power to transfer the grant in the face of article 46 of the constitution of 1879 and article 48 of the constitution of 1898, prohibiting the legislature from granting any special immunity to a person or corporation?

The predicate of the inquiry is not on firm basis. It rests upon the idea of a special immunity granted. Of course, if special immunity ¹² had been granted in the case before us for decision, the article would bear application. Here a transfer was made of a franchise. It was not an immunity, a mere exemption. The contract was based on a *quid pro quo*—convenience to the public for which the public was to pay an amount deemed reasonable.

The power to fix rates is inherent in the government, to a reasonable extent at least. That power has been exercised at the date of the contract in this case. The transfer is a complete legal transfer in which sovereignty through the municipality appears as transferrer. The same power asks to alter that which has been agreed upon. We feel constrained to disagree with the view that would lead to setting aside the agreement. The inviolability of contracts must be

maintained. It only becomes necessary to show that there is a contract in order to hold all parties bound to its faithful execution.

To return for a few moments to the power of the city of Shreveport under the legislative grant to transfer the franchise, as it was transferred originally, including the right to fix fares: We find that it was similar to the power which the city of New Orleans had years ago under the provisions of Act No. 131, page 182, of 1855, and Act No. 20, page 14, of 1882. As to the last power, it was directly held in the Brown-Duplessis case, 14 La. Ann. 842, that the city council of New Orleans "was empowered to grant franchises for the construction, operation and running of railroads over the streets of that city with the right to fix the tariff of rates."

This was in effect reaffirmed in *Forman v. New Orleans & C. R. R. Co.*, 40 La. Ann. 446, 4 South. 246, also cited above.

As this was the law for New Orleans, similar rule applies to the city of Shreveport.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed.

ON REHEARING.

13 The whole contention of the defendants is predicated on the proposition that the city of Shreveport has no power to fix rates by contract so as to preclude the subsequent regulation of such rates by the city council.

The power to fix rates by contract and the power to regulate rates may coexist in the same council or other legislative body. Thus the legislature has the undoubted power to regulate rates, but at the same time may grant to a railroad company the right to charge rates within certain limitations. Such a grant is a contract, and the rights thereby vested cannot be divested or impaired by subsequent legislation: *Gulf & S. I. R. Co. v. Adams*, 90 Miss. 559, 45 South. 91.

There is no express legislation in this state authorizing municipalities to establish rates for street railroads by contract or agreement. But such power necessarily flows from the statutory prohibition that no railroad shall be constructed through the streets of any incorporated city without the consent of the municipal council thereof, and from the general power of regulating the use of the streets: Rev. Stats. 1870, sec. 689; Act No. 131, p. 184, of 1855, sec. 7; *Brown v. Duplessis*, 14 La. Ann. 842; *Forman v. New Orleans & C. R. R. Co.*, 40 La. Ann. 446, 4 South. 246. In the latter case, the ordinance fixing the rates of fare was held by the court to

constitute a contract which the city had the undisputed right to make under its powers as expounded in the jurisprudence of the state. The city of New Orleans had the charter power "to authorize the use of the streets for horse and steam railroads and to regulate same." The city of Shreveport has the same power under its charter and section 689 of the Revised Statutes of 1870. If a municipality has the power to grant a franchise on conditions, it necessarily must have the power to enter into an agreement binding on both parties. If the railroad be bound by the tariff agreed upon, ¹⁴ the municipality must also be bound. Under defendants' contention neither party is bound, or one is bound and the other is free to repudiate the agreement. In *Cleveland v. Cleveland City R. R. Co.*, 194 U. S. 517, 24 Sup. Ct. Rep. 756, 48 L. ed. 1102, an ordinance granting a street franchise, with the right to charge certain rates of fare, duly accepted by the grantee, was held to constitute a binding contract, the obligation of which could not be impaired by subsequent legislation.

The city of Shreveport had the power to grant the street franchise and to fix the rates of fare by agreement with the railroad company, and this contract precluded the municipality from lowering the rates during the life of the franchise. The contrary theory would leave the street-car company at the mercy of every successive council, and would render the construction of street-car lines impracticable as a business investment.

Rehearing refused.

The Power of States and Municipal Corporations to regulate the rates charged by such public service corporations as gas and water companies is discussed in City of Madison v. Madison Gas etc. Co., 129 Wis. 249, 116 Am. St. Rep. 944; *Brooklyn Union Gas Co. v. New York*, 188 N. Y. 334, 117 Am. St. Rep. 868; *Danville v. Danville Water Co.*, 178 Ill. 299, 69 Am. St. Rep. 304; *San Diego Water Co. v. City of San Diego*, 118 Cal. 556, 62 Am. St. Rep. 261; *Spring Valley W. W. v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116. The power of the legislature, either directly or indirectly through grant of authority to municipal corporations, to limit the charges exacted by railway companies is recognized, except as restricted by contract in the charter, unless the rates are made clearly unreasonable or unless the regulation amounts to an interference with interstate commerce: *Milwaukee E. R. & L. Co. v. Milwaukee*, 87 Fed. 577; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; *Wellman v. Chicago etc. Ry. Co.*, 83 Mich. 592, 47 N. W. 489; *Norfolk & W. R. R. Co. v. Pendleton*, 86 Va. 1004, 11 S. E. 1062, affirmed in 156 U. S. 667, 15 Sup. Ct. Rep. 413, 39 L. ed. 574.

IN RE BILLIS' WILL.

[122 La. 539, 47 South. 884.]

WILL, Letter, When Constitutes.—A letter written, dated, and signed by the author may serve as a last will, where it contains testamentary language indicating that it was so intended. (p. 358.)

WILLS, Presumption in Favor of.—The law presumes that a testator intends a lawful rather than an unlawful disposition of his property, and though such presumption may be rebutted, and the creation by last will of a fidei commissum may be proved by presumptions arising from circumstances dehors the instrument, such presumptions must be grave, precise and consistent, and must leave no reasonable basis for a different conclusion. (p. 361.)

WILLS, Forbidden Trust, When not Implied from.—Where, in sufficiently explicit terms, the person named as universal legatee is bequeathed the entire estate of the testator, the expressions or instructions, "Now, do as I told you, at the station, when you left," and "Do for my children as I have said" (referring to certain illegitimate children), are too vague and uncertain to impose any charge on the legatee, and do not create a fidei commissum in favor of the children. (pp. 359, 361.)

(Syllabi by the court.)

Henry Denis, for the appellants.

W. C. and J. B. Roberts and James Alexander Williams, for appellee Morat.

539 MONROE, J. An instrument, written in French, and of which a translation is given below, was offered for probate as the holographic ⁵⁻⁴⁰ last will of Joseph Billis, and the probate was opposed by W. B. Clark, "curator for absent heirs and for Henry Denis, delegate for the French consul to represent absent heirs," on the grounds that the instrument had not been written and signed by Billis, and "that the said last will contains a prohibited substitution and fidei commissum in favor of the illegitimate children of Joseph Billis, by which the universal legatee is charged to transmit the whole or part of the decedent's estate to the said illegitimate children." The instrument (as translated) reads as follows:

"Redemption P. O. (La.), October 27, 1906.

"Dear Nephew Antoine:

"You will excuse me for not answering your letter sooner. I will say to you that I have been to New Orleans since you left school. It was on business, and I returned eight days ago. I am very glad to know of your safe arrival at Memphis, Tennessee, and all the disasters that you have seen. Last Sunday your father and mother told me that you are at

a new school that has been opened, and I think that will be a greater advantage to you. Now, do as I told you, at the station, when you left. If anything should happen to me, no matter what [*"ci n'importe, ayant quelque chose m'arriver"*], take possession of that which I have. I give you all that I have accumulated. That is my will [*"c'est ma volonté"*]. Not a cent [*"ci pas le sou"*] for my brothers, remembering the ingratitude of which you know. Settle my accounts. Do for my children as I said. I transfer [*"passe"*] to you all my rights. Take care of this letter. Now, work hard. This will be the last year of work for you. Try to work, to be received. You know what the field is, and you have proved it with courage, and that is what makes me believe in you. As to the examination, you will go out one of the first, and afterwards, you know, if your father cannot afford to do for you what you need, I will. Accept, then, my sincere friendship [*"amitié"*]. Your Uncle. And if you need anything, write to me.

“[Signed] JOSEPH BILLIS.”

It is abundantly shown that this instrument is altogether in the handwriting of the decedent, so that the question of its sufficiency, in that respect, may be at once eliminated.

Counsel for opponents submits to this court (for the first time, there being nothing in the pleading on the subject) the proposition ⁵⁴¹ that, in order to establish a letter as a last will, it must appear that the writer so intended it, and he cites Demolombe, Baudry-Lacantinerie, and the Court of Cassation as supporting him. Conceding the soundness of the proposition, and taking the record as it is, we find nothing which suggests any doubt that the decedent intended the instrument here presented to take effect after his death and to operate as a final disposition, so far as he was concerned, of his property. That he did not intend it as a conveyance in *présenti* is evident from the qualifying clause with which he begins the use of the dispositive language, to wit, “If anything happens to me, no matter what,” or, as we find it in the record, “Any time something happens to me.” In other words, the addressee was to take possession of the property and occupy the status accorded to him by the instrument only when and if something should happen to the writer, and the evidence offered by the opponents, in his handwriting, taken in connection with the facts subsequently developed, indicates clearly that the “something” which the writer had in contemplation was his own death. Then follow the words:

"Take possession of that which I have. I give you all that I have accumulated. That is my will."

It is true that the writer uses the word "*volonté*," and the learned counsel suggests that the French word "means simply volition, and not last will and testament." Nevertheless the records of our courts contain many testaments, written in the French language, in which "*volonté*" and "*dernière volonté*" are used as the equivalents of "will" and "last will," and the evidence shows that Joseph Billis had lived in this state and in an English-speaking parish for many years, so that, considering the context, it seems more than probable that he used the word "*volonté*" just as an American, similarly situated, would have used the word "will." He then ⁵⁴² proceeds to state his wish that his brothers should get nothing, and to give his reasons, which would have been altogether uncalled for—as, indeed, the whole instrument would have been—if he had not been making a disposition of his property, to take effect after his death, since, so long as he lived, his estate would have remained under his own control. He then writes: "Settle my accounts. Do for my children as I said. I transfer [*passe*] to you all my rights. Take care of this letter."

The addressee, it will be remembered, was in a distant city, and there was no suggestion that he should go at that time to the parish of Grant, either to settle the accounts of the writer, to take possession of his property, to do for his children, or for any other purpose; his succession to the rights and obligations conferred and imposed upon him, and the action that he was expected to take, being dependent and contingent upon the happening of "*something*" to, or, in other words, the death of, the writer. An eminent English author, dealing with the question presented, says: "If an instrument is not testamentary, either in form or substance (none of the gifts in it being in testamentary language, or being in terms postponed to the death of the maker), and no collateral evidence is adduced to show that it was intended as a will, probate will not be granted of it as a testamentary document."

He then refers to the case of a person who wrote a paper in these words: "I, A. B., in the presence of the two under-mentioned witnesses, do give all my goods and chattels to M. D., of ———, spinster."

In such case it was held: "That, as the paper bore upon its face no evidence of its being intended to be testamentary, but it rather appeared, both from its contents and from the

evidence dehors (though the latter was rather conflicting), to have been intended as a present gift, probate ought not to be granted."

On the other hand, in a note to the above, we find the following reference to the case ⁵⁴³ of *Morrell v. Dickey*, 1 Johns. Ch. (N Y.) 153, viz.: "The following letter, addressed to a friend, was held to be good and valid as a will: 'A thousand accidents may occur to me [the writer was about sailing for the West Indies] which might deprive my sisters of that protection which it would be my duty to afford, and in that event I must beg that you will attend to putting them in possession of two-thirds of what I may be worth, appropriating one-third to Miss E. and her child, in any manner that may appear most proper'": 1 Jarman on Wills, 5th Am. ed., pp. 45, 46.

We therefore conclude, upon the record as we find it, that the instrument offered for probate in this case was intended as a last will and testament. We will say, further, that if we had entertained any doubt upon the subject we might, perhaps, have found it necessary to remand the case, since we should find some difficulty in ordering the probate of an instrument which upon its face did not appear to be testamentary either in form or substance, and equal difficulty in deciding a case against a litigant upon an issue that had not been raised in the trial court and concerning which he had had no opportunity of offering evidence.

Considering the objection that the will contains "a prohibited substitution and fidei commissum," it is well understood that an essential requisite to a substitution is that the thing given be tied up in the hands of the first recipient during his natural life (*Beaulieu v. Ternoir*, 5 La. Ann. 476), and counsel for opponents appears to concede that there is no substitution in this case. The fidei commissum is not, perhaps, defined with such precision; but it has been said to differ from the substitution in that (in such case) the charge imposed on the first recipient is to be executed during his life: *Succession of Michon*, 30 La. Ann. 213. A better founded distinction, perhaps, lies in the fact that in a case of substitution the gravatus, or first recipient, and the ultimate beneficiary, both take title to the thing given directly ⁵⁴⁴ from the donor, whilst in the case of the fidei commissum the title vests in the ultimate beneficiary, for whom the first recipient holds and administers the gift as trustee. In the instant case we find that the testator bequeathed his estate absolutely to a particular person, and in legal contemplation

imposed no charge upon him whatever. That he had at some previous time verbally expressed a wish or given an instruction with which he expected his instituted heir to comply is apparent from the language of the will: "Now, do as I told you, at the station, when you left. . . . Do for my children as I said."

So far as the will is concerned, however, such vague references to conversations or understandings between the testator and the legatee amount to nothing more than reminders or appeals by the former to the conscience of the latter.

But by previous understanding between the parties the same thing might have been accomplished by the most trifling mark, scratched on the will, or the turn of a letter, or the dating of the will on a particular day, or the writing of it on a particular kind of paper, either of which devices might have been intelligible to the legatee, but neither of which could be recognized by the courts as part of the testament, being too vague to admit of interpretation: Succession of Trouard, 5 La. Ann. 390; Succession of Shaffer, 50 La. Ann. 601, 23 South. 739; Succession of Bougere, 28 La. Ann. 743.

In a case of this kind we think there can be no doubt that evidence dehors the instrument is admissible for the purpose of ascertaining whether the legatee named is a person interposed and charged to deliver the property to others whom the law declares incapable of taking (or of taking beyond a certain proportion) directly from the testator, since the question involved is one of ⁵⁴⁵ public policy and fraudem legis. Such evidence was considered, as of course, in the case of *Badillo v. Tio*, 6 La. Ann. 129. In the case at bar, however, the opponents rely exclusively upon presumptions arising from the following circumstances (as stated in the brief of their counsel), to wit:

"(1) Billis had legally acknowledged his illegitimate children.

"(2) He gave them, during his lifetime, seventy-four acres of land.

"(3) He was devotedly attached to them, and had his wife promise to receive them at his house.

"(4) He wrote, just before his death, that he was going to kill himself, because she would not permit them to come to his house, and he had been unhappy with her for ten years of marriage.

"(5) He disliked his brothers, and did not want them to inherit one cent from him.

“(6) Morat, the alleged universal legatee, was his cousin, not his nephew.

“(7) The said Morat was a mere youth.”

Another circumstance relied on is that, a few months after the date of the will here offered, and the day before his death, Billis attempted to make a will leaving his property to his children (who were colored as well as illegitimate) and his cousin, Morat, in equal proportions. From these circumstances the learned counsel argues that: “If the letter to Morat did not contain the secret charge to transmit his property to his children, then he left them nothing. Yet all his affections were centered upon them. His ten years of marriage were so much of misery and unhappiness, as he said himself. He had no love for his brothers, and would give them nothing. Morat himself was only a distant cousin of his. It is impossible to believe that he intended to go to his grave and leave absolutely nothing to his children. Only one conclusion is admissible, and that is the fidei commissum.”

There is a great deal of force in this argument—all the greater since it must be conceded that proof of fraud is in all cases mainly dependent on presumptions arising from the circumstances, surroundings and influences naturally operating on the minds of those by whom the fraud is supposed to have been committed. But there is something to be said on the other side. Billis, ⁵⁴⁶ as has been stated, had already given his children seventy-four acres of land that we know of, and, conceding that he was devotedly attached to them, it may fairly be presumed that he had given them a good deal more, of which we are not informed. He was estranged from his brothers, who live in France (whence he came), and, so far as the record shows, had no relatives in this country save Morat and Morat's parents. Morat appears to be an intelligent, well-educated young gentleman, who was studying medicine at the date of the letter (and will) here in question, and he testifies that, though he and Billis were cousins (he does not use the word “distant”), the latter always appeared to be attached to him and called him his “nephew.” Billis himself was a man of so little education that he could not correctly spell the simplest words in his native language. He had, as he himself says, in one of the papers offered by opponent, so far lost caste in the community in which he lived that he had no friends, and, being estranged from his brothers, it appears to us not improbable that he found in Morat, as his blood relative, and the equal, socially and otherwise, of his neighbors, a person in whom he could feel an

honest family pride, and upon whom he could lavish his affections without shame. It may be, therefore, that when he wrote to Morat, "Do for my children as I have said," he was merely reminding him of some previous request or instruction to the effect that he should aid them in the management of their affairs and encourage them in decent living, and the presumption that he could have meant nothing but that Morat was to turn over to them the property which had been left to him is therefore not inevitable. In the somewhat similar case of *Badillo v. Tio*, 6 La. Ann. 129, a similar presumption was invoked, and the court said: "These circumstances raise a violent presumption that the defendant was not the real object ⁵⁴⁷ of the testator's bounty. The fact of interposition involving a question of fraud, there is no doubt that it may be proved by simple presumptions. But there must be several presumptions leading to the same conclusion, and, in order to make proof, they must all be 'graves, precises et concordantes': Civ. Code 1842, art. 2267.

"The presumptions to which we have referred would not be sufficient to prove the interposition alleged. But, if they are corroborated by the acts and conduct of the defendant, after the death of Macarty [the testator], no reasonable doubt of his interposition can exist."

And the opinion then goes on to show that the presumptions were corroborated by the fact that the legatee turned over the property bequeathed to him to the person for whom it was really intended.

Upon the other hand, the doctrine is well established that the proponent, in a case such as this, starts with the presumption in his favor that the testator intended a lawful, rather than an unlawful, thing: *Cole's Widow v. His Executor*, 7 Mart., N. S., 414, 18 Am. Dec. 241; *Roy v. Latiolas*, 5 La. Ann. 552; *State v. Executors of McDonogh*, 8 La. Ann. 171; *Succession of Theurer*, 38 La. Ann. 510.

We therefore conclude that the fidei commissum alleged by opponents has not been proved, and the judgment appealed from is accordingly affirmed.

Holographic Wills are discussed in the note to *Estate of Fay*, 104 Am. St. Rep. 22.

What Constitutes a Testamentary Writing is the subject of a note to *Ferris v. Neville*, 89 Am. St. Rep. 486. A private letter, testamentary in character, wholly written, dated and signed by the testator, requesting an answer from the addressee, and that the latter should keep the contents of the letter private, is a valid holographic will, although never answered, and although the testator lived several months after writing it: *Buffington v. Thomas*, 84 Miss. 157, 105 Am. St. Rep. 423.

CROSSETT v. CAMPBELL.

[122 La. 659, 48 South. 141.]

FALSE IMPRISONMENT, What does not Constitute—Restraints, When Deemed Voluntary.—Plaintiff entered upon grounds which were lawfully in possession of schoolboys, who were giving a free picnic, and who had given notice, in advance, that later in the day a game of baseball would be played, to which a trifling admission fee would be charged. When the game was about to begin he refused, though repeatedly requested so to do, to pay the fee or go out, and he was thereupon taken by the arm by a citizen—one of the assembled guests or patrons—acting in behalf of the boys, though without special authority, and led in the direction of the gate, always with the privilege of paying and staying, and the alternative of not paying and going. Before reaching the gate, he paid the fee, and thereafter stayed and witnessed the game. Held, that the restraint imposed was not total, and did not render it impossible for plaintiff to stay where he was or otherwise control his movements; that, being at all times able to release himself on payment of the fee, for which, if he stayed, he was morally and legally bound, the restraint imposed on him, merely as a means of his ejection, until he elected to pay, was the result of his voluntary persistence in an unlawful act, did not deprive him of “free egress,” and affords no ground for an action in damages for false imprisonment. (p. 367.)

(Syllabus by the court.)

John Henry Mathews, for the appellant.

Casimir Moss, for the appellees.

660 MONROE, J. This is an action for damages in which plaintiff appears before this court as appellant from a judgment rejecting his demands.

He states his supposed cause of action by alleging that: “Petitioner was in company with his wife and friends on an open lot, in the village of Dodson, . . . behaving himself, in every respect, as a good citizen should do; . . . that, while so situated, J. W. Campbell, the marshal of the town, . . . and W. C. Johnson, acting in conjunction with and aiding and assisting each other, did, with force and arms, unlawfully arrest, detain, and imprison your petitioner by seizing hold of your petitioner’s body and drawing a deadly weapon on your petitioner, and, in this manner, dragged your petitioner through a large assembly of people congregated there, and did in this manner forcibly detain petitioner, against his will, for some considerable time; . . . that there never did exist any warrant or legal process whatever authorizing either the said J. W. Campbell or the said W. C. Johnson to take petitioner in their custody or to detain or imprison him; . . . that said acts furnish an instance of false imprisonment for which they should be held liable in solido;

. . . . that, on account of said false imprisonment, he has suffered damages in the sum of three thousand dollars; and he prays judgment against the defendants in solido."

An exception of no cause of action was filed and overruled, and, defendant having answered, the case was tried on its merits, developing the following facts: The boys of the Dodson High School, having decided to celebrate their commencement by giving a public picnic, to be followed in the afternoon ⁶⁶¹ by a game of baseball, secured from the Tremont Lumber Company the use of certain ground, owned by the latter, from which they removed the stumps and other obstructions, and which they inclosed by encircling it with a rope and a wire. No charge was made for participation in the picnic, but, in order to provide balls and bats, and to aid in paying the expenses of the visiting, Winnfield, High School team, the Dodson boys found it necessary to charge a fee of twenty-five cents to those who chose to remain, or to come, after dinner, within the inclosure and witness the baseball game, and notice of their intention in that respect was published in the Dodson paper, and was also served on many of the citizens by means of postal cards, plaintiff being one of those to whom such a card was mailed. He, however, seems to have conceived the idea that the charge was an imposition, and, before going to the grounds, announced his determination not to pay it. He says in his testimony: "About 2 o'clock the professor got up on a stump and announced for everybody to go down to the gate so that they could collect their twenty-five cents. Most of the ladies went, and a good lot of men. Some of them stood around and did not go."

Plaintiff's wife was one of the ladies who "went." She gave the gatekeeper ten cents, and told him she would give him the remaining fifteen cents (to make up the twenty-five cents for her admission) before she left the grounds, and her assurance was accepted, without discussion, as satisfactory. Plaintiff, though he had in his pocket more than enough money to pay the charge, was one of those "who stood around and did not go." In that situation appeals were made by the boys to plaintiff, and to those who assumed a like position, either to pay or to go out, and most of them did one thing or the other. Plaintiff did neither. One of the boys, being asked, "What did you propose to do if a person came on the ground that day and did not want to pay a fee," replied, "We did not think that anyone ⁶⁶² would want to run over us in that way. . . . Didn't think very much about that."

Campbell, the marshal, had had a talk with the mayor, in which the latter had expressed the opinion that no one could be arrested or otherwise dealt with under the town ordinances for refusing to pay the admission fee, and the marshal, acting on that opinion, contented himself with merely appealing to the recalcitrants either to pay or go out. He says he explained to plaintiff and others why the charge was made, and told them, "I believe I would pay or just go out, and not create any contrariness." He did nothing more. Johnson, a citizen of the town and a friend of the boys, seems rather to have urged the matter upon the few who persisted in holding out, and, it being said by some of them, "Everybody has gone out except that Dodson fellow [referring to plaintiff], and if he will go out we will go out too," he approached plaintiff, who had already been appealed to several times, and, at this point, there is some variance in the testimony. One or two witnesses say that Johnson asked plaintiff whether he had paid; that plaintiff replied that he had not; that Johnson then requested him to go to the gate, and took him by the arm; that plaintiff resisted, slightly, at first, and then walked in the direction of the gate, all the witnesses agreeing that he settled the matter by paying before reaching the gate. Plaintiff says that Johnson asked if he had been to the gate; that he replied, "No, my wife has made arrangement"; that Johnson then said, "Consider yourself under arrest for resisting an officer," and grabbed him by the arm; that he "finally got loose, . . . was not trying very hard, and, when he did, Johnson grabbed him again," and "threw his hand back like he was going to pull a gun"; that he (plaintiff) said, "You can't arrest me, for I am not bothering you"; that Johnson said, "Pay up, then, pay up," and that he went with Johnson for a distance of some seventy-five yards, ⁶⁶³ when he paid up and was released. Johnson says: "I said, 'Mr. Crossett, everybody has gone out but you, and it don't look nice for you to stay'"; and I said, "If I was you, I would go out, and act nice about it," and he said "My wife paid," and I said, "Did she pay for you?" and I asked Mrs. Crossett did she pay for him, and she said, "No"; and I said, "Crossett, you will have to go out and (or) pay," and I took him by the right arm and started and he said he would go, and then he stopped and asked me if I was going to take him to the calaboose, and I told him, "No." We went to the other side of the cold drink stand, which I reckon was twenty or thirty steps—I guess it took about twenty or thirty seconds—and

he said, "Hold on, I will pay you my quarter, and I will prosecute you." Plaintiff thereupon produced a dollar, from which the gatekeeper, who came up at the moment, gave him seventy-five cents in change, and the matter ended, plaintiff returning to his wife and remaining, without further disturbance, to witness the game. A witness by the name of Dean says that Johnson had a pistol in the rear pocket of his trousers, and partly drew it out at one time, but it is shown beyond question that he was in his shirt sleeves and was wearing linen trousers, and several witnesses testify that they saw no pistol and that they could not very well have helped seeing it if he had had one. Johnson himself swears that he had no pistol.

It will be observed from the foregoing statement of the facts of the case, as disclosed by the evidence, that instead, as he alleges, of being on "an open lot," plaintiff, at the time of the incident out of which this suit arises, was upon a lot, the use and enjoyment of which had been granted by the owner to the Dodson High School Baseball Team, which the members of that team had cleared of stumps and other obstructions, and had ⁶⁶⁴ inclosed, or partially inclosed, with a wire and rope for their own purposes, and of which they were in full possession; and that, instead of his "behaving himself, in every respect, as a good citizen should do," he was engaged in a most unreasonable and wrong-headed interference with a lot of schoolboys and other persons who were exercising, innocently, their legal right to amuse and be amused, upon property over which, for all the purposes of this case, they had absolute control. It will also be observed that, whereas plaintiff alleges that "on account of said false imprisonment" he suffered the damages for which he prays judgment, the facts are that he was given the alternative of staying where he was upon complying with a condition rightfully imposed, or of removing himself from premises where otherwise he was an intruder and a trespasser, and that, upon his refusal to do either the one thing or the other, he was in course—not of being imprisoned upon but—of being ejected from, the premises (with the privilege reserved to him of remaining where he was, on complying with the required condition, or of going elsewhere, without so complying, as he pleased), when he concluded to comply with the condition, and the trouble ended. There was, therefore, never an instant of time during which his release from the restraint imposed upon him was not entirely within his own

control, and might not have been accomplished by his paying the trifling amount of money demanded of him, and he was never restrained from doing anything, save the unlawful thing of remaining upon the boys' playground, against their wishes, in violation of their rights, and to their disturbance and the disturbance of their assembled guests. Our law (Rev. Stats., sec. 796) imposes a penalty for "false imprisoning," but does not define the offense. It is elsewhere defined as follows: "False imprisonment is the unlawful and total restraint of the liberty of the person."

665 The right violated by this tort is "freedom of locomotion. It belongs, historically, to the class of rights known as simple or primary rights (inaccurately called absolute rights), as distinguished from secondary rights, or rights not to be harmed. It is a right in rem; it is available against the community at large. The theory of the law is that one interferes with the freedom of locomotion of the other at his peril. . . . The right of freedom of locomotion is violated when one is wrongfully detained against his will, or is in any way deprived, as distinguished from obstructed or subjected to inconvenience, of his right to come, or go, or stay, when and where he wishes. Some conduct imposing restraint or detention is essential, but any conduct resulting therein is sufficient. It is the unlawful interference with the wish or desire of plaintiff which the law seeks to compensate. Free egress must therefore be impossible; the restraint must be total": 19 Cyc., pp. 319, 322.

A note to the paragraph last above quoted reads: "If plaintiff is free to go where he wants, he cannot sustain an action of false imprisonment; if he is prevented from going where he may have a right to go, a mere partial obstruction to his will may be the basis of some other form of action, but not of the one here under consideration: *Bird v. Jones*, 7 Q. B. 742; . . . *Stevens v. O'Neill*, 51 App. Div. 364, 64 N. Y. Supp. 663. . . .

"There is no legal wrong unless the detention was involuntary": 19 Cyc., p. 323.

A note to this paragraph reads: "One who submits to arrest and imprisonment rather than pay a small license fee, illegally exacted, but which he might have recovered back, without serious injury or damage, has no cause of action: *Cottam v. Oregon City (C. C.)*, 98 Fed. 570."

And again we find that it has been held that: "When the contest is for possession of personal property, and there is no

intent to detain the person, false imprisonment is not made out: McClure v. State, 26 Tex. App. 102, 9 S. W. 353."

Applying the definition and interpretation thus given to the case at bar, it will be noticed ⁶⁶⁶ that free egress from the baseball grounds was at all times possible to the plaintiff, and that Johnson's purpose was, not to imprison him in the grounds, but to eject him from them, though the privilege was accorded him of remaining there on his complying with a reasonable and lawful condition, and that it was entirely and at all times within his power to release himself from the restraint incidental to his proposed ejection by the payment of the admission fee, for which, if he stayed, he was morally and legally bound. Such restraint was therefore of his own doing, and was not involuntary.

It is said that the defendant, Johnson, should be held liable in any event, because, disclaiming, as he does, authority either from the marshal or the boys, he was without right, as an individual, to interfere in the matter. It might, perhaps, be answered that an individual has the right to interfere where a breach of the peace or a misdemeanor is committed, or threatened, in his presence, and that, apart from the fact that plaintiff was unlawfully disturbing the boys in their enjoyment of the premises in question—a course of conduct the tendency of which was to provoke acts of violence—he was, by his unauthorized presence, disturbing and invading the rights of a peaceful assemblage of which Johnson was a member, in violation of a statute which denounces such disturbance as an offense punishable by fine and imprisonment: Rev. Stats., sec. 929.

We, however, prefer to base the decision upon the ground first stated, to wit, that the restraint of which plaintiff complains was voluntary, in that it always rested with him to terminate it by desisting from the doing of an unlawful act, and that "free egress" was always open to him.

Judgment affirmed.

What Constitutes False Imprisonment is the subject of a note to *Hebrew v. Pulis*, 118 Am. St. Rep. 719.

LEE LUMBER COMPANY v. HOTARD.

[122 La. 850, 48 South. 286.]

TIMBER, Sale of "Merchantable" not Void for Uncertainty.—

A contract for the sale of all merchantable pine timber, measuring ten inches in diameter and over, on a described tract of land, was not void for uncertainty, the word "merchantable" being used to describe the grade or quality of the thing sold, and determinable by experts with approximate certainty. (p. 370.)

TIMBER, Sale of, When not Void as Being Uncertain as to

Price.—A contract for the sale of standing timber on certain described land for one dollar per thousand feet, to be paid in cash, or vendor's option of equivalent value, by the vendees on the fifteenth day of the succeeding month for all timber cut during any month, imposed an obligation on the vendees to cut, haul and scale the timber, and was therefore not objectionable for uncertainty as to the price. (pp. 370, 371.)

TIMBER, Contract for Sale of, When not Void Because of a

Provision as to the Manner of Paying the Purchase Price.—Where a contract for the sale of standing timber required payment in cash "or vendor's option of equivalent value," such clause should be construed to mean only that payment should be made in cash unless vendor chose to accept something other than cash of equivalent value if offered him by the vendee, and did not render the contract uncertain as to the price as giving the vendor the right to demand something other than money in satisfaction of the debt, and as so construed, the clause was mere surplusage. (p. 371.)

TIMBER—Contract for Sale of not Enforceable by Specific Performance is Still Obligatory.—The fact that specific performance of a contract for the sale of standing timber could not be enforced did not deprive the contract of its obligatory character. (p. 371.)

TIMBER, Sale of, When not Void Because for Lump Sum.—

Revised Civil Code, article 2458, providing that when produce or other objects are not sold in a lump, but by measure, the sale is not perfect, inasmuch as the thing so sold is at the risk of the seller until measured, but the buyer may require either the delivery of them or damages, if there be any, in case of nonexecution of the contract, is applicable to a sale of standing timber, the title to which does not pass until it has been cut. (p. 371.)

TIMBER, Sale of, When Valid as Against Third Persons.—

A contract of sale of standing timber of certain dimensions on described land for a specified price per thousand feet, to be paid on the fifteenth day of the month succeeding that in which the timber was cut, constituted a valid sale of the timber, and, being recorded, was valid as against third persons. (p. 371.)

TIMBER, When Real Property.—

Trees continue to be real estate, after they are sold apart from the land, until severance. (p. 372.)

INJUNCTION and Attorneys' Fees.—Defendant is not entitled to counsel fees for dissolving an injunction, where the services of his counsel were rendered exclusively on the trial of the case on the merits. (p. 372.)

(Syllabi by the court.)

Robert P. Hunter & Sons and W. C. and J. B. Roberts, for the appellants.

Blackman & Overton, for the appellee.

852 PROVOSTY, J. By a contract dated October 14, 1906, and recorded October 22, 1906, J. N. Thornhill sold to plaintiff a certain tract of land, including the timber thereon; and by another contract dated September 24, 1906, and recorded on the same day, he sold to plaintiff all the timber upon another tract. He had previously entered into the following agreement with reference to the same timber.

“Buckeye, P. O., La., August 16th, 1905.

“State of Louisiana, Parish of Rapides.

“Know all men by these presents and this instrument that I, J. Newton Thornhill, of the first part, a resident of Buckeye, P. O., Rapides parish, Louisiana, agree and covenant with J. N. Graves and J. L. Head, parties of the second part and residents of Buckeye P. O., Louisiana, as follows, to wit:

“Party of the first part bargains and sells to parties of the second part, their heirs and assigns, all merchantable pine timber measuring (10) ten inches in diameter and over, on the following tract of land, to-wit:

“E. $\frac{1}{2}$ N. E. $\frac{1}{4}$, E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Sec. 6 T. S. 4 N. 3 East La. Mer.

“This for and in consideration of one dollar (\$1.00) per thousand feet, which sum is to be paid in cash or vendor's option of equivalent value by parties of the second part to parties of the first part in the following order: All timber cut, hauled and scaled in a given month up to and including the last day of the month, shall be payable on the 15th day of the succeeding month, this giving parties of the second part 15 days grace on each monthly settlement, and further that the agreement shall be in force from date until (10) ten years after date.

“This acknowledges the receipt of one dollar by party of the first part as a part payment in advance.

“[Signed] NEWTON THORNHILL.

“J. N. GRAVES.

“J. L. HEAD.

“Witness:

“I. D. REYNOLDS.

“S. C. GREER.”

This agreement was recorded September 18, 1905.

Graves and Head, the parties with whom this agreement was made, purchased a sawmill already on the land, and began cutting and sawing the timber. They cut and sawed one hundred and twenty-five thousand feet for which they paid Thornhill at the agreed price of one dollar per thousand.

In November or December, 1905, they left the place, and went to the adjoining parish ⁸⁵³ of Avoyelles. They took away the whistle and belting of the sawmill and shortly afterward the saw. In March, 1906, they sold the sawmill to the International Lumber Company, and transferred to said company all their right, title and interest under the said agreement; and on October 11, 1906, this company made a similar sale and transfer to the defendant. These transfers were recorded the day following their respective dates.

When the defendant Hotard attempted to cut the timber in accordance with this agreement, the plaintiff by the present suit enjoined him from doing so.

Plaintiff contends that the foregoing agreement with Graves and Head does not evidence a binding contract, and that consequently Thornhill was at liberty to disregard it and sell the timber to some one else.

In support of this it is said that there is no certainty in the thing sold, because only the merchantable timber is sold, and no rule is furnished by which to determine which part of the timber is not merchantable; and evidence is offered to the effect that experts will disagree with regard to the merchantability of any particular timber.

In answer to this, we will say that the word "merchantable" is commonly used in sales in describing the grade or quality of the thing sold, and that no one has heretofore thought of suggesting that the object sold was thereby made so uncertain as to invalidate the contract. There can be no question that experts can determine with approximate certainty the merchantability of timber—they are doing it every day—and the parties to this contract must be understood to have intended that such approximate certainty should answer the purpose of their contract. It must be assumed that they thought that there would not likely be any disagreement if the contract were carried out in a spirit of fairness on both sides, and ⁸⁵⁴ that in the contrary case the courts could decide.

In this connection, the present case differs toto calo from that of *Werner Sawmill Co. v. O'Shee*, 111 La. 817, 35 South. 919, in which the agreement was that the parties themselves—in other words, not the courts—should name the experts, and one of them refused to do so, thereby rendering the contract impossible of execution.

It is next argued that there is uncertainty also as to the price, because the object sold is not all the merchantable timber upon the land, but only that part of it which Graves

and Head or their assigns may cut, without there being any obligation on their part to cut any.

We think there is an obligation on the part of Graves and Head to cut, haul and scale the timber. After having signed an instrument by which they bought timber to be paid for when cut, hauled and scaled, they could not be heard to deny that they were under obligation to cut, haul and scale the timber. The contract manifestly contemplated that the timber should be cut, hauled and scaled by them; and, by signing it, they assumed that obligation.

The broad distinction between such a case and those of *Union Sawmill Co. v. Lake L. Co.*, 120 La. 106, 44 South. 1000, and *Thompson v. Union Sawmill Co.*, 121 La. 318, 46 South. 341, is that in the latter cases the contract, for one thing, was not signed by the vendee, and, for another, became void for nonaccomplishment of one of its conditions.

The price is said to be uncertain for the further reason that the stipulation is that it is to be paid "in cash or vendor's option of equivalent value."

Of course, if the clause "or vendor's option of equivalent value" were given the meaning that the vendor was to have the right to demand of the vendee something other than money, there would be fatal uncertainty⁸⁵⁵ in the price. But that clause, as we read it, means nothing more than that the payment should be in money, unless the vendor chose to accept something else of equivalent value if offered him. As thus read, the clause is mere *brutum fulmen* and surplusage. The clause could not possibly be accepted as written, because as written it would mean that the vendor was to have the right to exact from Graves and Head in payment of the timber any and whatever they might own of equivalent value to the timber; for instance, to put an extreme case, that he might thus demand the very shirts from their backs.

The circumstance that specific performance of the contract could not be enforced—if such were in fact the case—would not deprive the contract of its obligatory character. It is more the exception than the rule when specific performance of contracts can be enforced.

Nor is the circumstance that in case the trees perished the loss would fall upon Thornhill to test the existence vel non of a contract, and of the contract being a sale. Article 2458, Revised Civil Code, provides for just that kind of a sale. It reads: "When goods, produce, or other objects, are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk

of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery of them or damages, if there be any, in case of nonexecution of the contract."

The principle embodied in this article is equally applicable to a sale of trees which are not to pass into ownership of vendee until they have been cut down.

We say nothing of the lease by Thornhill to Graves and Head, as it was recorded after the sale to plaintiff, and is not insisted on in defendants' brief.

The point is not discussed in the briefs whether the contract, conceding it to have been valid and to have been a sale, had the effect of transferring the ownership of the ⁸⁵⁶ trees, or, if not, whether it had the effect of creating a right upon them such as would follow them into the hands of any third person to whom Thornhill might sell them. Waiving the point whether a sale by weight, tale or measure conveys the ownership before the thing sold has been weighed, counted or measured, we think that such a sale as the one in question in this case has all the effects of a promise of sale, and that a promise of sale of real estate follows the thing into the hands of third persons. By recent statutes, trees continue to be real estate after they are sold.

The services of counsel having been rendered exclusively upon the trial of the case on the merits, defendant is not entitled to counsel fees for dissolving the injunction. The other damages could only have been very small, and the claim for them is not seriously pressed.

It is ordered, adjudged and decreed that the judgment appealed from be set aside, and that there be judgment in favor of defendants and against plaintiff dismissing plaintiff's suit, and setting aside the injunction herein, and that plaintiff pay all costs.

Sales of Timber are discussed in the recent note to *Wilson etc. v. Alderman*, 128 Am. St. Rep. 868.

CASES
IN THE
SUPREME COURT
OF
MAINE.

CUTTING v. HARRINGTON.

[104 Me. 96, 71 Atl. 374.]

THE RETURN OF AN EXECUTION is not Necessary to Sustain an Execution Sale. The purchaser has no control over the officer and is not prejudiced by a deficient or incorrect return, nor by the entire absence of any return. (p. 375.)

EXECUTION SALE—Sheriff's Deed as Evidence.—The giving of the notice of a sale under execution, and how given, may be proved, *prima facie* at least, by the recital in the officer's deed to the purchaser. (p. 375.)

EXECUTION SALE of Lands, Difference Between and Their Transfer by Extent.—The decisions respecting the officer's return and the transfer of lands by extent requiring the returns of the officer's doings to be drawn with fullness and exactness, and not aided by inferences and presumptions, are allowed little, if any, force, and do not control, where lands are sold under execution at a public sale and after ample notice. (p. 375.)

EXECUTION SALE—Notice to Debtor, When Sufficiently Appears.—If the statute requires that the officer about to make an execution sale shall give written notice to the debtor of the time and place of sale, in person or by leaving it at his last and usual place of abode, and when the debtor is not a resident of the county, that the notice may be forwarded by mail, postage prepaid, the recital in a sheriff's deed that he sent the debtor a written notice by mail sufficiently establishes the notice. Taking into account the legal presumption as to the correctness of the action of a public officer, the inference must be indulged that he paid the postage. (p. 376.)

Real action to recover property which at the death of Thomas M. Reed vested in his three sons, Edwin, Franklin and Andrew. The defendant claimed to have succeeded to the title of the two latter, and whether he had done so or not depended on the validity of two execution sales. The objections to these were founded on the assumption that it did not sufficiently appear that the judgment debtors had been given notice of the times and places of the sale. The execution

against Andrew was never returned to the clerk's office, nor was there any evidence that any return had been made thereon. The return on the execution against Franklin was to the effect that the officer "sent to said Franklin Reed a notice in writing that said right, title and interest would be sold at public auction," etc. The sheriff's deeds recited the sending to the respective judgment debtors of "written notice by mail," etc.

The statute prescribing notice when real estate was to be sold in execution, being section 33, chapter 78 of the Revised Statutes, is as follows: "The officer in such case shall give written notice of the time and place of sale, to the debtor in person, or by leaving the same at his last and usual place of abode, if known to be an inhabitant of the state, and cause it to be posted in a public place in the town where the land lies, and in two adjoining towns, if so many adjoin; and if the land is situated in two or more towns, then in each of those towns, and in two towns adjoining each of them; and if the land is in two or more counties, an officer in either county may sell the whole right. When the land is not within any town, the notice shall be posted in two public places of the shire town of the county in which the land lies, instead of the posting aforesaid. When the debtor is not a resident of such county, the personal notice may be forwarded to him by mail, postage paid; all to be done thirty days before the day of sale. The notice shall also be published for three weeks successively before the day of sale, in a newspaper printed in whole or in part in such county, if any, otherwise in the state paper."

The case was reported that such judgment should be rendered as the law and evidence required.

Staples & Glidden, for the plaintiffs.

George E. Hughes, for the defendant.

99 EMERY, C. J. Real action on report. The controversy is over two undivided thirds of the demanded land which the defendant claims under levy of execution. The judgment and the execution are admitted to be valid. The levy was by sale of the land under what is now Revised Statutes, chapter 78, section 32 et seq. The only objection urged against the validity of the sale and its efficacy to pass the title to the purchaser is that there is not sufficient legal evidence that the officer gave to the judgment debtor the notice of sale provided by the statute.

The plaintiffs claim that the only competent evidence of such notice is the return of the officer upon the execution, which return in this case may be conceded, *arguendo* at least, not to show sufficient notice. But as was said by this court in *Caldwell v. Blake*, 69 Me. 458, at page 470: "Where an extent is made upon lands, the return of the officer must be seasonably made and recorded. Not so where property is sold upon execution. The statute does not require it, and the decisions are that 'the purchaser's title is not dependent on the performance of this duty by the officer. The purchaser has no control over the officer, and is not prejudiced by a deficient or incorrect return, nor by the entire absence of any return whatever.' " The giving the notice of sale, and how given, may be proved, *prima facie* at least, by the officer's recitals in his official deed to the purchaser: *Wigmore on Evidence*, sec. 1664.

In his official deed in this case the officer recited that he "sent to the (judgment debtor, naming him) a written notice by mail" of ¹⁰⁰ the time and place of sale, the debtor not being a resident of the county in which the land lay. The statute (section 33) provided that in such case the notice might be "forwarded to him [the debtor] by mail, postage paid." The plaintiffs contend that, even if the recitals are evidence, the omission of the words "postage paid" from the recital is fatal, and that because of that omission the purchaser acquired no title.

In cases of levy upon land by extent (where, instead of being sold at public sale after public notice, the land was transferred direct to the judgment creditor, as was formerly the practice in Maine and other New England states), it was generally held that the officer's return of his doings must be drawn with fullness and exactness. Inferences and presumptions were allowed little, if any, force. Such has been the rule of construction in this state in such cases. We do not think, however, that those decisions control the decision of cases like this, where the land is sold at public sale after ample public notice. Indeed, it is very generally held in the other states that when a sale upon execution is actually made and a deed executed and delivered to the purchaser, no evidence of notice of the sale having been given need be adduced by him in support of his title. In *Freeman on Executions*, third edition, section 286, the learned author, with many citations of authorities, says: "A very decided preponderance of the authorities maintains this proposition: that the statutes requiring notice of the sale to be given are di-

rectory merely, and that the failure to give such notice cannot avoid the sale against any purchaser not himself in fault. This rule has been applied in cases where the purchaser was aware of the deficiency of the notice, and seems applicable in all cases in which the absence of the notice was not occasioned by some fraud or collusion of which the purchaser had notice, or in which he participated." The theory seems to be that, while the officer is responsible to any party harmed by the absence or insufficiency of the prescribed notice of sale, the sale itself cannot be collaterally avoided thereby: Freeman on Executions, 3d ed., sec. 339. The purchaser at an execution public sale, or his grantee, is not in the same relation to the judgment debtor as is the judgment creditor taking the debtor's land direct to himself by extent. Their titles ¹⁰¹ are different in origin and nature. The purchaser may have the benefit of reasonable inferences and presumptions in reading the officer's recitals of his doings without conflicting with the strict rule in cases of levy by extent: Freeman on Executions, sec. 339. Thus in *Wood v. Morehouse*, 45 N. Y. 368, where one question was whether the officer had given the proper notice of an execution sale, the court held that, in the absence of evidence to the contrary, it was to be presumed, under the maxim "*Omnia praesumuntur rite esse acta*," that the officer gave the proper notice. Other cases to the same effect are cited by Freeman in the section 339 above cited.

In this state, also, the strict rule applied to returns of levy by extent has been relaxed in cases of levy by sale. In *Bailey v. Myrick*, 50 Me. 171, the statute required the notice of sale to be published in some "public newspaper." The officer returned that he had published the notice in "a newspaper," omitting the word "public." The court held that it sufficiently appeared that the statute was complied with, that the word "newspaper" imported publicity. In *Millett v. Blake*, 81 Me. 531, 10 Am. St. Rep. 275, 18 Atl. 293, the judgment debtor was described in the execution as residing in Lagrange. In his recital of sending a notice by mail, the officer did not state that he directed it to the debtor at Lagrange. The court held that such a direction could be inferred, saying (page 535): "Something may be inferred as to the correctness of the action of a public officer when the law requires him to do a certain act."

In the case at bar, as already stated, the statute provided that the notice to the debtor might be "forwarded to him by mail, postage paid." The officer recited he "sent to the

said (debtor) a written notice by mail." Taking into account the legal presumption "as to the correctness of the action of a public officer when the law requires him to do a certain act," as was done in *Millett v. Blake*, 81 Me. 531, 10 Am. St. Rep. 275, 18 Atl. 293, we think it a fair, and even obvious, inference that the officer prepaid the postage. It was at the time (1897 and 1898) well known that under the postal laws and regulations mail matter would not be forwarded without prepayment of postage. It had then, as now, become a fixed habit especially among business men and officials, to prepay postage by means of affixing a stamp. Anyone ¹⁰² then asserting he had "sent by mail" a letter or document would have been universally understood as asserting that he had done everything required to insure its being forwarded, including prepayment of postage as well as depositing the letter in the proper postoffice receptacle. If convinced that in fact he had not prepaid the postage, he would have retracted his assertion that he had "sent" the letter. The single word "mailed," as used by a notary in his certificate, is held to imply that the requisite postage was prepaid: *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51. The words "sent by mail" would seem to be of as strong import in any connection,

We find no previous decision of this court in cases of levy by sale compelling us to construe the officer's recitals in this case so strictly and technically as the plaintiffs would have us. In *Pratt v. Skolfield*, 45 Me. 386, where the officer's deed was held defective for want of sufficient recitals, the defects are not stated. Hence, that case is no guide. Even in the cases of levy by extent, no return has been adjudged insufficient because of an omission like this. Granting that the court should be critical in construing official returns to see that all essentials are fully stated, or clearly implied, or presumed by law, yet it would be hypercritical to hold at this day that an official recital by an officer that he had "sent a written notice by mail" does not import that he affixed the usual stamp, thus prepaying the postage (that being his official duty), as well as that he deposited the document in the proper postoffice receptacle.

No other objection is made to the deed or recitals in the deed, and none is perceived. It must be held, therefore, that the defendant has the better title to two-thirds, and that the plaintiff can only have judgment for one-third of the land.

Judgment for the plaintiff for one undivided third only of the demanded land.

The Returns of Officers are discussed as to their conclusiveness in the note to *Reiger v. Mullins*, 124 Am. St. Rep. 756; and they are discussed with reference to their admissibility in evidence in the note to *Driggers v. United States*, 1 Okl. Cr. 167, post, p. 823.

A Recital in the Sheriff's Return on an Execution that the purchase price was paid him by the purchaser named in the deed given at his sale is conclusive of that fact: *Mason v. Perkins*, 180 Mo. 702, 103 Am. St. Rep. 591. A return without date, made on an execution, is presumed to have been made while the sheriff had the right to make it, and in due time: *Rowe v. Hardy*, 97 Va. 674, 75 Am. St. Rep. 811.

FLYNN v. AMERICAN BANKING AND TRUST CO.

[104 Me. 141, 69 Atl. 771.]

CORPORATIONS—Acceptance of Amendment of Charter, When Sufficiently Appears.—The fact that after the enactment of an amendment to a corporate charter the stockholders allowed the corporation to continue in business and exercise new powers conferred by the amendment, and to make contracts, debts and engagements thereunder, is sufficient evidence of their acceptance of the liability imposed by the amendment. (p. 381.)

CORPORATIONS—Stockholders' Liability—Limitation of Actions.—The Statute of Limitations does not Begin to Run Against the Creditors of a Corporation and in favor of its stockholders when the debt or other obligation is contracted, but only when the stockholders become subject to a suit to enforce their liability. (p. 381.)

CORPORATIONS, Debts and Liabilities of and of Their Stockholders.—The creditor's claim is primarily against the corporation and only secondarily against its stockholders. (p. 382.)

CORPORATIONS, Limitation of Actions Against Stockholders, When Commences to Run.—The remedy under the statute to enforce the liability of stockholders does not become perfect, and therefore the statute of limitations does not commence to run, until the assets of the corporation have been exhausted and it has been judicially ascertained in proceedings against the corporation that resort to the statutory liability against the stockholders is necessary. (p. 382.)

CORPORATIONS—Stockholders' Liability, Suit to Enforce, When not Premature.—A suit brought to enforce the stockholder's liability is not premature if a receiver of the corporation has filed his final account showing the disbursement of all his receipts, and it has been settled by a decree declaring the account to be final and to show a complete disposition of the assets of the corporation, and no balance remained in his hands, and there had been a report of the commissioners on claims previously filed and accepted showing the debts of the corporation, and the receiver's report stated how much of the indebtedness of the corporation had been paid. (p. 384.)

CORPORATIONS—Stockholders' Liability for Interest.—The creditors of a corporation have the same right to recover interest of its stockholders, not in excess of their maximum liability fixed by statute, as they would have had against the corporation had it continued solvent and possessed of assets. (p. 385.)

CORPORATIONS—Stockholders' Liability to Interest When the Principal has been Paid.—Though separate actions cannot be maintained against stockholders of corporations for the payment of interest and principal, yet if the principal has been fully paid by dividends resulting from proceedings against the corporation, and its assets have thereby become exhausted, the creditors may maintain a suit against the stockholders for payment of interest. This rule remains applicable although the whole liability for interest accrued during delays in the administration of the insolvent corporation. (p. 385.)

CORPORATIONS—Stockholders or Creditors, Which must Bear Loss Due to a Receiver.—If, through the misconduct of a receiver, assets of a corporation are lost, such loss must be borne by the stockholders rather than by the creditors. (p. 386.)

GUARANTY BY CORPORATION, Demand, When not Necessary.—If, a banking corporation having guaranteed sundry notes, the directors of the corporation vote to stop payment and a sequestration of its assets immediately follows, no demand is necessary to perfect the liability on the guaranty, and interest at once begins to accrue thereon. (p. 387.)

GUARANTY OF CORPORATION, Stockholders' Liability on Though There is No Proceeding Against the Original Promisors.—If a banking corporation guarantees the payment of certain promissory notes, it is not necessary for the holders to proceed first against the original promisors before seeking to enforce the liability of the stockholders. (p. 388.)

CORPORATIONS—Holders of Guaranties of, When not to be Prejudiced by the Action of the Receiver.—If the holders of notes and mortgages guaranteed by a banking corporation after the appointment of a receiver, though it assigned the notes and mortgages to him and permitted him to collect of the makers, and such collections, if properly applied, would have proved sufficient to have discharged the claims under the guaranties, but the receiver turned all collections into the general fund, which was administered by the court and distributed among the creditors, leaving a balance due in favor of the persons holding the guaranties, they are entitled to recover for such balances against the stockholders. (p. 388.)

BANKING CORPORATION—Liability for Deposit on Suspending Business.—When a banking corporation votes to stop business and its assets are sequestered, its deposits become immediately due and payable without any formal demand, and the bank becomes liable for legal interest. (p. 388.)

CORPORATIONS—Holder of Stock as Collateral Security, Liability of.—Persons whose names appear on the stock books and certificates of a corporation as owners of stock are liable as stockholders, though they hold such stock as collateral security only. (p. 389.)

CORPORATIONS—Stockholder Designated as "Trustee," Liability of.—The fact that a person appearing on the books of a corporation as stockholder was there designated as "trustee" does not relieve him from liability to creditors, if there is no evidence that he did not in fact hold such stock as its owner. (p. 389.)

CORPORATIONS—Stockholder's Liability not Dependent on the Time of His Purchase.—All the stockholders of a corporation at the time of its default become liable to its creditors, whether the liability of such stockholders arose before or after the acquisition of their stock. (p. 389.)

Suit in equity by a creditor of an insolvent banking corporation on behalf of himself and all other creditors to enforce the liability of stockholders.

Harry R. Coolidge and Newell & Skelton, for the plaintiff.

W. W. Bolster, Oakes, Pulsifer & Ludden, Reuel W. Smith, John A. Morrill, C. Vey Holman and W. H. Judkins, for the defendants.

¹⁴⁴ EMERY, C. J. The American Banking and Trust Company, a Maine banking corporation, stopped payment by vote of its directors December 22, 1896. Seven days afterward the bank examiner filed a bill in equity against the corporation for the sequestration of its assets and the appointment of a receiver to administer them. Two days later—December 31, 1896—the decree of sequestration was signed and a receiver appointed, who took possession of all the assets of the corporation. These assets were in time fully administered and distributed to the creditors of the corporation. There was no surplus.

The corporation was chartered and began business in 1887 as the Maine Mortgage Loan and Investment Company, but in 1889 it changed its name to American Banking and Trust Company. By an amendatory act (Special Laws of 1889, c. 349) additional powers as a banking company were granted the corporation, and by section 6 of the act its shareholders were made “individually ¹⁴⁵ liable, equally and ratably, and not one for another, for all contracts, debts and engagements of said corporation, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.” The present bill in equity is brought by a creditor of the corporation in behalf of all the creditors against sundry of its shareholders to enforce that liability. The case was heard upon bill, answers, demurrer and evidence by a single justice, who made findings and rulings, and made a decree sustaining the bill and referring the case to a master. No appeal was claimed from his findings of fact, but several exceptions were taken by different defendants to his rulings of law, and the case is before the law court upon those exceptions only. The various exceptions have been exhaustively argued with numerous citations of cases by the several counsel for the defendants and by the counsel for the plaintiff. Of course all the briefs and the cases cited, numerous as they are, have been studied, but to answer every argument and comment on every case cited would consume

so much space and make this opinion so very long, the parties and counsel must be content with our conclusions and briefly stated reasons therefor.

THE EXCEPTIONS TO THE RULINGS OF THE SINGLE JUSTICE.

1. Some of the defendants contend that there is not sufficient evidence that the amendment creating that liability of the shareholders was ever accepted by them. The fact that after the enactment of the amendment the shareholders allowed their corporation to continue in business and exercise the new powers provided in the amendment, and to make contracts, debts and engagements therein authorized, is sufficient evidence of their acceptance of the liability imposed upon them. No shareholder appears to have objected at the time. It is too late to object now after the contracts, etc., have been made: *Stanley v. Stanley*, 26 Me. 191.

2. The corporation stopped payment December 22, 1896. Its assets were sequestered by decree of the court December 31, 1896. This bill was not filed until September 17, 1904. The defendants contend that this suit is therefore barred by the general six year statute of limitations.

¹⁴⁶ Upon the question when the statute of limitations begins to run against a creditor seeking to enforce the statutory liability of shareholders for his debt against the corporation, there have been numerous, various and even conflicting decisions in other jurisdictions, but our duty is to construe our own statute in harmony with our own decisions and with what we think the better reason, even though we come to conclusions different from those of other courts.

Of course the statute of limitations does not begin to run against the creditor and in favor of the shareholder when the debt or other obligation is incurred by the corporation, but only when the shareholder becomes subject to a suit to enforce his liability. When does the shareholder become subject to such suit is, therefore, the determining question. One view is that it is when the corporation fails to pay, or, at least, when its assets are sequestered so it cannot pay. The other view is that it is when the creditor's remedies against the corporation and the assets of the corporation have been exhausted. Under the former view the creditor immediately upon default of the corporation can ignore the corporation and its assets, can pursue the shareholders alone, collect of them his debt against the corporation, and leave them to bring their own suits against the corporation for recoupment, though it might in the end appear that the corporate assets

were ample to pay all the corporate debts, and hence that the suits against the shareholders were unnecessary and vexatious. Individuals and corporations often default for want of ready cash to meet obligations when due, though they have ample assets eventually to pay all their obligations in full. Under the latter view the creditor cannot ignore the corporation, his direct and principal debtor, upon its default, and cannot burden the shareholders with suits until the necessity therefor is shown by an exhaustion of the corporate assets. Evidently the liability of the shareholder is heavier and more severe under the former than under the latter view.

We think the latter view is the correct one to take of the statute imposing the liability in this case. The statute imposes a new liability before nonexistent, and hence if susceptible of more than one construction, it should receive that imposing the lightest burden. ¹⁴⁷ The shareholder is not made liable "on" the contracts, debts and engagements of the corporation, but only "for" them. He cannot be joined in any suit against the corporation on such contracts, etc., because he is not a party to them, nor can the corporation or its receivers sue him, since his liability is not to them or for them, but only "for" the creditors. It is no part of the corporate assets. It is a liability apart and distinct, in origin and character, from that of the corporation. The creditor's claim is primarily against the corporation and only secondarily against the shareholder. The creditor's remedy against him, to use a military metaphor, is a reserve force to be brought into action only when necessary, only when it becomes apparent that the remedy against the corporation has failed.

We hold, therefore, that under the statute in this case the shareholder is not to be vexed with suits, and hence the statute of limitations does not begin to run until the assets of the debtor corporation are fully exhausted, nor until it has been judicially ascertained in proceedings against the corporation that a resort to the statutory liability of the shareholders is necessary.

In so holding we hold nothing new, but are following the reasoning in the cases in this state: *Longley v. Little*, 26 Me. 162; *Hewett v. Adams*, 50 Me. 271; *Morris v. Porter*, 87 Me. 510, 33 Atl. 15; *Gillin v. Sawyer*, 93 Me. 151, 44 Atl. 677; *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714; *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921; *Hale v. Cushman*, 96 Me. 148, 51 Atl. 874; *Abbott v. Goodall*, 100 Me. 231, 60 Atl. 1030. The same view was incidentally expressed by the court in *Maine*

Trust & B. Co. v. Southern Loan & T. Co., 92 Me. 444, 43 Atl. 24, where the court said on page 452: "So must the assets of the corporation be exhausted before this liability be incurred."

It is urged in argument that by such a holding the burdens of the shareholders are increased; that they are disabled from discharging themselves from liability; that the creditors can delay almost indefinitely their proceedings against the corporation and thus prolong the liability of the shareholders against their will. The shareholders, however, are not helpless. They can so conduct the affairs of their corporation that there shall be no default in its ¹⁴⁸ obligations. They can themselves apply the corporate assets to the payment of the corporate debts. That their assets are sequestered and receivers appointed is rather the fault of the shareholders than of the creditors, but even then the shareholders can compel the receivers to proceed with reasonable vigor and speed to a full administration.

In the proceedings against the corporation in this case it was not judicially ascertained until May, 1904, at least, that the corporate assets were exhausted and that a resort to the shareholders was necessary. This bill was filed September 17, 1904, and hence is not barred by the six year statute of limitations.

3. But some of the defendants contend that if the right of action against them did not accrue until it was judicially ascertained that the corporate assets were exhausted, then this bill was prematurely filed. The final account of the receiver was filed May 7, 1904 and showed a full disbursement of all his receipts. On September 13, 1904, this final account was settled, and the court entered a decree that the account, being final and "showing a complete disposition of the assets of the corporation and no balance remaining in his hands, is hereby accepted, approved and allowed." The report of the commissioners on claims had previously been filed and accepted, showing the amount of the debts of the corporation. The receiver's accounts allowed showed how much of the indebtedness had been paid and when. These two amounts had thus been judicially ascertained and declared. It had also been adjudicated that the assets had been fully administered and exhausted. The deficiency of assets, if any, and the amount of the deficiency then appeared of record. There was no need of a further decree of the court to establish a mere mathematical truth. We agree with the single justice that to require such a decree would be finical in the

extreme. This bill, not having been filed until after the decree of September 13, 1904, was not prematurely filed.

4. Upon the appointment of a receiver for the corporation, commissioners were also appointed by the court to determine the claims against the corporation, and were instructed to allow such ¹⁴⁹ interest as would accrue up to the date of the receivership, January 1, 1897. They executed their commission according to those instructions and made their report showing the amounts due at that date. Upon these claims thus allowed, payments were made from time to time by the receiver as he realized from the assets, the last payment being made November 12, 1903. The sum of these various payments only equals the amounts of the debts allowed to be due January 1, 1897. The interest accrued since that date remains unpaid.

The defendants now contend that the shareholder's liability does not extend to such interest. As supporting this contention many cases are cited, but nearly all of them are cases of proceedings against the corporation, and can be eliminated by conceding, *arguendo*, that, as between the creditor and the corporation and its sequestered assets in the hands of its receivers, interest beyond the date of the receivership cannot be recovered unless there are surplus assets after paying the indebtedness of that date; that when the corporate assets are exhausted the remedy against the corporation is exhausted. Moreover, in all these cases it is held that where there is a surplus of assets, it shall be applied to the payment of such interest before any distribution is made among shareholders. When, however, the corporate assets are exhausted and the corporation by a court decree, in pursuance of the statute, is enjoined from transacting any further business, the corporation has become *civilter mortuus*. It has then no legal rights nor liabilities except to formal dissolution. The liabilities of its receivers or other representatives are fully discharged when they have administered its assets. If nothing remains for the payment of subsequent accrued interest, creditors have no remedy against the corporation, its assets or receivers for such interest.

But though the corporation and its receivers may thus be freed from actions by creditors to recover claims for interest or other claims, it does not follow that the contracts, debts and engagements of the corporation have been fulfilled. If the contract, debt or engagement is such that interest accrues for delay in fulfillment, it is not fulfilled until that interest also is paid. Whoever is made ¹⁵⁰ liable by contract or by

statute for those contracts, debts and engagements is made liable for the interest accrued and accruing on them. The liability of the shareholders for them and for the interest on them is not discharged when the corporation is dissolved. It continues until they are fulfilled, interest as well as principal. It was imposed to insure that fulfillment in case the corporation should become defunct before itself fulfilled them. The creditor then acquired the same right against the shareholders to recover principal and interest (of course not in excess of their maximum liability fixed by the statute) that he would have had against the corporation had it continued solvent and possessed of its assets: *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788, 30 L. ed. 864. The cases *Crease v. Babcock*, 10 Met. 525, and *Grew v. Breed*, 10 Met. 569, were suits by bill-holders against shareholders in banks of issue, and were decided upon the ground that the then Massachusetts statute did not provide for interest on bank bills.

The defendants cite from the Maine statute relative to claims against insolvent banks the last clause of section 66 of chapter 47 of Revised Statutes of 1883 (in force when the proceedings against the bank in this case were begun) as follows: "All claims allowed shall bear interest from the time they are filed, provided that the assets in the hands of the receivers are more than sufficient to pay the principal of all the claims allowed and outstanding when the final dividend is declared." The original of this clause is found in Laws of 1872, chapter 86, section 3, which enacts that section 71 of chapter 47 of the Revised Statutes of 1871 "shall not be construed to require the payment of interest on claims against the bank unless the assets, etc." The argument is that that statutory limitation upon the payment of interest is to be read into every contract and obligation of the bank, and hence that its shareholders are entitled to the benefit of that limitation. That statute, however, was designed for banks of issue, where the liability of the shareholders was different in many respects from that imposed by the statute in this case, and was enforceable only by the receivers. But even that statute does not declare the bank's contracts and obligations to be fulfilled by the failure of the bank and the appointment¹⁵¹ of the receivers. It simply limited the powers of the receivers of such banks, and thereby limited the liability of those shareholders. In this case the creditors, and they only, have the right to enforce the liability imposed by its charter upon the shareholders of this corporation. That liability is

for all the contracts, etc., of the corporation. There is no exception nor condition, except that it shall not exceed the par value of their shares.

5. The defendants claim, however, that an action cannot be maintained for interest alone, and hence this proceeding cannot be maintained for interest. It is true that one action cannot be maintained for the principal of a debt and a separate action for the interest. It is also true that when a creditor has accepted payment of the principal in full for his claim or debt, he cannot afterward maintain an action for the interest. The interest is incident to the principal debt and not a separate debt, unless so stipulated in the contract. In this case, however, there has been no action to recover the principal, and there has been no acceptance, nor even offer of payment, of the principal in full for the debt. The proceedings against the corporation were for the sequestration and division of its assets. The sums received by the creditors from those assets were received as dividends, not as payments. They were, of course, applicable to the debts as they were received, but their reception and application entailed upon the creditors no forfeiture of the accruing and accumulating interest.

It is urged that to hold the shareholders responsible for interest accruing during the delays of administration is a hardship upon them. It would be an equal hardship upon the creditors to hold that they must lose the interest, through no fault of theirs. The responsibility for the failure of the corporation, for the necessity, for the sequestration and administration of its assets, and for the delay and expense entailed, is more upon the shareholders than upon the creditors. It is not, however, a question of hardship but of legal right. The enforcement of even unquestioned legal rights sometimes inflicts great hardship, but the court cannot for that reason stay its hand.

¹⁵² 6. Through the misconduct of the first receiver appointed some six thousand five hundred dollars of the assets of the corporation were irretrievably lost. Who must bear the loss—the creditors or the shareholders? We think the loss fell upon the shareholders and that there it must remain. Though the assets were in the custody of the court through a receiver by it appointed and controlled, they were still the property of the corporation and its shareholders, until administered. The loss was their loss even if from causes beyond their control. The risk of that loss they assumed when

they so managed the affairs of the corporation that a receivership became necessary.

7. A demurrer to the bill was filed, but the bill with the amendments allowed by the single justice, read in the light of the foregoing, will show sufficient grounds for its maintenance. The objections to the bill are practically disposed of by the propositions above laid down.

EXCEPTIONS TO THE REPORT OF THE MASTER.

The bill having been sustained, the case was referred to a master to ascertain the amount and nature of the claims of the creditors within the statutory liability of the shareholders, also the names of the shareholders, the number of shares owned by each, and the ratable amount of the liability of each share. Upon the coming in of the report of the master, various exceptions to it were filed, which were all overruled by the single justice and the report accepted. Exception was taken from that ruling.

Some of the exceptions to the master's report are disposed of by propositions already laid down upon the questions above considered. We have therefore only to consider the other exceptions not thus disposed of.

1. Some of the claims were against the corporation as guarantor of certain notes and mortgages sold and assigned by it to purchasers. The guaranty was as follows: "For value received, the within named American Banking and Trust Company hereby guarantees the payment of the within note and interest coupons thereto attached, when due and payable, without notice of any neglect on the part of the payors thereof. The mortgage securing their payment to be ¹⁵³ re-assigned in due form." The promisors having failed to pay at maturity, the holders of these guaranteed notes and mortgages presented their claims therefor to the commissioners, which claims were allowed. It is contended by the defendants that for want of a demand made upon the bank for payment of these notes and mortgages no interest runs against it. We think the vote of the directors to stop payment and the immediately following sequestration of its assets deprived the bank of all right to insist upon a demand. The evident inability and the declared resolution not to pay, if demanded, made a demand useless and therefore unnecessary. All claims due upon demand, including those under the guaranty in question, then became due and payable, and, unless otherwise stipulated in the contract of guaranty, interest began to accrue against the guarantor.

2. It is also contended by some of the defendants that the holders of these guaranteed notes and mortgages should first have proceeded against the promisors. But there was no such stipulation. The guaranty was unconditional, dispensing even with notice of the default of the promisor. The holder could proceed at once against either: *Cooper v. Page*, 24 Me. 73, 41 Am. Dec. 371.

3. After the appointment of the receiver, the holders of these guaranteed notes and mortgages proved against the corporation their claims under its guaranties, and assigned the notes and mortgages to the receiver as they had stipulated to do to the corporation. The receiver collected more or less of them from the makers. Had he paid the proceeds over to the respective holders, they would have been paid in full and thus eliminated from the case. Instead of doing this, the receiver turned all the proceeds into the general fund, all of which was administered and distributed pro rata among all the creditors. The result was that the holders of the guaranteed notes and mortgages only received a partial payment pro rata with the general creditors. Can they be reckoned in this proceeding as creditors for the balance remaining unpaid? This question, so far as appears, is academic rather than practical. If the proceeds had all been paid to the holders, the dividends to the other creditors would have been so much less, and the balance of indebtedness to ¹⁵⁴ them to be paid by the shareholders so much more. The burden upon the shareholders would have been nearly the same in either event. We do not think, however, the holders of the guaranteed notes and mortgages are to be excluded from consideration because of the action of the receiver. He was the bank's representative, performing its duties so far as its assets would permit. The money or other property received upon these notes and mortgages were passed to the general fund as the bank would have done. The court ordered them paid out in dividends to all the creditors. The shareholders made no objection at the time, and it is too late now, the decree having been made, the money paid out, and those proceedings closed.

4. When the bank or corporation voted to stop payment and its assets were sequestered, all its deposits became immediately due and payable without formal demand, except such as were on some specified time which had not then elapsed. Whatever interest the bank had agreed to pay upon these deposits, it became liable for the legal rate of six per cent from and after its default, unless otherwise stipulated, which does not appear to have been done as to any deposit in this case: *Eaton v.*

Boissonnault, 67 Me. 540, 24 Am. Rep. 52. It has been held in some cases that a demand for payment of bank currency bills is necessary even after failure of the bank if the billholder wishes to recover interest. We do not think those cases applicable to deposits under our statute.

5. In some cases the persons appearing on the stock ledger as owners of shares really only hold them as security for loans, made to the real owners. This fact, however, did not appear upon the books of the bank nor upon the share certificates. So far as there appeared, the persons named as owners were the actual owners. As to the corporation and its creditors, they were the owners and as such were within the statutory liability of shareholders: *Crease v. Babcock*, 10 Met. 525.

6. Upon the stock ledger of the corporation the word "trustee" appeared after the name of one shareholder. That shareholder contends in his answer and argument that he invested the entire trust fund in those shares, and that as there is nothing left of that ¹⁵⁵ fund he should not be held personally liable. Even if such facts would exempt him from the liability, no evidence of them was reported to the law court. So far as appeared, he purchased the shares, became the legal owner, and entitled himself to the dividends on them as well as to represent them in corporation meetings. He thereby assumed the statutory liability attached to them. The addition of the word "trustee" was only *descriptio personae*. Even if the statute, Revised Statutes, chapter 47, section 84, applies to a case like this, it was not enacted till 1897, after the liability in this case had become fixed.

7. The shareholders purchased their shares at different times, some before and some after particular contracts, debts and engagements upon which the corporation defaulted were entered into. This fact does not make any difference in their liability under the statute in question, whatever might be the effect under other statutes. No distinction is made by the statute and none can be made by the court. Those who were shareholders at the time of the default have the entire liability cast upon them, those who purchased at the eleventh hour as well as earlier purchasers. The purchaser of shares took the risk of the financial condition of the corporation, good or bad, as it was at the time of his purchase, as well as the future risks. He took over the liabilities as well as the advantages attaching to the shares: *Curtis v. Harlow*, 12 Met. 3; *Maine Trust & B. Co. v. Southern Loan & T. Co.*, 92 Me. 444, 43 Atl. 21.

Though numerous exceptions were taken by different defendants, it is not expedient to recite and discuss every one seriatim, since all the questions of law raised by any of them are decided in the foregoing opinion. The rulings of the master and the single justice were in accord with what we above hold to be the law, and hence the exceptions must be overruled and the decrees of the single justice be affirmed, and with costs.

So ordered.

If a Contract or Debt of an Insolvent Corporation is of a nature that interest is allowable thereon, this constitutes a part of the indebtedness for which stockholders in the company are liable: *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145.

Limitation of Actions Against Stockholders of Corporations is the subject of a note to *Boyd v. Mutual Fire Assn.*, 96 Am. St. Rep. 972. Upon the appointment of a receiver for a corporation which has been adjudged insolvent, a cause of action at once accrues against its members or stockholders for the enforcement of their liability as such, and the statute of limitations thereupon commences to run in their favor: *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948.

WEEKS v. HACKETT.

[104 Me. 264, 71 Atl. 858.]

TREASURE-TROVE is the Name Given by the Early Common Law to any gold or silver in coin, plate or bullion found concealed in the earth or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. (p. 392.)

LOST PROPERTY, Title and Rights of the Finder of.—With respect to lost goods and treasure-trove, the title vests in the finder against all the world except the true owner, and ordinarily the place of the finding is immaterial. (pp. 393, 395.)

TREASURE-TROVE and Lost Property.—The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of such ownership. (p. 393.)

TENANT IN COMMON, Trover by One Against the Other.—With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, one tenant in common cannot maintain trover against another, because the two are equally entitled to possession, and the one who has it is not guilty of a conversion because he retains it. (p. 395.)

JOINT FINDERS OF MONEY, Rights and Duties of.—Where two or more persons originally find, and thereby become tenants in common of, gold coin, each is entitled to the possession of a moiety and charged with the duty of holding it for the owner until he can be ascertained. (p. 396.)

FINDERS OF LOST PROPERTY, Right of One to Maintain Trover Against Another.—If two or more persons find lost coin, each becomes entitled to the possession of a moiety, and may maintain trover for such moiety against any of his cofinders who became possessed of the whole and refused to surrender such possession. (p. 397.)

FINDING OF LOST PROPERTY, When may be Found to have been Joint and Several.—If, when three persons are making an excavation and joking about the finding of money, one of them discovers the top of an old can and says, "I have found it," and another commences to take out the stones and gravel and then takes up the can, whereupon coins drop out, and the three continue to dig for the purpose of taking up coin, and thereby discover two more cans having moneys therein, the conclusion by the jury that there was a joint finding by the three entitling them to share in the moneys found is sustained by the evidence. (p. 399.)

Frank W. Butler, for the plaintiffs.

Joseph C. Holman, for the defendant.

266 WHITEHOUSE, J. These were actions of trover brought by each of these plaintiffs to recover one-third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other and with the defendant, Fessenden E. Hackett. It is not in controversy that the coins in question, of the aggregate par value of twelve hundred and eighty-four dollars and sixty-seven cents, were found contained in three metallic cans buried and concealed in the soil and underneath the surface of land owned by one Leonard J. Hackett, in the town of New Vineyard; and it appears in evidence that after the coins were found, and prior to the commencement of these actions, the defendant, Fessenden E. Hackett, purchased all the right, title and interest, if any, which Leonard J. Hackett had in and to these coins as owner of the land where they were found.

Three contentions were set up in defense:

1. That the defendant found the coins under circumstances which made him the sole owner of them as against these plaintiffs.

2. That if the plaintiffs participated in the finding, they are joint tenants or tenants in common with the defendant, that he is entitled to hold the coins in trust for the true owner, and that the plaintiffs as tenants in common cannot maintain trover against him for their respective shares.

3. That the defendant became the sole owner of the coins by purchase from Leonard J. Hackett, the owner of the premises where they were found.

The presiding justice did not sustain the legal propositions involved in these contentions of the defendant, but instructed the jury in substance that gold or silver coin deposited in the soil as this appeared to have been became what is known in law as ²⁶⁷ treasure-trove, the title to which does not pass with the soil, and that the owner of the premises where the coin was found acquired no title to it by virtue of his ownership of the land, and that the defendant consequently acquired no title by purchase from Leonard J. Hackett; that if the coin was purposely buried in the soil and forgotten, or its place of concealment remained undiscovered by reason of the death of the depositor, the finder acquired a right to the possession of it and a qualified property in it, subject to the right of the true owner when he appeared, and in that sense became a trustee for the owner, but if several participated in the finding so as to become joint finders with equal rights, the ownership pertained to all of them, and one of them was not authorized to hold exclusive possession as against his fellows; and finally, that since the coins were separable and divisible by weight or count, if the defendant refused to deliver to each of such tenants in common the share to which he was entitled, an action of trover would lie against the defendant for the conversion of such number or portion of the coins as rightfully belonged to each of the joint finders.

The jury returned a verdict in favor of each plaintiff for the sum of two hundred and ninety-one dollars and twenty cents, being one-third of the aggregate market value of the coins, and the cases come to the law court on exceptions to these instructions and on a motion to set aside the verdict as against the law and the evidence.

1. It is the opinion of the court that the instructions given by the presiding justice were correct and that the exceptions must be overruled.

Treasure-trove is a name given by the early common law to any gold or silver in coin, plate or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown: 1 Black, 295; 19 Cyc., p. 339; 28 Am. & Eng. Ency. of Law, p. 472; *Livermore v. White*, 74 Me. 452. 43 Am. Rep. 600; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100. To what extent the doctrine of the English common law in regard to treasure-trove has been merged, in this country, into the law respecting the finding of lost property, and whether in modern commercial life the term "treasure-trove" may be ²⁶⁸ held to include not only good gold and

silver, but the paper representatives of them, are questions not necessary to be considered here (see *Huthmacker v. Harris' Admr.*, 38 Pa. 491, 80 Am. Dec. 502, and *Danielson v. Roberts*, 44 Or. 108, 102 Am. St. Rep. 627, 74 Pac. 913, 65 L. R. A. 526), for while it is not in controversy that the coins here in question clearly fall within the common-law definition of treasure-trove, the general rule is established by a substantially uniform line of decisions in the American states, with respect to both lost goods, properly so termed, and treasure-trove, that in the absence of legislation upon the subject, the title to such property belongs to the finder as against all the world except the true owner, and that ordinarily the place where it is found is immaterial: *Lawrence v. Buck*, 62 Me. 275; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664; *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172; *Danielson v. Roberts*, 44 Or. 108, 102 Am. St. Rep. 627, 74 Pac. 913, 67 L. R. A. 526; *Armory v. Delamarie*, 1 Strange, 504, 1 Smith's Lead. Cas. 631; *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. 424; 21 L. J. Q. B. 75. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land: *Regine v. Thomas, Leigh & Cave Eng. Cr. Cas.*; 28 Am. & Eng. Ency. of Law, 2d ed., 473. According to Bracton, lib. 3. cap. 3, as quoted in Viner's Abridgment, "he to whom the property is shall have treasure-trove, and if he dies before it be found, his executors shall have it, for nothing accrues to the king unless when no one knows who hid that treasure"; and according to Lord Coke (3 Institutes, 132) the common law originally left treasure-trove to the person who deposited it, or upon his omission to claim it, to the finder: 2 Kent's Commentaries, 458. The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many states, but the provisions of the Maine statutes (Rev. Stats., c. 100, sec. 10 et seq.) have no reference to the law of treasure-trove.

In *Danielson v. Roberts*, 44 Or. 108, 102 Am. St. Rep. 627, 74 Pac. 913, 67 L. R. A. 526—in which the facts were strikingly analogous to those at bar—two boys unearthed on the defendant's premises an old tin can containing gold coin of ²⁶⁹ the value of seven thousand dollars. The circumstances under which the money was discovered, the rust-eaten condition of the can in which it was contained, and the place of deposit, tended strongly to show that it had been buried for a long

time, and that the owner was probably dead or unknown. It was held that the fact the money was found on the premises of the defendants in no way affected the plaintiffs' right to possession or their duty in relation to the treasure, and that they could maintain trover therefor against the defendants to whom they had been induced to deliver the money. In a well-reasoned opinion, the court say: "Ever since the early case of *Armory v. Delamare*, 1 Strange, 504, where it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrongdoer, the right of the finder of lost property to retain it against all persons except the true owner has been recognized. In that case a chimney-sweeper's boy found a jewel, and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that by the finding he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled: *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; 19 Am. & Eng. Ency. of Law, 2d ed., 579. But it is argued that property is lost in the legal sense of that word only when the possession has been casually and involuntarily parted with, and not when the owner purposely and voluntarily places or deposits it in a certain place for safekeeping, although he may thereafter forget it and leave it where deposited, or may die without disclosing to anyone the place of deposit."

"But at the present stage of the controversy it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure-trove, or, if treasure-trove, whether it belongs to the state or the finder or should be disposed of as lost property if no owner is discovered. In either event the plaintiffs are entitled to the possession of the money as against the defendants unless the latter can show a better title. The reason of the rule giving the ^{27c} finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface."

In *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528, the plaintiff bought an old safe and soon afterward, through his agent, left it for sale with the defendant, who was a blacksmith. Upon examination of it soon after it was left with him the defendant found secreted between the exterior and the

lining a roll of bank bills amounting to one hundred and sixty-five dollars. Neither the plaintiff nor the defendant knew the money was there before it was found and the owner was unknown. The plaintiff brought suit against the defendant to recover the money, claiming that as owner of the safe he was entitled to the money by right of prior possession. But the court held that the plaintiff "never had any possession of the money except unwittingly, by having possession of the safe which contained it; that although it was originally deposited in the safe by design, it was not so deposited after the safe became the property of the plaintiff, so as to be in the protection of the safe as his safe, or so as to affect him with any responsibility for it," and it was accordingly held that the plaintiff, as finder of the money, was entitled to retain it as against the defendant, the owner of the safe, and as against all the world except the real owner.

In *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172, the plaintiff while engaged as an employé in the defendant's paper-mill found two fifty-dollar bank bills, in a clean unmarked envelope, in a bale of old paper which the defendant had bought for manufacture, and delivered the bills to the defendant for the purpose of ascertaining if they were good and upon his promise to return them. The defendant refusing to return them, the plaintiff brought suit to recover their value, and the court held that she was entitled to recover, citing, among other cases, *Lawrence v. Buck*, 62 Me. 275, *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528, and *Armory v. Delamarie*, 1 Strange, 505, and stating that the place of the finding was ordinarily immaterial.

The result, therefore, seems unquestionable that in the case at bar the coins sued for belonged to the finder or finders, as against all ²⁷¹ the world except the true owner, or his legal representatives, when discovered. Indeed, the defendant's counsel does not seriously contend to the contrary, but, as already noted, he claims under the motion that the defendant was in fact the sole finder of the coins, and further insists under the exceptions that in any event these actions are not maintainable, for the reason that an action of trover will not lie in favor of one tenant in common against his original cotenant.

With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, it is undoubtedly a well-established rule that one tenant in common cannot maintain trover against his cotenant, for the reason that the two are equally entitled to

possession, and the one who has it cannot be guilty of conversion by retaining it. But this rule "can have no reasonable application to such commodities as are readily divisible by tale or measure into portions absolutely alike in quality, such as grain or money": Cooley on Torts, 2d ed., p. 533. *Cessante ratione legis, cessat ipsa lex*. If A and B are tenants in common of a carload of corn, and B, denying A's right to any part of it, refuses to surrender his half on demand, this is deemed in law a conversion, because the commodity would be capable of exact division by weight or measure, and by refusing to surrender A's half, B exercised a dominion over it inconsistent with A's rights. As observed by the court in *Pickering v. Moore*, 67 N. H. 533, 68 Am. St. Rep. 695, 32 Atl. 828, 31 L. R. A. 698: "One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another than there is in selecting A's marked sheep from B's flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which either may make without expense and without danger of injustice to his cotenant": See, also, *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Gates v. Bowers*, 169 N. Y. 14, 88 Am. St. Rep. 530, 61 N. E. 993; *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, 35 Am. Rep. 137.

272 It is also familiar law that absolute and unqualified ownership of a chattel is not essential to enable one to maintain trover for its conversion. Either a general or special property in the plaintiff with the right of possession at the time of the conversion will be sufficient. It has been seen that in all the cases above cited in which it has been held that the finder of lost property is entitled to retain possession of it as against all the world until the rightful owner appears, it was also held that the finder had a special or qualified property in the thing found sufficient to enable him to maintain trover for its conversion against anyone except the true owner.

Upon the assumption, then, that the plaintiffs and the defendant were joint finders and therefore tenants in common of the coin contained in the cans found in the case at bar, each was entitled to possession of one-third of it, and charged with the duty of holding it for the true owner if he could be ascertained. He was under obligations to exercise reason-

able care to safely keep his share of it, and be prepared to restore it to the true owner whenever he might appear, and was therefore authorized to maintain such action as might be necessary to entitle him to retain or recover possession of it. The coins were readily divisible into three parts by counting and weighing, but the defendant denied the plaintiffs' rights and refused to surrender any part of the coin. This was effectually a conversion of their respective shares as tenants in common, and an action of trover was the appropriate remedy for each plaintiff.

2. Under the motion the defendant insists that he discovered the cans under circumstances that constitute him the sole finder of the coins. But under instructions upon this point to which no exceptions were taken, the jury evidently reached the conclusion that the plaintiffs participated in the discovery so as to become joint finders with the defendant with equal rights in the property found. They awarded to each plaintiff two hundred and ninety-one dollars and twenty cents, and this appears to have been precisely one-third of the aggregate market value of all the coin. As it satisfactorily appears that the quantity of coin in any one can was not of the same value as that in any other, the jury must have decided that there was a joint finding by all and not a ²⁷³ separate finding of a single can by each. And the question now is whether this conclusion of the jury was warranted by the evidence.

A mill owned by Leonard J. Hackett had been destroyed by fire, including a small building fourteen feet distant from it and a covered passageway connecting it with the mill. The plaintiffs and defendant were employed by the owner of the premises, among other things, to make an excavation about eight feet wide for a shaftway preparatory to the erection of a new mill on the same site. At the time of the discovery of the coin they were all engaged in digging out the gravel and small stones in the passageway connecting the old mill with the small building. It appeared in evidence that there had been some "joking" between these workmen and Mr. Sweet, a neighbor who happened to be present, with reference to a tradition that one Porter, a former owner, had buried some money on the premises; but according to the testimony in behalf of the plaintiffs, the coin was discovered under the following circumstances: The plaintiffs and defendant were working in the trench about four or five feet from each other when the defendant discovered the top of an old can, and asked Sweet, who was walking away, to come

back, saying, "I have found it." Thereupon the plaintiff Morton commenced to dig out the stones and gravel around the can when the defendant tried to pull it out with his hands and said, "I can't lift it. I guess it is filled with sand." After further digging the plaintiff Morton took up the can, when the bottom dropped out and the silver coins were seen falling from the can among the stones. The defendant exclaimed, "It is money! I wish I hadn't said anything for there will be a row over it." While digging out more stones for the purpose of picking up the coins that fell among the stones, the plaintiff Morton discovered the second can, which was taken out by the defendant and Mr. Sweet. Morton continued to dig out the stones and gravel and soon uncovered the third can, the top of which, however, appears to have been first seen by the plaintiff Weeks. This can was removed by the defendant and the plaintiff Morton. The three cans were set in a triangular position about a foot equi-distant from each other, the spaces between them being filled with stones and gravel.

274 The money was turned into a pail and pan and carried to the house of Leonard J. Hackett by the defendant and Mr. Sweet, where it remained from Saturday afternoon until the following Monday, when by arrangement between the defendant and the owner of the land the money was deposited in a national bank.

The defendant's account of the finding is materially different. He testifies that the cans were standing in a row close to each other, and that when he unearthed the first one, and before it was taken out, he discovered the other two through the openings in the stones, and plainly saw the bright coins in the cans. He expressly admits, however, that "we all had hold of those cans," and it is the opinion of the court that there was sufficient evidence to warrant the jury in accepting the plaintiffs' version of the finding, and in drawing the inference that neither the plaintiffs nor the defendant had any knowledge or belief that silver coins had been discovered until they were seen to fall through the bottom of the first can after it was taken out by the plaintiff Morton. It may also be fairly inferred from the conduct of the parties that at the time of the discovery of the coins neither the plaintiffs nor the defendant understood that the finder of money, under such circumstances, acquired any legal claim to it as against the owner of the soil where it was found.

The solution of the question thus raised respecting the rights of the several parties who participated in the discovery

and removal of the cans containing the coin in dispute is necessarily attended with some practical difficulties. Other courts have encountered similar difficulties under analogous circumstances.

In *Keron v. Cashman* (N. J. Eq.), 33 Atl. 1055, one of several boys playing along a railroad track picked up an old stocking in which something was tied, and, after he had swung it about in play for a time, a second one of the boys snatched it, or, it having been thrown by the finder, the second boy picked it up, and began striking the other boys with it. In this way it passed from one to another, and, finally, while the second boy was swinging it, it broke open, and paper money to the amount of seven hundred and seventy-five dollars was found therein, all then examining it together. It was held that the money belonged to all the boys in common. In the opinion the ²⁷⁵ court say: "This money within the stocking was therefore the lost property, and as to this money the first intention, idea, or 'state of mind,' as it is called in some of the authorities, arose on this discovery. As a plaything, the stocking with its contents was in the common possession of all the boys; and inasmuch as the discovery of the money resulted from the use of the stocking as a plaything, and in the course of the play, the money must be considered as being found by all of them in common."

"All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal 'finder' of such property, and the peculiarity of the present case is that the intention or state of mind necessary to constitute the finder must relate to the lost money inclosed within a lost stocking, and not to the lost stocking itself, in the condition when first found; and, under the circumstances established by the evidence in this case, the finder of the lost stocking was not, by reason of such finding, the legal finder of the lost money within the stocking. A decree will therefore be advised dividing the money equally between the defendants."

In *Cummings v. Stone*, 13 Mich. 70, the plaintiff's tugboat, while towing a raft belonging to the defendant, slackened speed, and on starting again the tow-line, which was the property of the defendant, caught and drew up an anchor and chain which were secured and put on the raft by the defendant. And it was held that the plaintiff and defendant were joint finders of the property.

In these decisions the courts appear to have been governed by those practical considerations of fairness and conceptions

of common right which influence just and thoughtful men in the ordinary affairs of life, and which are in harmony with the principles of equity and not discountenanced by the rules of law. In reaching the conclusion that the discovery of the three cans should be deemed one transaction, and that the participation of the plaintiffs in the discovery of the coins was sufficient to constitute them joint finders with the defendant, the jury in the cases at bar appears to have been governed by the same equitable considerations, and it is the opinion of the court that the verdicts were warranted by the evidence.

Exceptions and motions overruled.

LOST PROPERTY AND ITS FINDER AND OWNER.

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I. What is Lost Property.

Perhaps the most difficult question connected with our subject which naturally suggests itself for our attention, and the one upon which we shall find the least assistance in answering from the authorities is, What is lost property within the meaning of the rules to which we shall hereinafter refer? Treasure-trove is said, in the principal case, to be the name "given by the early common law to any gold or silver in coin, plate or bullion concealed in the earth or in a house or private place, but not lying on the ground, the owner of the discovered treasure being unknown": *Weeks v. Hackett*, 104 Me. 264, ante, p. 390, 71 Atl. 858, 19 L. R. A., N. S., 1201; *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100. This term, therefore, is not a synonym for lost property, nor does it constitute one of the several classes into which lost property might be divided, for it is indispensable to treasure-trove that the property in question should have been concealed by the owner: *Livermore v. White*, 74 Me.

452, 43 Am. Rep. 600; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; *Attorney General v. British Museum*, [1903] 2 Ch. 598.

The property involved in the principal case was, strictly speaking, not lost property, but treasure-trove, for the place in which it was found and the fact that it was in metallic cans and covered by earth indicated that it had not been placed there involuntarily, but voluntarily, and therefore that it had been hidden or concealed. At the common law, one of the important distinctions between lost property and treasure-trove was that the one, until reclaimed by the true owner, belonged to the finder, and the other to the king: *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600; *McLaughlin v. Waite*, 5 Wend. 404, 21 Am. Dec. 232; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; *Hutchmacher v. Harris' Admr.*, 38 Pa. 491, 80 Am. Dec. 502; *Attorney General v. Moore*, [1893] 1 Ch. 676, 62 L. J. Ch. 607, 3 R. R. 213, 68 L. T. 514, 41 N. R. 294; *Attorney General v. British Museum*, [1903] 2 Ch. 598; because the owner, being unknown and not capable of being found, was presumed to be dead and the sovereign to be his heir. Why this principle should not be applicable in this country, where, while there is no king, there is still a sovereign, to wit, the state, which takes by escheat the title of all persons not having any ascertainable heir, we confess our inability to suggest, but, though we know of no reported case considering the question, the assumption is made in the principal case that the property there in question, though entirely treasure-trove, belonged to the finders, at least until the true owner appeared and established his claim; and this accords with the views expressed and the action taken in *Hutchmacher v. Harris' Admr.*, 38 Pa. 491, 80 Am. Dec. 502.

The words "lost property" are not used in their popular sense in speaking of the rights and duties of finders. In the popular sense, as we understand it, property is lost when the owner, though he has not been deprived of his possession by the act of another, does not know and cannot ascertain where it is. In this sense, treasure-trove and all classes of property no longer in the possession of the owner and not taken from him by another, and the whereabouts of which he neither knows nor can ascertain after diligent search, would be classed as lost property. Apparently the essential test of property which in contemplation of law is lost is to inquire whether the owner parted with the possession of the property intentionally, or casually or involuntarily. Only in the latter contingency may it be lost property: *Kuykendall v. Fisher*, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A., N. S., 94. If he lays it down in a store or bank or any other place, and then forgets that he had done so, and hence cannot find it, or if he hid it and does not remember and cannot discover the hiding place, it is not lost property, and he who first discovers and takes possession of it is not, in contemplation of law, a finder, and has not the rights of a finder to which we shall here-

inafter refer: *McAvoy v. Medina*, 11 Allen, 548, 87 Am. Dec. 733; *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142; *State v. McCann*, 19 Mo. 249; *Hoagland v. Forest Park Highlands A. Co.*, 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878; *Loucks v. Galloly*, 1 Misc. Rep. 22, 23 N. Y. Supp. 126; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; *Danielson v. Roberts*, 44 Or. 108, 102 Am. St. Rep. 627, 74 Pac. 913, 65 L. R. A. 526; *Lawrence v. State*, 1 Humph. 228, 34 Am. Dec. 644. In *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600, it appeared that the owner of a tannery sold it, but accidentally omitted to remove some of the hides from the vats. Soon afterward he died and the property passed to a manufacturing company, which erected mills, and twenty years afterward their agent and servant, when engaged in digging for the foundation of a brick building, discovered these hides, and for that reason claimed title thereto. There was no evidence of any actual abandonment of the property by the owner, and the only question for decision was whether, under the circumstances, it had been lost so as to give a right of possession to the servant finding it. The trial court instructed the jury that if the owner of the hides intentionally, carefully, voluntarily and in the ordinary course of business placed them in the vats, and then accidentally or inadvertently overlooked or forgot them, then they remained his property, or the property of his heirs in the event of his death. This instruction was on appeal declared to be correct, the court saying: "This is not a case of lost goods. The owner is shown. They belong to his estate. The title of the finders vanishes when the owner is known. These goods were not lost. The facts negative a loss by the owner. These hides were through carelessness left in the vat. If the fact of their being there was forgotten by the owner, they are none the less his—and though forgotten they are not lost. They remained in the vats subject to his control."

The question has most frequently been presented in actions between a servant or employé finding valuables on the premises or in the place of business of his employer, and the latter claims the right of possession until the true owner shall call for them. If they are lost, then the employé has the right to such possession, but if, on the other hand, they are not lost, it may be the duty of the principal to care for the articles, and for this purpose, to withhold possession from the finder. If there is any evidence supporting the inference that the property was intentionally placed where it was found by its owner or other lawful possessor, then it cannot be deemed lost. Any cases apparently in conflict with this view may be regarded, not as denying its correctness, but rather as drawing the inference that the circumstances attending the finding indicate that the property was not left intentionally, but involuntarily or casually: *Hoagland v. Forest Park Highland A. Co.*, 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878; *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664; *Ferguson v. Ray*, 44 Or. 557, 102 Am. St. Rep. 618, 77 Pac. 100, 1 L. R. A., N. S., 477; *Bridges v. Hawsworth*, 21

L. J. Q. B. 75, 15 Jur. 1079. Generally, however, the leaving of the property in any public place is presumed to have been unintentional, and the property hence to have been lost.

Thus one attending a performance at a place of amusement sat down at one of the tables and found a pocketbook lying on the ground. Divers employés of the place claimed to be the proper person to whom the book should be delivered, and upon the refusal to deliver it to any of them, the manager ordered the arrest of the finder, and the policeman called upon to make such arrest took the pocketbook, refused to continue the arrest but also refused to return the book to the finder, though demanded. The finder subsequently brought an action for the damages suffered from his unlawful arrest, and the defendants claimed that their action was, under the circumstances, reasonable. The court held that under the circumstances it was not fairly inferable that the pocketbook had been laid down and forgotten, "for certainly it would not have been left intentionally upon the ground under the table, but was dropped there, or in some other way came there accidentally, and was within contemplation of law lost, when plaintiff found it." The court further determined that there was no right to use force to eject the plaintiff from the premises for his refusal to surrender the pocketbook, because he had a right to retain it as against all other persons except the true owner, and that it was not true that it was the duty of the owner of the premises to exercise reasonable care to protect for their true owners all valuables inadvertently mislaid or lost on the premises, "when the finder of the property which had been lost on the premises was himself entitled to its possession and custody against every person except the owner": *Hoaglan v. Forest Park Highlands A. Co.*, 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878.

II. Who is a Finder.

Of course, in contemplation of law, no one can find property unless it is first lost. Hence, one who discovers property years after it has been hidden, the place of hiding forgotten, and even after all the persons who know of the place had died, or he who first sees or takes up valuables after they have been laid aside and the place where left forgotten, is not a finder. Where, as in the principal case, the finding is conceded, as well as that the property was lost, there may be difficulty in determining which of two or more persons is entitled to be regarded as the finder. None of the cases coming within our observation tends to assist in determining this question, when it is doubtful. Probably all the inference which can be drawn is that the question is one of fact, and that the courts will hence not interfere with the conclusion reached by the jury, unless very clearly contrary to the evidence: *Weeks v. Hackett*, 104 Me. 264, ante, p. 390, 71 Atl. 858, 19 L. R. A., N. S., 1201.

III. The Place of Finding or the Ownership of the Premises or the Receptacle Wherein the Property was Found.

Contests for the possession of lost property have usually taken place between the finder and the owner of the premises or place of business wherein the property was found or of the receptacle whence it was taken, the one claiming the right because of such finding, and the other because of such ownership. So far as the American cases are concerned, we think they very decidedly affirm that the place of the finding is wholly immaterial, except in so far as it may indicate that the property was not, in contemplation of law, lost. Hence, an employé finding a lost article in an old safe, box or other receptacle on the premises of his employer may have the rights of a finder, and be entitled to possession in preference to the employer: *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172; *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75, 15 Jur. 1079. The facts in these cases are so peculiar that they deserve to be detailed. In *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172, the evidence disclosed that the defendants were engaged in the manufacture of paper, and in the course of their business received old papers in bales, which, after being placed on the floor, were cut open by their employés. One of these, in the performance of her duties, discovered a number of bank notes in a bale in a clean, unmarked envelope, and turned them over to the defendants upon the promise that they should be returned. The defendants, however, refused to make such return, claiming to be entitled to the moneys, or, at least, to hold them until the true owner should appear and claim them. The court held, however, that the fact that the bills were found in an article of property which had been purchased by the defendants did not carry with it property in the bills in question, and that the finding of the money, though by an employé, gave her the rights of a finder. In *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664, a servant in a hotel found a roll of bills in the parlor thereof and informed her employer, who took them, suggesting that he thought they belonged to a certain transient guest. It was subsequently ascertained that the money did not belong to this guest, and no claim was made for it by anyone. In the contest for possession between the servant and the hotel-keeper it was held that the circumstances did not justify the inference that the property had been left intentionally, that it was therefore lost, and the servant entitled to the rights of a finder. In *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528, the plaintiff, having bought an old safe, offered to sell it, but the person to whom the offer was made refused to purchase. The safe was, however, left with him for sale, and soon afterward, upon examining it, he found secreted between the sheet iron exterior and the wooden lining a roll of bills of considerable value, and the owner of which was unknown. The owner of the safe demanded the money, but

the finder refused to surrender it, and thereupon the owner of the safe brought an action for such money, the safe having already been delivered to him. It was held that, as there was no evidence that he purchased the money with the safe, the bills could not be regarded as his property; that such possession as he had ever held of them was unwittingly by having possession of the safe, and did not confer any right. He also claimed that, as the money had probably been placed where it was found designedly, it was not lost property, but the appellate court answered: "However that may be, we think the money here, though designedly left in the safe, was probably not designedly put in the crevice or interspace where it was found, but that, being left in the safe, it probably slipped or was shoved into the place where it was found without the knowledge of the owner, and so was lost, in the stricter sense of the word. The money was not simply deposited and forgotten, but deposited and lost by reason of a defect or insecurity in the place of deposit." The court further said: "The general rule undoubtedly is, that the finder of lost property is entitled to it as against all the world except the real owner, and that ordinarily the place where it is found does not make any difference. We cannot find anything in the circumstances of the case at bar to take it out of this rule."

Though the property is concealed or imbedded in the earth, this fact has been held not to give any right to its possession to the owner of the premises: *Weeks v. Hackett*, 104 Me. 264, ante, p. 390, 71 Atl. 858, 19 L. R. A., N. S., 1201. This is not true where the property has become a part of the realty, as when an aerolite falling from the sky imbedded itself in the earth: *Goodard v. Winchell*, 86 Iowa, 71, 41 Am. St. Rep. 481, 52 N. W. 1124, 17 L. R. A. 788. Perhaps it is no longer true under any circumstances if the owner of the soil has an absolute right to exclude all persons therefrom and to take whatsoever may be regarded as a part of it. The more recent American decisions tend to recognize in the owner of the soil rights not conceded by the earlier cases, and to deny as against him the rights of the person finding valuables concealed or imbedded therein: *Burdick v. Chesebrough*, 94 App. Div. 532, 88 N. Y. Supp. 13; *Ferguson v. Ray*, 44 Or. 555, 102 Am. St. Rep. 648, 77 Pac. 600, 1 L. R. A., N. S., 477. In so doing they follow a late English decision, which must be regarded both as settling the law in that country and as likely to have a powerful influence on the decisions hereafter to be made in this. Workmen employed to clean out a pool, known as the "Minister Pool," found in the mud in the bottom thereof two gold rings. The owners of the premises demanded these rings, and they were placed in the hands of the police authorities that they, by advertisement and otherwise, should endeavor to find the owner. This endeavor being unsuccessful, the authorities returned the rings to the finder, and the owner of the premises sued him in detainue. The county court gave judgment for the defendant, which, on appeal, was reversed, the chief justice, Lord Russell

of Killowen, saying: "The plaintiffs are the freeholders of the locus in quo, and as such they have the right to forbid anybody coming on their land or in any way interfering with it. They had the right to say that their pool should be cleaned out in any way that they thought fit, and to direct what should be done with anything found in the pool in the course of such cleaning out. It is no doubt right, as the counsel for the defendant contended, to say that the plaintiffs must show that they had actual control over the locus in quo and the things in it; but under the circumstances, can it be said that the Minister Pool and whatever might be in that pool were not under the control of the plaintiffs? In my opinion, they were. The case is like the case, of which several illustrations were put in the course of the argument, where an article is found on private property, although the owners of that property are ignorant that it is there. The principle on which this case must be decided, and the distinction which must be drawn between this case and that of *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75, 15 Jur. 1079, is to be found in a passage in Pollock and Wright's *Essay on Possession in the Common Law*, page 41: 'The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to anyone who requires a specific intention as part of a de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession constituted by the occupier's general power and intent to exclude unauthorized interference': *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44, L. J. Q. B. 460, 74 L. T. 765, 44 W. R. 653.

IV. Rights of the Finder.

a. **To the Possession of the Property.**—The finder of lost personal property of whatsoever character is commonly said to be its owner against all persons except the loser: *Brandon v. Huntsville Bank*, 1 Stew. 320, 18 Am. Dec. 48; *Clark v. Maloney*, 3 Harr. (Del.) 68; *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172; *Williams v. State*, 165 Ind. 472, 75 N. E. 875, 2 L. R. A., N. S., 248; *Lawrence v. Buck*, 62 Me. 275; *Weeks v. Hackett*, 104 Me. 264, ante, p. 390, 71 Atl. 858, 19 L. R. A., N. S., 1201; *Ellery v. Cunningham*, 1 Met. 112; *Cummings v. Stone*, 13 Mich. 70; *Hoagland v. Forest Park Highlands A. Co.*, 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Peay v. McEwen*, 8 Rich. 31; *Tancil v. Seaton*, 28 Gratt. 601, 26 Am. Rep. 380; *Kuykendall v. Fisher*, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A., N. S., 94. Whether, strictly speaking, he is the owner or not, he is entitled to possession against all third persons, and may vindicate his claim to the property by appropriate actions of the same character and to the same extent as if it had always been his. As against

all persons but the loser, the finder is regarded as the owner of the property. His title is not diminished by the fact that the property has gotten out of his possession, either by its loss and finding by another or by its being wrongfully taken and converted. In other words, his title, such as it is, is not dependent on his possession, and may be vindicated by any appropriate action, notwithstanding his loss of possession: *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Deaderick v. Oulds*, 86 Tenn. 14, 6 Am. St. Rep. 812, 5 S. W. 487; *Taneil v. Seaton*, 28 Gratt. 601, 26 Am. Rep. 380; *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75, 15 Jur. 1079. This, however, cannot be affirmed of property of that peculiar character which, originally belonging to no one, becomes the property by capture. Thus, though a sea-lion, on being captured, becomes the property of its captor, this title is dependent on his continued possession, or, at least, on his property not regaining its liberty. Therefore, if it escapes and is captured by another, in the ocean, many miles from where its original captor lost it, since it had regained its liberty without any intent to return, though it may not have reached its native place or one suited to its existence, the title of the first captor is, therefore, devested, and the title of the second captor becomes perfect, dependent, however, on his retaining possession and control of his property: *Millet v. Bradley*, 24 Misc. Rep. 695, 53 N. Y. Supp. 781.

b. To Reimbursement for Expenses.—The finder of lost property, while in possession thereof, may be regarded as the trustee for the true owner, and under some obligation to preserve the property and to incur such expenses as are necessary to its safekeeping and general preservation. Therefore, for expenditure made for this purpose, the owner, if he claims and resumes the possession of the property, may be regarded as promising to make payment, and therefore as subject to an action in implied assumpsit seeking indemnity on the part of the finder for these necessary expenses: *Reeder v. Anderson's Admr.*, 4 Dana, 193; *Chase v. Corcoran*, 106 Mass. 286; *Armory v. Flynn*, 10 Johns. 102, 6 Am. Dec. 316. The finder is not, however, entitled to any gratuity or reward unless the reward has been offered by the owner for the finding or return of the property. The right to recompense is limited to the necessary expenses of keeping and preserving the property: *Tome v. Four Cribs of Lumber*, Taney, 533, Fed. Cas. No. 14,083.

c. To a Lien.—The few cases that have spoken of the subject deny that the finder has any lien for his expenses incurred on the property: *Etter v. Edwards*, 4 Watts, 63; *Tome v. Four Cribs of Lumber*, Taney, 533, Fed. Cas. No. 14,083; *Nicholson v. Chapman*, 2 H. Black. 117, 3 B. R. 674; but sustain such lien when any specific reward has been offered for its finding or return: *Wilson v. Guyton*, 8 Gill, 213; *Wentworth v. Day*, 3 Met. 352, 37 Am. Dec. 145; *Wood v. Pierson*, 45 Mich. 313, 7 N. W. 888. The result of this is, that where the true owner appears and demands possession of his prop-

erty, he is entitled thereto without paying any liability which may exist in favor of the finder for expenses incurred, but if a reward has been offered, the finder may, we think, retain possession until it is paid.

d. **To a Reward.**—We have already shown that the finder is not entitled to any gratuity or reward merely because of the finding: *Ante*, IV, b. If, however, the owner of the property has offered a specific reward for its finding or return, the finder is entitled to such reward on complying with the terms on which it was offered: *Deslondes v. Wilson*, 5 La. 397, 25 Am. Dec. 187; *Wentworth v. Day*, 3 Met. 352, 37 Am. Dec. 145.

e. **To the Use of the Property.**—Very singularly, none of the decisions coming within our observation consider the general question of the right of the finder to the use of the property found. If it has been lost, he who found it rightfully takes and keeps possession, at least, unless he knows the owner and makes no effort to return it to him. This possession would in many cases be quite onerous if no compensating advantage is to be acquired from it. Nevertheless, it has been determined that if the property found consisted of domestic animals, such as horses, and the finder used them for his own profit, and they died during such use, the owner might charge this as conversion and maintain an action for their value: *Watts v. Ward*, 1 Or. 86, 62 Am. Dec. 299. The opinion of the court in this case, however, impresses us with the conviction that the court writing it deemed the finder in fault for not returning the property to its owner, and for using it to repay expenses and charges which the owner was under no obligation to satisfy.

V. Duty of the Finder.

The duties of the finders of lost property have received little judicial consideration. Probably they are the same as those of other bailees acting without compensation. If the finder has reason to suspect who is the owner, he should make pertinent and reasonable inquiries for the purpose of discovering the owner: *Peters v. Bourneau*, 22 Ill. App. 177; *Sovern v. Yoran*, 15 Or. 644, 15 Pac. 395. In a number of the states the duties of finders are regulated by statute. We shall not here attempt any reference to or consideration of these statutes. Whenever they are constitutional, and so far as we know all of them are, the finder's duty is to comply with all their provisions, but if he knows who the owner is, compliance with the statute is unnecessary, at least in so far as the statute relates to proceedings to be taken for the purpose of ascertaining such ownership, and provided there is no attempt to unreasonably detain the property from its owner: *Jones v. Smyth*, 18 N. H. 119. The property must be surrendered to the owner when he demands it, but the finder is entitled to have it identified and the ownership established. Whether he must first submit the property to the inspection of the claimant cannot be answered as a ques-

tion of law. When there is a claim to the property by the alleged owner and a refusal to submit it to an inspection until it is identified and the ownership is established, and an action is brought for conversion or otherwise, it is apparently a question of fact for the jury to determine whether either of the parties was unreasonable in the requirements attempted to be imposed by him, and, in considering whether the finder was at fault, the jury should not overlook the legal proposition, that it is his duty to keep the property for the true owner, or that he is liable if he surrenders possession to anyone else: *Wood v. Pierson*, 45 Mich. 313, 7 N. W. 888. The finder is not under any duty to deliver the property to the proprietor of the place of business or amusement where it was found, nor to any of his employés, for the very sufficient reason that it is not his nor theirs, and the finder would still remain answerable to the true owner when ascertained: *Hoagland v. Forest Park Highlands A. Co.*, 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878. But if the owner has died, the finder must, if demanded, deliver the property to his administrator, for the administrator is vested with the right to the possession which would be held by the owner had he survived: *Gardner v. Ninety-nine Gold Coins*, 111 Fed. 552.

VI. Actions Respecting.

a. **By the Finder.**—It was determined in *McLaughlin v. Waite*, 9 Cow. 670, affirmed, 5 Wend. 404, 21 Am. Dec. 232, that the finder of a lottery ticket had not such special property therein as would support an action against one converting it or receiving its proceeds, but if this be true, which we very much doubt, it is because of the special character of the property. We have already shown that the finder is regarded as the owner of the property against all persons but the loser. As such, the finder is entitled to maintain the same actions as if he were the true owner against all persons other than the loser who have been guilty of any invasion of his rights. As against one who after the finding obtained possession of the property and withheld it or converted it to his own use, the finder may maintain replevin or trover or an action for the proceeds of the property, if it has been sold or the proceeds otherwise realized: *Clark v. Maloney*, 3 Harr. (Del.) 68; *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172; *Ellery v. Cunningham*, 1 Met. 112; *Hoagland v. Forest Park Highlands A. Co.*, 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 378; *Matthews v. Harsell*, 1 E. D. Smith, 393; *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664; *Tancil v. Seaton*, 28 Gratt. 601, 26 Am. Rep. 380; *Deaderick v. Oulds*, 86 Tenn. 14, 6 Am. St. Rep. 812, 5 S. W. 487; *Armory v. Delamirie*, 1 Strange, 504. These decisions indicate that the measure of damages on a recovery is the same as if the title of the plaintiff were absolute.

b. **By the Loser or Owner.**—The right of action of the loser of the property and his successor in interest is modified only by the rights of the finder. The latter is rightfully in possession, and such possession of itself, therefore, creates no right of action in favor of

the loser. Something must first occur to make the possession wrongful, as where, upon demand and appropriate evidence of title, the finder refuses to deliver the property, or even in the absence of such demand and refusal, he is guilty of some misconduct toward it, as where he abuses or wrongfully uses it. When the possession has thus become wrongful, the owner may maintain trover or replevin or any other action necessary to vindicate his rights: *Wood v. Pierson*, 45 Mich. 313, 7 N. W. 888; *Tome v. Four Cribs of Lumber*, Taney, 533, Fed. Cas. No. 14,083. It has been said that the owner's right to maintain his action is not defeated by the existence of a right on the part of the finder to a reward offered by the owner: *Wood v. Pierson*, 45 Mich. 313, 7 N. W. 888; but this cannot be true. The finder, as we have already shown, is entitled to a lien for any reward due him, and this lien is obviously dependent on the possession of the property, and whether this is true or not, the lien would probably become of no practical value if the finder were compelled to surrender the property and resort to some independent proceeding to enforce his lien. In the only case in which the question was necessarily involved and decided, the right of the finder to the possession of the property until his lien was satisfied was affirmed where the amount of the reward was specific: *Wentworth v. Day*, 3 Met. 352, 37 Am. Dec. 145. If no specified amount is offered, as where the loser declares that he will pay a liberal reward, it is not possible to affirm his liability or that of his property for any designated sum, and the finder has no right to retain possession because no definite sum has been offered to be paid him as his reward: *Wilson v. Guyton*, 8 Gill, 213.

VII. Joint Finders.

If two or more are joint finders of lost property, their rights therein to the extent of their title or interest is that of tenants in common, and they are entitled to the same remedies as against all persons but the owner and as against each other as are other cotenants: *Weeks v. Hackett*, 104 Me. 264, ante, p. 390, 71 Atl. 858, 19 L. R. A., N. S., 1201; *Cummings v. Stone*, 13 Mich. 70. Whether several persons present at a finding are to be deemed joint finders or not is sometimes a difficult question, when the evidence shows that some one of them saw the property before the others or had a greater share of the work or play of which the finding was an incident. All that can safely be said is that the courts have inclined in doubtful cases to regard the finding as joint and all persons present and to any degree participating as joint finders: *Weeks v. Hackett*, 104 Me. 264, ante, p. 390, 71 Atl. 858, 19 L. R. A., N. S., 1201; *Keron v. Cashman* (N. J.), 33 Atl. 1055.

VIII. The Loss of the Owner's Title.

As between the owner and the finder, the former must be regarded as continuing to be the owner of the property and entitled to its possession, unless the right to such possession is subject to some

then existing against the property and resulting from the offer of some definite reward for its return. As between the owner and third persons, the title of the former must be deemed perfect, except as to property of the class to which title may be acquired by bona fide purchasers without notice of the rights of the true owner. In this class are included money and bank-bills (*Sinclair v. Piercey*, 5 J. J. Marsh. 63), and all such choses in action as, in contemplation of law, are payable to bearer, and may hence be transferred by anyone into whose possession they come and without any indorsement: *Garvin v. Wiswell*, 83 Ill. 215; *Caruth v. Thompson*, 16 B. Mon. 572, 63 Am. Dec. 559. A finder of lost property, whatsoever its character, has the same, but no greater, power as against its true owner to transfer the title or right of possession than has a thief in possession of property of like character which he has stolen: *Prather v. Weissiger*, 10 Bush, 117; *Marsh v. Small*, 3 La. Ann. 402, 48 Am. Dec. 452.

IX. Larceny of the Property by the Finder.

The cases are quite numerous in which finders of lost property have been accused of so dealing with it as to become guilty of larceny. The decisions upon this subject have, however, been heretofore collected and presented in this series, and do not, we think, here require further consideration: *Note to People v. Miller*, 88 Am. St. Rep. 591.

PODVIN v. PEPPERELL MANUFACTURING COMPANY.

[104 Me. 561, 72 Atl. 618.]

MASTER AND SERVANT, Duty of the Former as to the Safety of the Latter.—It is not the duty of an employer of labor upon machines to provide and use the safest known machines. There must be no weakness, nor want of repair, nor dangerous features not visible to an observing operative, or made known to him, and such as the employer should have known. If such a machine is provided, the employer has done his full duty. He can otherwise use machines of such pattern, detail of construction and roughness of finish as he prefers, leaving the operative the free choice of operating it as he prefers. (p. 413.)

MASTER AND SERVANT—Failure to Call Attention to Dangerous Parts of Machine.—An operative of a particular machine assumes the risk of injury not only from those parts of it called to his attention, but also from those parts open to observation. (p. 414.)

MASTER AND SERVANT—Ignorance on the Part of the Latter of Dangerous Set-screws.—Where set-screws are open and exposed to observation and plainly visible to anyone making the most cursory examination of the machine, the operative cannot recover for

injury due to such screws on the ground that he did not know of their existence, and that they were not visible when the machine was in motion, if there were times when, because it was at rest, the screws could be plainly seen. (pp. 414, 415.)

MASTER AND SERVANT.—A Woman Employé Assumed the Risk of Her Hair Becoming Entangled in set-screws revolving on a machine which she operated where such screws were plainly visible when the machine was at rest. (p. 415.)

Cleaves, Waterhouse & Emery, for the plaintiff.

Nathaniel B. Walker and George F. & Leroy Haley, for the defendant.

562 EMERY, C. J. This case is one of that class now come to be known as "set-screw cases." The evidence for the plaintiff and the uncontradicted and credible evidence for the defendant establishes the following as the version to be taken as true: The plaintiff was a woman fifty-nine years of age in the employ of the defendant company in its cotton-mill, and had charge of and operated a somewhat complex spinning machine known as an "intermediate." Two revolving metal cones, one above the other, ran lengthwise this machine under the spindles. The lower cone was within two inches of the floor. The upper cone was twenty-four and one-half inches above and directly over the lower cone. The small end of the upper cone was connected with the end of a shaft by a metal collar held and tightened in place by set-screws projecting five-eighths of an **563** inch above the surface of the collar. The diameter of the collar and cone at this end was two and one-half inches. When in operation this cone revolved at a speed of two hundred and eighty revolutions a minute. When at rest the collar and set-screws were plainly visible, being opposite a large window with plenty of light and with nothing to conceal them from anyone looking the machine over. The whole machine, including the cones and set-screws, was of standard pattern and in common use in cotton-mills.

The plaintiff had operated a similar machine for eight or ten years, and this particular machine for fifteen years, during which time no change had been made in the cone or set-screws. In addition to tending the machine in its operation, she, as was her duty, cleaned it as often as twice a week and oftener of the dirt and cotton waste that accumulated on its various parts, including the cones and set-screws. She cleaned all around the gears and wheels and also the ends of the cones and the set-screws, getting out with a short-handled brush the cotton accumulating there. She also

washed the floor under the cones and machine at least twice a week.

By the vibration of the machine while in operation empty bobbins would at times be shaken from their shelf or creel and fall upon the floor under the machine. It was the duty of the plaintiff to pick these fallen bobbins from the floor as they fell and restore them to their places. Frequently, to do this, she would need to reach her hand and arm in between the two cones to reach the fallen bobbins where they lay on the floor. She usually did so while the cones were revolving, and this practice was well known to the defendant's superintendent and overseers in that room. Her attention was never called by them or anyone to the set-screws, or to any danger from set-screws.

At last, after fifteen years of such work by the plaintiff on and about this machine, as she was one day reaching down between the two revolving cones to pick up a fallen bobbin from the floor, her woman's hair became entangled in the set-screws on the upper cone and her scalp torn from her head. There was, of course, a danger that while so picking up fallen bobbins from the floor the plaintiff ⁵⁶⁴ might be hurt by the revolving set-screws. Was that danger a risk cast upon the defendant, or a risk assumed by the plaintiff?

The plaintiff claims that the risk was upon the defendant, because it did not have the set-screws so counter-sunk or otherwise fixed as to remove all danger of injury from them. This claim is not well founded. It is not the legal duty of an employer of labor upon machines to provide and use the safest possible, or even safest known, machines. There must be no weakness, no want of repair, no dangerous feature not visible to an observing operative or made known to him, and such as the employer should have known. If such a machine be provided the employer has done his full legal duty in that respect. He can otherwise use machines of such pattern, detail of construction, and roughness of finish as he prefers, leaving to the operative free choice to operate it or not as he prefers: *Wornell v. Maine Central R. R. Co.*, 79 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49; *Bryant v. Great Northern Paper Co.*, 100 Me. 171, 60 Atl. 797; *Rooney v. Sewall etc. Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Keats v. National Heeling Machine Co.*, 65 Fed. 940, 13 C. C. A. 221; *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785.

But the plaintiff further claims that the risk was upon the defendant, and had not been assumed by her because her attention had not been called to the set-screws and to the

danger of injury from them. This claim also is without foundation. An operative, by agreeing to operate and operating a particular machine, without stipulation to the contrary, assumes the risk of injury not only from those features of the machine called to his attention but also from those open to observation. The law is well stated by the Massachusetts court in *Rooney v. Sewall etc. Cordage Co.*, 161 Mass. 153, 36 N. E. 789, a case where an operative was injured by a projecting set-screw of which he did not know and had never heard. The court said: "When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making his contract or not. He could look at it if he chose, or he could say, 'I do not care to examine it; I will agree to work in this mill, and I am willing to take my risk in regard to that.' In either case ⁵⁶⁵ he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage. A projecting set-screw is a common device for holding the collar on a shaft, although there is a safer kind of set-screw in common use. Under its contract with the plaintiff the defendant owed him no duty to box the pulley or shaft, or to change the set-screw for a safer one."

In the case at bar the set-screws were open and exposed to observation, and plainly visible to anyone making the most cursory examination of the machine and its operation. They were not in any obscurity, being well lighted from a window but a few feet away. They were directly visible to an operative washing the floor under them or cleaning cotton waste from them. It is urged, however, that they were not visible while the collar was revolving two hundred and eighty times a minute. There is no evidence to that effect, and we do not find it self-evident that a collar only two and one-half inches in diameter bearing set-screws projecting five-eighths of an inch, and revolving at that speed, would show a smooth surface. But, however that may be, there is no evidence that the collar was always revolving at that or any speed. It undoubtedly was often at rest when the set-screws could be plainly seen. There is no suggestion of immaturity, or want

of experience, or want of intelligence on the part of the plaintiff. It was her duty to acquaint herself with the machine she was to operate, and, in the absence of stipulation to the contrary, she assumed not only the risks pointed out to her but those open and visible. If she did not observe them she none the less assumed the risk of them: *Ragon v. Toledo etc. Ring Co.*, 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612, and cases *infra*.

It has been held in several decided cases that ignorance of set-screws in machinery does not relieve the operative of the risk of danger from them, where they are open to observation: *Rooney v. Sewall etc. Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Ford v. Mt. Tom Sulphite Co.*, 172 Mass. 544, 52 N. E. 1065, 48 L. R. A. 96; *Archibald v. Cygolf Shoe Co.*, 566 186 Mass. 213, 71 N. E. 315; *Kennedy v. Merrimack Paving Co.*, 185 Mass. 442, 70 N. E. 437; *Mutter v. Lawrence Mfg. Co.*, 195 Mass. 517, 81 N. E. 263.

The danger to a woman from allowing her hair to become entangled in set-screws revolving as these were is too obvious for comment.

Under the law and the facts of the case, the plaintiff must be held to have assumed the risk of the injury she received.

Verdict set aside.

The Liability of an Employer to His Employé for injuries resulting from dangerous machinery and appliances is the subject of a note to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289. The doctrine of assumption of risk and contributory negligence on the part of the employé is further discussed in the note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884.

MERRILL TRUST COMPANY v. HARTFORD.

[104 Me. 566, 72 Atl. 745.]

APPEAL AND ERROR—Questions of Fact, When not Presented.—Where in his “reasons of appeal” the appellant does not assign any error in the findings of fact, the correctness of such findings cannot be questioned. (p. 417.)

PROBATE COURTS, Power of to Annul Decrees.—A probate court has power, upon petition, notice and hearing, to vacate or annul a prior decree probating a will clearly shown to have been without foundation in law or in fact and in derogation of legal right. (p. 418.)

THE PROBATE OF A WILL may be Annulled on the ground that the will was not signed by the testatrix nor by any person for her or at her request, nor subscribed by her in the presence of three

credible witnesses, and the only evidence given in its support was before a judge in vacation. (p. 418.)

A PROBATE COURT has No Authority in Vacation, nor has Its Judge, to receive evidence in support of a will nor to admit it to probate. Any action so taken by the judge is not judicial. (p. 418.)

PROBATE OF WILL, Failure to Appeal from, When does not Prevent Annulment.—The failure to appeal from an order probating a will does not prevent proceedings for the annulment of such probate, when it does not appear that the petitioner for annulment appeared at any hearing upon the matter of the decree or had any notice thereof prior to the expiration of the time for appeal. (p. 419.)

PROCEEDING to Annul the Probate of a Will, When not Barred by Receiving a Legacy.—The petitioner for the annulment of the probate of a will is not precluded from maintaining the proceeding by having received a legacy under the will, if she offers to return such legacy, and it does not appear that when receiving it she had any knowledge of the facts relied upon for annulment. (p. 419.)

PROCEEDING for the Annulment of a Will, When not Barred by a Prior Proceeding for the Same Purpose.—One who presents a petition for the annulment of the probate of a will which is dismissed because the facts disclosed were entirely insufficient is not precluded from prosecuting subsequent proceedings in which other and sufficient facts are alleged. (pp. 419, 420.)

LACHES cannot be Held to Exist When the Party did not Know His Rights or the facts constituting them, and was not negligent in not knowing them. (p. 420.)

PROBATE OF A WILL—Proceeding for Annulment, When not Barred by Laches.—The fact that ten years elapsed after the probate of a will before a petition for its annulment was filed does not convict the petitioner of laches if she was a distant relative of the decedent, living in another state, and did not know, nor have reason to suspect, the existence of the facts rendering the annulment proper. (pp. 420, 421.)

PROBATE OF A WILL—Decree Annuling cannot Also Declare that There was No Will.—A proceeding to annul the probate of a will must be confined to such annulment, and cannot also adjudge that there was no will and that the decedent died intestate. This question cannot be considered until the will is again presented for probate. (p. 422.)

O. P. Cunningham, F. H. Appleton and John A. Peters, for Merrill Trust Company.

Oscar F. Fellows, for Hattie M. Hartford.

571 EMERY, C. J. The case is this: After the death of Mrs. Frankie M. Jordan, of Orland, Hancock county, her husband, Andrew J. Jordan, presented to the probate court for that county at the January term, 1898, an instrument purporting to be the last will of his deceased wife, with a petition that it be probated and allowed as such. After due notice the probate court at the next February term by decree allowed and probated the instrument as the last will of Mrs. Frankie M. Jordan, deceased. Letters testamentary were

issued to Andrew J. Jordan, named in said instrument as executor and also named as residuary legatee.

At the December term, 1907, of the probate court, and after the death of Andrew J. Jordan, Hattie M. Hartford, an heir of Mrs. Jordan, presented to the court a petition for annulment of the probate decree of the February term, 1898, allowing, as the will of Mrs. Jordan, the instrument presented as above stated by Mr. Jordan. In this petition the petitioner alleged, among other matters, that the instrument was not signed by Mrs. Jordan nor by anyone for her at her request; that the instrument was not signed by three credible witnesses not beneficially interested; that none of the witnesses to the instrument signed or attested it in the presence of Mrs. Jordan; that Mrs. Jordan had no knowledge of the witnessing of the instrument; that while four names appear on the instrument as witnesses there were in fact only three persons subscribing, one of whom was beneficially interested and subscribed a second time under another name; that the only evidence to support the probate of the instrument was the testimony of one of the subscribing ⁵⁷² witnesses, Mrs. Gott, given, not in court during term time, but to the judge in vacation. After due public notice and personal notice to the appellant, the Merrill Trust Company, the executor of the will of Andrew J. Jordan, the matter of the petition was heard at the next January term, 1908, and the probate court passed a decree in which it declared that "the allegations of said petition are true, and that there was fraud in the making, signing, witnessing and probating the instrument named in the petition" as the will of Mrs. Jordan, and that the former decree of the court made at the February term, 1898, allowing and probating the instrument of Mrs. Jordan, "be and the same hereby is revoked, annulled and declared void." From this decree the Merrill Trust Company appealed to the supreme court of probate. In that court the case was again heard and reported to the law court for determination.

In its "reasons of appeal" the appellant did not allege, or assign as a reason for appeal, that the probate court erred in any finding of facts alleged in the petition so far as essential to the decree; hence the correctness of such findings cannot now be questioned. We are here concerned only with the allegations of other facts in the "reasons of appeal" and with the questions of law involved: *Prescott v. Tarbell*, 1 Mass. 204; *Boynton v. Dyer*, 18 Pick. 1; *Gilman v. Gilman*, 53 Me. 184.

It is well settled that a probate court has the power and duty upon subsequent petition, notice and hearing to vacate or annul a prior decree, even a decree of probate of a will, clearly shown to be without foundation in law or fact, and in derogation of legal right: *Cousens v. Advent Church*, 93 Me. 292, 45 Atl. 43; *Hotchkiss v. Ladd's Estate*, 62 Vt. 209, 19 Atl. 638; *Waters v. Stickney*, 12 Allen, 1. 90 Am. Dec. 122. In the last case cited the question is discussed and settled in a very learned, exhaustive and convincing opinion.

The first real question in this case, therefore, is, whether the allegations of fact in the petition for annulment, found to be true by the probate court and not questioned in the reasons of appeal, and nothing else appearing, show cause for the annulment of the decree complained of. Of this there can be no reasonable doubt. ⁵⁷³ The supposed will was not signed by the supposed testatrix nor by any person for her at her request; nor was it subscribed in her presence by three credible witnesses not beneficially interested; nor was there any evidence in support given in court, the only evidence being from the statement of one witness made to the judge in vacation. The decree of the probate court should not have been made upon the statement of one witness made, not in court, but only to the judge in vacation, at least unless by consent of all parties interested. The probate court is not always open. It has regular terms. It may, of course, adjourn a term from one day to another, and special terms may be appointed upon notice, but in the interims between such terms and such days the judge, while perhaps he may lawfully perform mere ministerial acts, cannot lawfully perform any judicial act, except such as are authorized by statute to be done in vacation. No power is conferred upon him to hear out of court statements or testimony as evidence for the decision of cases pending in court. Such action by the judge in this case was not the judicial action of the court: *White v. Riggs*, 27 Me. 114; *State v. Hall*, 49 Me. 412.

From all the above it must be evident that upon the allegations in the petition, nothing else appearing, the instrument probated in the decree of February, 1898, was not entitled to probate, and further, there was no legal evidence before the court that it was so entitled, and hence that the decree of probate should be annulled.

We now come to the consideration of the matters set forth in the reasons of appeal as reasons why, nevertheless, the decree of probate should not be annulled. We notice only

those pressed in argument, the others not being relied upon by the appellant.

1. Because all the legacies under the instrument probated have been duly paid, together with all outstanding bills and claims against the estate of Mrs. Jordan. It does not appear that Andrew J. Jordan, as executor of the instrument, or his executor, the appellant, has ever settled or even filed any account as such executor, or even filed any inventory of the estate of Mrs. Jordan; nor was it proved aliunde that all the legacies and outstanding bills and claims have been paid. This alleged reason, therefore, cannot be sustained.

⁵⁷⁴ 2. Because no appeal was taken from the decree now sought to be annulled. It is not shown that Mrs. Hartford, the petitioner here, appeared at any hearing upon the matter of the decree, or had any actual notice of the proceedings at the time, or during the time allowed for appeal. Under such circumstances the fact that the decree was not appealed from by her does not make it invulnerable, when it is made clearly to appear that the decree was without foundation in law, fact or evidence, and was wrongfully obtained without legal evidence produced in court. There are many decided cases where decrees of probate courts not appealed from have, nevertheless, afterward been annulled. This reason of appeal cannot be sustained.

3. Because the petitioner elected to receive the legacy of two hundred dollars bequeathed her in the instrument allowed, and did receive it and did not make any claim as heir. The petitioner did receive from Andrew J. Jordan, claiming to be executor, the sum of two hundred dollars, named as her legacy, but upon filing her petition in this case she deposited in court the sum of two hundred dollars for the use of the estate of Mrs. Jordan. She did not pay in, or account for, any earnings of or interest upon the two hundred dollars while in her possession, but there is no evidence and we cannot assume that she ever made any use of the money by way of investment or expenditure. She was under no obligation to do so. It does not appear that when she received the two hundred dollars, or that before she offered to return it, she was aware of the facts set forth in her petition as cause for annulment of the probate. She having returned the money, we do not think that her original reception of it under the circumstances bars her petition.

4. Because the petitioner once before, viz., at the June term of the probate court, 1907, presented a petition for annulment of the probate of the instrument, which petition,

after notice and hearing, was dismissed and no appeal taken. It appears that she did file a petition as stated, in which, however, the only fact alleged was that "she had recently discovered evidence as to the making and signing of the alleged instrument purporting to be the last will and testament of said Frankie M. Jordan which could never have been known to her before." No facts which the newly discovered evidence ⁵⁷⁵ would prove were stated, nor was any of the evidence stated. It is apparent that the petition should have been dismissed for insufficiency of allegation, and it is difficult to see how the mere dismissal of such a petition is an adjudication upon all the allegations of fact in the present petition. At the most, it could be so only upon the allegations as to the making and signing the instrument. It cannot include the allegations as to the witnessing and probating the instrument. Further, the decree dismissing that petition was by its terms placed solely on the ground that the petitioner had not returned the money received by her as a legacy under the instrument. There is no finding of any other fact in the decree. None of the allegations in this present petition appear to be *res adjudicata*.

5. Because of the laches of the petitioner in that she did not file her present petition until December 7, 1907, though she had knowledge nearly ten years previously of the death of Mrs. Jordan and of the claim of Andrew J. Jordan that there was a will in which two hundred dollars was bequeathed to her. Something more than lapse of time, however, must be shown. To make out a case of laches, it must appear both that the delay was without reasonable excuse and that during the delay the condition of the other party in good faith became so changed that he cannot make the defense that, but for the delay, he might have made. There is no laches when the party did not know his rights, or at least the facts constituting his rights, and was not negligent in not knowing them. In this case the petitioner seasonably knew of the death of Mrs. Jordan and of Mr. Jordan's assuming to act as executor of a will of the deceased. She is also presumed to know that an instrument had been probated as the will of Mrs. Jordan, and also its contents. She is not presumed to know whether the instrument probated as a will was legally signed, witnessed and probated. She testified without contradiction that she did not know of the facts set forth in her petition until June, 1907. We do not think that under the circumstances she can be held negligent for not earlier knowing them. She lived in another state. She was no nearer

relative than cousin. She had not been in Orland since 1892. While she was bound to know all ⁵⁷⁶ that appeared on the records of the court, she was not bound to know nor suspect that the instrument appearing to have been probated had not been signed nor witnessed as required by law to constitute a valid will, nor that the probate of it had been obtained without legal evidence of the necessary requisites.

There is one matter relied upon to charge the petitioner with laches which should be noticed. It appears that other heirs of Mrs. Jordan at the October term, 1898, of the supreme court of probate petitioned for leave to enter an appeal from the decree of February, 1898 (the decree now sought to be annulled), and in their petition alleged several facts alleged in the petition before us, but not the fact that no evidence was heard by the judge in court. That petition was later dismissed by consent, Mr. Jordan purchasing his peace of those petitioners by extra payments. Mrs. Hartford was asked by them if she would join in an effort to get more than the will gave them, and she expressed her willingness to do so, but she did not become a party to the petition, and it does not appear that she received anything from it, or knew its contents or what was done with it. It is evident that these facts do not show her then to have knowledge of the facts now alleged, or to be negligent in not knowing them. She filed her first petition for annulment in June, 1907, when she first had notice of the matters alleged, and her second, the present, petition in December, 1907, as soon as her first was disposed of. Andrew J. Jordan had died the January before, and there is no evidence that her delay from June to December, 1907, made any change in the condition of the other party.

Under this head of laches the appellant also urges that by the death in January, 1907, of Andrew J. Jordan, the executor and residuary legatee of Mrs. Jordan, it has become impracticable to determine what of the property left by him came to him from the estate of Mrs. Jordan, she having died nine years before. That matter must be adjusted or tried out in proceedings between the administrator of Mrs. Jordan, if one be appointed, and the appellant, as executor of the will of Andrew. It does not appear but that the estate of Andrew is intact, no payments out of it ⁵⁷⁷ having been shown. No loss will fall upon the appellant, but only on the estate of Andrew, who did the wrong.

Under this same head it is further urged that by the death of Andrew J. Jordan, the appellant, his executor, is deprived of evidence that might have supported the decree of February,

1898, and shown cause against its annulment, and that by waiting till after the death of Andrew, the petitioner has placed his estate and his executor at such a disadvantage that the court should not now grant her petition. Granting, arguing only, that such a disadvantage would be cause for denying the petition, we do not think it is shown to exist. It does not appear that Andrew alone may have known of material facts. So far as appears, the witnesses to the instrument and the then judge of probate are all living and within our jurisdiction and competent to testify, and all material facts can be shown by them.

No other reasons of appeal are argued, and it is not claimed that those not argued show cause against the petition. It follows that the decree appealed from should be affirmed, with costs of appeal so far as it annuls the prior decree of February, 1898, probating as the will of Mrs. Jordan the instrument therein described. The probate court, however, went further, and undertook to decree that the instrument was not the will of Mrs. Jordan and that she died intestate. The probate court had no occasion to make any decree upon either of those questions, though asked for in the petition. There is no occasion yet to decide either question, and will not be until the instrument is again offered for probate, or until application is made for the appointment of an administrator upon the estate of Mrs. Jordan as having died intestate. That part of the decree should be eliminated.

The case is remitted to the supreme court of probate sitting for Hancock county to make and enter decrees in accordance with this opinion.

So ordered.

Judgments Rendered in Vacation are, as a rule, held to be without jurisdiction and void: *Ex parte Ellis*, 37 Tex. Cr. 539, 66 Am. St. Rep. 831; *In re Terrill*, 52 Kan. 29, 39 Am. St. Rep. 327. Such judgments, however, may be authorized by statute: *Adler v. Van Kirk Land etc. Co.*, 114 Ala. 551, 62 Am. St. Rep. 133; and are said to be valid if entry is in accordance with the agreement of the parties entered in open court: *King v. Green*, 2 Stew. 133, 19 Am. Dec. 46.

A Decree of a Court Acting Within Its Jurisdiction Admitting a Will to probate becomes conclusive, as a general rule, if an appeal is not seasonably prosecuted: *Brown v. Brown*, 71 Neb. 200, 115 Am. St. Rep. 568; *Cohen v. Herbert*, 205 Mo. 537, 120 Am. St. Rep. 772; *Tracy v. Muir*, 151 Cal. 363, 121 Am. St. Rep. 117; *Kemmerer v. Kemmerer*, 233 Ill. 327, 122 Am. St. Rep. 169. But, when the decree is void for want of jurisdiction, a contest of the will may be filed after the expiration of the time prescribed by statute: *In re Sullivan's Estate*, 40 Wash. 202, 111 Am. St. Rep. 895. And the general rule is that a judgment rendered without jurisdiction is void, and may be denied or contested at any time in any proceeding: *Flowers v. King*, 145 N. C. 234, 122 Am. St. Rep. 444, and cases cited in the cross-reference note thereto.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

WHALEN v. BALTIMORE AND OHIO RAILROAD COMPANY.

[108 Md. 11, 69 Atl. 390.]

RAILROADS—Covenant to Maintain Siding.—A covenant by a railroad company to establish and maintain a turnout and siding for private use is not necessarily against public policy. (p. 427.)

RAILROADS—Covenant to Maintain Siding.—A covenant by a railroad company to construct and maintain a turnout and siding on the property of the covenantee, and there take up and set down all persons going to and from the farm of the covenantee, runs with the land; but a further covenant to leave at the siding to be unloaded any car in which are articles for the covenantee weighing a certain amount on which transportation has been paid, does not run with the land. (p. 429.)

RAILROADS—Maintenance of Siding After Change of Route.—A railroad that has straightened its line so as to improve the road-bed and train service cannot be enjoined to operate trains over an abandoned part of the line and run cars on a private siding thereon in accordance with its covenant with the owner of the land at that point, when the burden will be wholly out of proportion to the benefits that will accrue to the covenantee. (p. 431.)

The material portion of the indenture referred to in the opinion is this: "And this indenture further witnesseth that the said parties of the second part do hereby covenant and agree in consideration of the premises to and with the said parties of the first part, their heirs and assigns, to construct and maintain a turnout and siding at Dorsey's run on the main stem of said railroad; to take up and set down at said siding by the passenger cars of said company all persons going to and from the farm now occupied by the said parties of the first part, and to leave at said siding to be unloaded any car in which any article or articles weighing at

least three thousand pounds shall be laden for the said parties of the first part and on which the cost of transportation shall have been paid at the place of lading."

Bernard Carter and Edward M. Hammond, for the appellants.

James A. C. Bond and Francis Neal Parke, for the appellee.

14 WORTHINGTON, J. The appeal in this case was taken from an order of the circuit court for Howard county, sitting as a court of equity, sustaining a demurrer to a bill of complaint filed in that court by the appellants against the appellee, for the purpose of obtaining an injunction to restrain the appellee from neglecting and refusing to properly maintain a turnout and siding at Dorsey's run in Howard county; and from neglecting and **15** refusing to maintain and run a reasonable train service of passenger and freight by or over said Dorsey's run siding; and from neglecting and refusing to take up and set down at said siding, by the passenger cars of defendant company, all persons going to and from the farm of the plaintiffs; and from refusing or neglecting to leave at said siding, to be unloaded, any car in which any article or articles weighing at least three thousand pounds shall be laden for the plaintiffs, and on which the cost of transportation shall have been paid at the place beginning.

The bill was filed June 17, 1907, and sets forth, as the grounds for its prayer for this relief, that on May 5, 1848, the defendant entered into an indenture with a certain Thomas Beale Dorsey, formerly for many years a member of this court, and Mileah Dorsey, his wife, wherein the defendant covenanted and agreed with the said Dorsey and wife, and with their heirs and assigns, to construct and maintain a turnout and siding at Dorsey's run on the main stem of said railroad, and also to do certain other things which in the prayer of said bill it is prayed the defendant may be enjoined and restrained from neglecting and refusing to do.

The bill further alleges that the plaintiffs have become, by mesne conveyances, enfeoffed and seised of a large part of the land owned by said Dorsey and wife at the time of the execution of said indenture, and that they are, as the assigns of said Dorsey and wife, entitled to enjoy the fruits of the covenant therein before recited; the said covenant, as is alleged, being a covenant running with the land. That the defendant was then, at the time of the filing of the bill of

complaint, constructing a cut-off on the main stem of its railroad, over which it would, when completed, run its passenger and freight trains, and thus divert all passenger and freight trains from that part of its line which theretofore had passed Dorsey's run at the siding and turnout which up to that time had been maintained and operated by said railroad company under the provisions of said covenant.

That the plaintiffs being advised of the intended abandonment of Dorsey's run turnout and siding, communicated with ¹⁶ the defendant and called its attention to the covenants in said indenture contained, to which communication the defendant replied that it would abandon said turnout and siding, but would hold itself in no way liable for a breach of said covenants; because, as it claimed, it was immune from liability for a breach thereof.

The bill further alleges that by the change of the location of the roadbed of said defendant company there would be no turnout or siding on the property of the complainants at Dorsey's run, and that they would be entirely without the passenger or freight service from said defendant, which the defendant has covenanted to give the complainants as assignees of said Dorsey.

That when the complainants purchased the property mentioned, the fact of having a station on their property at which the freight and passenger trains of the defendant stopped was an inducement and a consideration for them to purchase the said property, and that they were advised at the time of said purchase that said covenant was one running with the land, and could not be broken by said defendant company.

That the complainants were advised, and therefore charge, that no monetary compensation could recompense them should the defendant be allowed to violate its said covenants, and that a breach thereof would work a great depreciation in the value of the land belonging to them for which they would have no adequate remedy at law.

That it was not unreasonable to ask the railroad company to run and maintain a certain number of trains, passenger and freight, over its right of way passing by said Dorsey's run, and to maintain the turnout and siding covenanted by the defendant company to be maintained there, nor would such request be impossible of performance.

The bill further alleges that the defendant has not abandoned the property of the complainants entirely, but that its tracks were still on the property of complainants for a considerable distance.

That should the defendants be permitted to violate their ¹⁷ covenants, that the nearest station to the complainants would be Hollofields, which was distant three miles, whereas from the residence and property of the complainants to Dorsey's run turnout and siding was but one-quarter of a mile.

The bill also alleges in its sixteenth paragraph, "That from the nature of the topography of the ground and situation whereon the new line of railroad would run, it would be impossible to construct and maintain a turnout and siding which would be accessible to the complainants." The prayer of the bill for specific relief is substantially as hereinbefore set out, and there is also the usual prayer for general relief. With the bill was filed a copy of the deed to Priscilla J. Whalen, one of the complainants, for five hundred and sixty-seven acres, being a part of two thousand two hundred acres of land owned by Judge Dorsey at the time of the execution of the above-mentioned indenture; also a plat of the whole tract showing the location of Dorsey's run station, and of the so-called new "cut-off" of the railroad, and also a copy of the indenture entered into between the railroad company and Judge Dorsey in 1848.

The indenture is set out in the report of this case preceding this opinion. The legal principles involved in this appeal, all of which were elaborately argued by able counsel on both sides, and all of which are sufficiently involved in the case to require careful consideration, may be appropriately considered under three heads: 1. Was the covenant, or rather were the covenants (for while one in form, the covenant involved in this proceeding embraces several undertakings), contained in the indenture of May 5, 1848, originally valid and binding on the defendant, or void as against public policy? 2. If originally valid as between the parties, are they such covenants as run with the land in favor of the plaintiffs as assignees of Dorsey? 3. If valid, and if they inure to the benefit of the plaintiffs, are the plaintiffs entitled to have the agreement specifically enforced?

1. As to the first proposition, we think the covenants were valid, and binding on the defendant at the time they were entered ¹⁸ into, and capable then of being specifically enforced so far as the facts are disclosed by the record.

In *Green v. West Cheshire Ry. Co.*, L. R. 13 Eq. Cas. 44, a contract by the defendant railroad company to construct a siding upon plaintiff's land alongside the railroad tracks was specifically enforced. In *Lydie v. Baltimore etc. R. R. Co.*, 17 W. Va. 427, a right of way through land was granted to

the railroad company, and a verbal agreement was made by which the railroad company promised to put in a switch at a certain mill, and stop its trains at the switch. The court held, because the agreement was verbal, it did not run with the land, but distinctly stated that if it had been in writing under seal, it would then be a covenant running with the land and capable of being specifically enforced in equity.

In *Aiken v. Albany R. R. Co.*, 26 Barb. 289, the railroad was required to construct and maintain crossings over or under its tracks for the benefit of the farm land on each side in pursuance of an agreement to that effect in a deed from the land owners to the railroad company: See, also, *Murray v. Northwestern Ry. Co.*, 64 S. C. 520, 42 S. E. 617, and *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun. 467; *Pittsburgh etc. Ry. Co. v. Reno*, 123 Ill. 273, 14 N. E. 195.

The case of *Sapp v. Northern Central Ry. Co.*, 51 Md. 115, cited by the appellees, is distinguishable from these. In this latter case the court was dealing with a question involving the right or power of a railroad corporation to grant or create an easement for persons to walk along its tracks or by the side of them.

As the exercise of such a power, if permitted, would be subversive of the very purpose of the railroad's creation, it was held that the corporation possessed no such power.

In the case at bar we find nothing unreasonable or impracticable for the railroad to perform, contained in the covenant, as originally entered into, and nothing on the ground of public policy to forbid or prevent its execution at the time.

We think there is a manifest distinction to be made between covenants to establish and maintain stations for the public convenience, ¹⁹ and those to establish and maintain sidings, turnouts, crossings and the like, for private use merely. The former are generally condemned as against public policy, while the latter are to be governed by the circumstances of each particular case: *Fuller v. Dame*, 18 Pick. 472; *Texas & P. R. R. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. Rep. 846, 34 L. ed. 385; *Texas & P. R. R. Co. v. Scott*, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94; *Marsh v. Fairbury etc. Ry. Co.*, 64 Ill. 414, 16 Am. Rep. 564; *Northern Pacific Ry. Co. v. Washington*, 142 U. S. 492, 12 Sup. Ct. Rep. 283, 35 L. ed. 1092; *Lydie v. Baltimore etc. R. R. Co.*, 17 W. Va. 427; *Aiken v. Albany R. R. Co.*, 26 Barb. 289; *Green v. West Cheshire Ry. Co.*, L. R. 13 Eq. Cas. 44; *Gilmer v. Mobile Ry. Co.*, 79 Ala. 569, 58 Am. Rep. 623.

2. The next question is, Do the covenants run with the land in favor of the plaintiffs in this case?

By referring to the covenant it will be seen that the railroad company agreed to "construct and maintain" a turnout and siding at Dorsey's run on the main stem of said railroad, and to do certain other things connected therewith; and the agreement is made not only with the original grantors, but also with "their heirs and assigns."

In *Spencer's Case*, reported in 5 Coke, 16, and also found in 1 Smith's Leading Cases, ninth edition, at page 174, the question as to what covenants run with the land and what do not was fully considered by the whole court, and it was resolved in that case that when the warranty is made to one, his heirs and assigns, by express words, the assignee shall take the benefit of it, even though the covenant extend to something not then in esse, provided the thing to be done touch and concern the land.

The action in *Spencer's case* was between a lessor and the assignee of the lessee, but the principles enunciated therein have been held applicable to covenants between grantor and grantee, and their assigns, in very many modern cases.

In *Gleen v. Canby*, 24 Md. 127, the court said: "The established doctrine is that a covenant to run with the land must extend to the land so that the thing required to be done will affect the quality, value or mode of enjoying the estate conveyed, and thus constitute a condition annexed or appurtenant ²⁰ to it; there must also be a privity of estate between the contracting parties, and the covenant must be consistent with the estate to which it adheres, and of such a character that the estate will not be defeated or changed by a performance of it."

In all cases covenants conferring benefits will run with the land where the rights conferred are of such a character as to attach to the land and pass as incidents thereto: 11 Cyc. 1089.

The question as to whether the covenant runs with the land does not depend on its being performed on the land itself, but its performance must touch and concern the land, or some right or easement annexed or appurtenant thereto, and tend necessarily to enhance its value or render it more convenient or beneficial to the owners or occupants: 11 Cyc. 1081.

A covenant which does not touch and concern the land, as above indicated, is called a personal covenant, and binds only the covenantor, and can be taken advantage only by the covenantee: 2 Black's Commentaries, 304; Bouvier's Law Dictionary, tit. "Personal Covenant."

In the deed from Judge Dorsey and wife the railroad company expressly covenants to do three things, which are involved in this controversy: 1. To construct and maintain a turnout and siding at Dorsey's run; 2. To take up and set down at said siding by the passenger cars of said company all persons going to and from the farm then occupied by the grantors; 3. To leave at said siding to be unloaded any car in which any article or articles weighing at least three thousand pounds should be laden for the grantors, and on which the cost of transportation has been paid at the place of lading.

Tested by the foregoing general principles the third covenant seems to us to be a personal one, while the first and second are covenants real, and inure to the benefit of the plaintiffs as assignees of Dorsey and wife.

3. We come, then, to the third general head into which the consideration of the case has been divided—that is, Are the ²¹ plaintiffs entitled to have the covenants which run with the land and inure to their benefit specifically enforced?

There can be no doubt as to the right of the railroad company to change, for the purpose of carrying out the object of its creation, the location of its main stem.

A railroad is in many essential respects a public highway, and the rules of law applicable to one are generally applicable to the other: *Fuller v. Dame*, 18 Pick. 472.

The counsel for the appellees very well say in their brief “that a railroad company is a public service corporation, and is obliged to use its powers and privileges for the benefit of the public and in aid of the public good. It must therefore, from time to time, conform to the requirements of public travel and commerce, and adjust its grades, its route and its curvatures to these needs. No contract on its face can interfere with these public duties.

“To compel a railroad company to maintain its main stem on the old location forever is to render it impossible for the corporation to ever make in conformity with its own needs and the public's interests any change in its transportation route.”

It appears from the blue-print filed with the record in this case that the main stem of the defendant company where it passed through the lands of Judge Dorsey was, at the time of the execution of the indenture in question, located along the south side of the Patapsco river.

This river, which flows a generally easterly course, at that part of it which passes nearest to the mansion house and former residence of the late Judge Dorsey takes a short turn

to the south, and then after flowing a short distance turns again to the north and east, forming at this point a loop or curve very much in the shape of the letter U with the open part of the letter toward the north. Judge Dorsey's late residence is located about one-quarter of a mile south of the river at this point, and Dorsey's run and siding was located on the line of the old railroad near the south bend of the U-shaped curve thus formed.

For the purpose of straightening its line and bettering its ²² roadbed and train service, a cut-off was made across the upper part of this U-shaped curve in the river, crossing the river twice; and the main stem of the railroad was relocated along this cut-off, thus eliminating the sharp curve in the road at Dorsey's run, and leaving the turnout and siding formerly established about one-quarter of a mile to the south and on the opposite side of the river.

The bill of complaint alleges "that from the nature and topography of the ground and situation whereon the new line of railroad will run, it is impossible to construct and maintain a turnout and siding which will be accessible" to the complainants.

The bill also avers that it is not impossible of performance or unreasonable to ask the defendant still to run a certain number of passenger and freight trains daily over its line passing by Dorsey's run, and still to maintain the turnout and siding at that place, as a reasonable compliance by the defendant with the terms of the covenant.

Whether it would be a reasonable requirement to compel the defendant to still run a certain number of trains daily, both passenger and freight, over the old abandoned route passing Dorsey's run, in addition to the train service required over its main stem as now located, is a question for the court to determine from all the circumstances of the case, and is not to be taken as admitted by the defendant's demurrer. The demurrer admits the truth of the facts alleged in the bill so far only as they are relevant and well pleaded; conclusions of law deduced by the pleader and theories as to the effect of the facts are not admitted by the demurrer: *Miller's Equity*, see. 133; *Felix v. Patrick*, 145 U. S. 317, 12 Sup. Ct. Rep. 862, 36 L. ed. 719.

There can be no doubt of the right and power of the directors of the railroad company to make the cut-off and change the location of its main line as indicated on the blue-print, for the purpose of straightening its lines and reducing its grades, and thus improving its service to meet its obligations to the

public, and also to increase its earning capacity for the benefit of its stockholders.

²³ As was said in *New Central Coal Co. v. Georges Creek Coal etc. Co.*, 37 Md. 537, "the managers or directors of the corporation are the sole judges of what is proper or convenient, as well with reference to location as to the execution of all other powers granted, as a means of attaining the object of its charter."

The injunction prayed for in this case would, if granted, accomplish all that a decree for specific performance could effect, and, therefore, all the principles which apply to the case of a bill for specific performance apply with equal force to the case of a bill for perpetual injunction, when that injunction accomplishes all the objects which could be accomplished by a successful prosecution of a formal bill for specific execution: *Maryland Telephone Co. v. Simons' Sons Co.*, 103 Md. 136, 115 Am. St. Rep. 346, 63 Atl. 314.

Specific performance is not a matter of absolute right in the party, but of sound discretion in the court, and it will not be granted, but the party will be left to his remedy at law when the performance has become impossible, or the decree would be inequitable under all the circumstances of the case.

Bearing in mind these general principles, and considering all the allegations of the bill of complaint, which are well pleaded, and which by the demurrer are admitted to be true, together, we think that to require the defendant to still maintain a train service over its now abandoned line past Dorsey's run, as is sought to be accomplished by the prayer of the bill, would impose upon the defendant an unreasonable burden wholly out of proportion to any benefit that would thereby accrue to the complainants. The railroad company appears to have faithfully complied with its covenant for nearly sixty years, and so long as its main line remained on the former location, it could perhaps have been compelled to comply therewith, but the very purposes of its creation forbid that it should be tied to the same location forever.

Whether the plaintiffs are entitled to compensation in damages for the abandonment by the defendant of the turnout and siding, and train service, so long maintained by the appellee at that place, this court is not called upon now to determine, ²⁴ but we are all of the opinion that the relief prayed for in the bill of complaint must be denied, and that the appellants must be left to seek redress for any injury which they may have sustained by such abandonment in a court of law.

The order appealed from will be affirmed and the bill dismissed without prejudice to the plaintiff's right to sue at law.

Order affirmed and bill dismissed with costs to the appellee.

Contracts to Locate a Railroad Depot at a particular place, while often held invalid as against public policy, are not necessarily so: Atlanta etc. R. R. Co. v. Camp, 130 Ga. 1, 124 Am. St. Rep. 151, and cases cited in the cross-reference note thereto. A contract whereby a railroad company, in consideration for a right of way for part of a switch-track, grants to a coal company the exclusive use of such track for coal purposes, is against public policy and void: Louisville etc. R. R. Co. v. Pittsburg etc. Coal Co., 111 Ky. 960, 98 Am. St. Rep. 447.

Covenants Which Run with the Land are discussed in the note to Geiszler v. De Graaf, 82 Am. St. Rep. 664. A covenant in a deed of a right of way for a railroad that as part consideration for the conveyance the grantee shall erect a retaining wall between the grantor's land and the right of way, keep it in repair at all times, and renew it when necessary, runs with the land: Flege v. Covington etc. Bridge Co., 122 Ky. 348, 121 Am. St. Rep. 463. As to when a grantee is bound by covenants in the deed, see the note to Dawson v. Western Maryland R. R. Co., 126 Am. St. Rep. 348.

COCHRAN v. PRESTON.

[108 Md. 220, 70 Atl. 113.]

HEIGHT OF BUILDINGS—Power of State to Regulate.—Under the police power the legislature may regulate the height of buildings in a city, but the regulations adopted must be reasonable in their character and adapted to accomplish the purposes for which they are designed. (p. 434.)

HEIGHT OF BUILDINGS—Purposes for Which may be Restricted.—A statute limiting the height of buildings to seventy feet above the surface of the street at a certain point, within a designated part of a city where there are handsome edifices, beautiful monuments, and valuable works of art is valid. Such statute is not enacted for purely æsthetic purposes, but rather to protect the vicinity from fire. (p. 437.)

HEIGHT OF BUILDINGS—Statute Restricting—Discrimination.—A statute limiting the height of buildings in a designated part of a city is not unconstitutional because under the rule which it prescribes persons owning property on low ground may build higher structures than owners of higher ground, for the danger from fire in the latter case is greater than in the former. (p. 437.)

HEIGHT OF BUILDINGS—Statute Restricting—Exemption of Churches.—A statute limiting the height of buildings in a certain portion of a city is not unconstitutional because it exempts churches, for they do not present the same danger from fire to surrounding buildings as do other structures. (p. 438.)

W. Stuart Symington, Jr., and Osborne I. Yellott, for the appellant.

Sylvan Hayes Lauchheimer and W. Cabell Bruce, for the appellees.

226 WORTHINGTON, J. The only question involved in this appeal is whether or not the act of 1904, chapter 42, is a valid exercise of legislative power.

By this act it is provided, "that from and after the date of the passage of this act, no building, except churches, shall be erected or altered in the city of Baltimore on the territory bounded by the south side of Madison street, the west side of St. Paul street, the north side of Center street and the east side of Cathedral street, to exceed in height a point seventy feet above the surface of the street at the base line of Washington Monument." The act was approved March 15, 1904.

The ordinances of Baltimore require all persons who desire to build, alter or repair any structure within the limits of the city, or who desire to put an additional story upon any building therein, to obtain a permit from the inspector of buildings, and also from the appeal tax court of that city.

The appellant is the owner of a large apartment house located on the northwest corner of Mt. Vernon Place and **227** Washington Place, within the territory to which the prohibition of the statute applies, and desiring to put an additional story thereon to be used as quarters for employés, he applied to the appellees for a permit to make the desired alteration.

In his application for such a permit the applicant stated that the house is at present seventy feet high, and that the proposed addition would be but eight feet in height, and set back on the roof at a uniform distance of twenty feet from Mt. Vernon Place, and a like uniform distance from Washington Place, and that it would not be possible to see any part of the addition from either of these places. That the total cost of the building and ground in the first place was about four hundred and fifty thousand dollars, and that as the building now stands it is impossible to derive from the same a sufficient revenue to yield a fair profit on the investment therein, but that the proposed addition would enable the owner to derive a fair return for the whole outlay.

The appellees refused the permit on the ground that the additional story proposed would raise the building to a height greater than seventy feet above the base line of Washington

Monument, contrary to the provisions of the act of assembly above mentioned.

A mandamus was then applied for and denied by the court for the same reason assigned by the appellees in the first instance.

It is elementary that the word "land," in its legal signification, has an indefinite extent upward as well as downward, and, therefore, if it were possible for man to live in a state of nature, unconnected with other individuals, the proprietor of land would own not only the face of the earth within the boundaries of his proprietorship, but also everything under it and over it. An imaginary person living in such a state of nature would be at liberty to use his land as he pleased; to build on it to any height, and to dig into it to any depth, without restraint. But as man was formed for society and is incapable of living alone, organized society is essential to his well-being and happiness, and every person who enters society must give up a part of his so-called natural rights and liberties for the benefit of the community: 1 Blackstone's Commentaries, p. 125.

228 "The very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. The principle inheres in the very nature of the social compact. The protection of private property is one of the chief purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good or proper and necessary to secure the equal rights of all": Parker & Worthington on Public Health and Safety, sec. 14.

The power to prescribe regulations demanded by the general welfare for the common protection of all is known as the police power of the state, and is inherent in every sovereignty: Prentice on Police Power, p. 6; Commonwealth v. Alger, 7 Cush. 53; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

Among the police powers of the state the right to regulate the height of buildings in a city is one that cannot be questioned: Lewis on Eminent Domain, sec. 156; Tiedeman on State and Federal Control of Persons and Property, p. 754; Welsh v. Swasey, 193 Mass. 364, 118 Am. St. Rep. 523, 79 N. E. 745.

Yet such regulations must be reasonable in their character and adapted to accomplish the purpose for which they are designed: People v. D'Oench, 111 N. Y. 359, 18 N. E. 862;

Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Attorney General v. Williams, 174 Mass. 476, 35 N. E. 77.

As the purpose of the statute under consideration does not appear on its face, such purpose is open to inquiry, and the appellant contends that its purpose was and is to preserve the beauty and architectural symmetry of the environment of Washington Monument, and that in the exercise of the police power property rights cannot be impaired for purely æsthetic purposes.

To sustain the legal proposition, he quotes from Freund on Constitutional Rights and Public Policy (1904), section 181, as follows: "If the purposes were purely æsthetic, the impairment of property rights, even upon the payment of compensation, would not pass unchallenged"; and also from Tiedeman on State and Federal Control of Persons and Property, 11, page 755, as ²²⁹ follows: "Regulations which are designed only to enforce upon the people the legislative conception of artistic beauty and symmetry will not be sustained, however much such regulations may be needed for the artistic education of the people."

Such is undoubtedly the weight of authority, though it may be that in the development of a higher civilization the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes.

In Welsh v. Swasey, 193 Mass. 364, 118 Am. St. Rep. 523, 79 N. E. 745, it is said that, "if the primary and substantial purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in as auxiliary." And our predecessors have said in speaking of an ordinance of Baltimore City passed in pursuance of the act of 1833, chapter 180, and regulating the distance that any portico, steps or other ornamental structure on Mt. Vernon Place might extend from the building line into the street, that the object was "in furtherance of the purpose to render these places or squares attractive, to give more freedom to the exercise of private taste for adornment in their vicinity. In a city noted for its monuments, municipal legislation peculiar to their neighborhood would seem indispensable": Garrett v. Janes, 65 Md. 260, 3 Atl. 597.

We do not assent, however, to the proposition that the statute under consideration was passed for purely ornamental purposes.

We find a more substantial reason for its enactment in the suggestion of the counsel for the appellees, that its purpose was to protect the handsome buildings and their contents, located in that vicinity, and also the works of art clustered there, from the ravages of fire.

It must be remembered that in the center of the prescribed territory to which the statute applied stands the lofty and beautiful monument to the illustrious Washington; on one corner of the Mt. Vernon Place and Washington Place is the ²³⁰ handsome Mt. Vernon Methodist Episcopal Church; on another is the Peabody Institute, a stately marble building in which are kept for public use many rare and valuable books and works of art, to replace which would be well-nigh impossible. In the same neighborhood are numerous handsome residences of private citizens, containing valuable works of art and of literature.

In Mt. Vernon and Washington Places are found statues to several eminent Marylanders; Severn Teackle Wallis, Roger B. Taney, and General John Eager Howard, and also a number of beautiful figures known as the Barye bronzes, so that the environment of the locality in question is in several respects unique, and well worthy of preservation in its entirety.

During the session of the legislature at which the statute under consideration was passed a great fire visited Baltimore and destroyed a large part of the business section of the city. Extracts from an account of the fire will demonstrate some of the dangers to be apprehended from this devouring element. The account says: "The fire spread to the north and east, rapidly devouring block after block of buildings. Landmark after landmark went down. Nothing but burnt clay—bricks and cement—could stand against a conflagration which developed two thousand five hundred degrees of heat, and was carrying itself along by its own volume, against which no water supply, no human effort could be effective. The lofty skyscrapers on Charles, St. Paul, Calvert and Baltimore streets burned like great torches up to the sky. Granite and marble cracked and spalled off. The marble work of the new custom-house then in course of construction was badly damaged wherever exposed to the heat, as was also the St. Paul street front of the new courthouse. Shortly after midnight the American newspaper office was enveloped in flames, which quickly spread across to the Sun Iron Building, involving all in common ruin. Devastation was carried down Calvert street, down South street and Holliday street and Gay street, wiping out hotels, newspaper offices, bank build-

ings, warehouses and nearly everything in the way clear to the waterfront of the inner harbor. Among the buildings destroyed ²³¹ were many so-called fireproof structures. After the fire these lofty buildings stood amidst the ruins of lesser buildings like gaunt skeletons, burned out interiorly but still structurally fireproof, with from forty to sixty per cent salvage credited to their construction."

Great impetus is given to such a fire by very tall buildings. They serve as so many large funnels, furnishing draft for the flames, thereby intensifying the heat and outreaching the efforts of the firemen.

Already some very tall buildings have been erected in this locality; the "Hotel Stafford," being one hundred and thirty-two feet high, and the apartment house known as "The Severn" being one hundred and fifteen feet above the pavement at the base line of Washington Monument. It was to prevent the multiplication of such buildings in this neighborhood, and the increased danger from fire attendant thereon, that this statute was no doubt passed.

We consider such an object entirely legitimate, and the statute valid as far as its purpose is concerned.

The appellant contends, however, that as the prescribed territory is hilly and the base line of Washington Monument practically the highest point within its limits, that persons owning property on lower ground have an advantage over those whose property is located on the higher ground, because the former may build houses to a greater height than the latter, and that therefore the statute denies the equal protection of the laws contrary to the fourteenth amendment to the constitution of the United States.

While we recognize the force of this contention, we think, when it is remembered that the primary object of the law is protection from fire, it is met by the consideration that very tall buildings on the highest part of the ground would be more difficult to deal with in case of fire than such buildings lower down.

By operating from the higher portions of ground, water might be thrown on tall buildings farther down the hill, and reach the top, while the tops of buildings of the same height ²³² on the higher ground would be wholly out of the reach of the fire apparatus.

"In virtue of its right and duty to provide for the public welfare, the legislative branch of government possesses a large discretion as to the manner in which it shall be exer-

cised": Parker & Worthington on Public Health and Safety, sec. 4.

If the object of the statute is to promote the public welfare, and there is a substantial relation between the object aimed at and the means devised for attaining that object, every indtendment will be in favor of the entire validity of such statute: Parker & Worthington on Public Health and Safety, sec. 4; Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. Rep. 862, 34 L. ed. 455.

The presumption in favor of the validity of the statute should prevail, unless the lack of constitutional authority is clearly demonstrated: United States v. Harris, 106 U. S. 629, 1 Sup. Ct. Rep. 601, 27 L. ed. 290.

It was for the legislature to determine the manner in which the purpose aimed at was to be accomplished, and we are not prepared to say that the method adopted does not bear a substantial relation to the object aimed at, or that it denies the equal protection of the laws, as that term is understood and construed: Easton v. Covey, 74 Md. 262, 22 Atl. 266; Ex parte Fisk, 72 Cal. 125, 13 Pac. 310; Hine v. New Haven, 40 Conn. 478; People v. D'Oench, 111 N. Y. 359, 18 N. E. 862.

In the last mentioned case the court held that a statute regulating the height of all houses used as dwellings did not include stores, factories, warehouses, buildings used for offices or hotels, and that it was a valid exercise of the police powers, although because private residences were seldom above the prescribed height, it in effect applied only to tenement and apartment houses.

The last mentioned case is also authority for upholding the present statute, although churches are, in terms, exempted from its operation.

There is not the same reason for regulating the height of churches as of some other buildings. The former frequently have spires for ornamental purposes reaching a much greater height than seventy feet, but they do not present the same ²⁰⁰³ danger from fire to the surrounding buildings as many other structures do, chiefly because they are not likely to become very numerous in any one locality.

After a careful consideration of the case in all its different aspects, we think the order of the lower court dismissing the application for a writ of mandamus was right, and the same will therefore be affirmed.

Order affirmed, with costs.

Statutes Limiting the Height of Buildings in a city are, so long as they are reasonable, free from constitutional objections. And the legislature may classify the different parts of a city, so that in some neighborhoods one height is prescribed and in others a different one: *Welch v. Swasey*, 193 Mass. 364, 118 Am. St. Rep. 523; note to *Bostock v. Sams*, 93 Am. St. Rep. 408.

BAKER v. BAKER.

[108 Md. 269, 70 Atl. 418.]

PARTITION—Presumption on Appeal of Service of Process.—

Where the record on appeal from an order in partition appointing a receiver does not show that the parties in interest were not in court, it will be presumed in support of the order that they were actually or constructively served with process. (p. 441.)

PARTITION—Persons Subject to Lis Pendens.—One Taking an assignment of a mortgage after an action, to which the mortgagee is a party, is instituted for partition of the land, takes subject to the lis pendens. (p. 441.)

PARTITION—Appointment of Receiver Without Notice.—The court should not appoint a receiver in partition until the parties to be affected have an opportunity to be heard, when the petition does not fully disclose facts necessary to inform the court of the real situation, such as the right of the petitioner to relief and the necessity for proceeding without notice, especially if the petition shows some right of possession of the property or to the rents and profits in another. (p. 442.)

MORTGAGEE—When Entitled to Possession and Rents.—A mortgagee upon default is entitled to the possession of the property and to the rents therefrom. (p. 444.)

PARTITION—Grounds for Appointment of Receiver.—While receivers are sometimes appointed to collect rents pending partition proceedings, such an appointment is not authorized where there is nothing to show any real necessity therefor or imminent danger of loss. (p. 445.)

Eugene L. Rowe, for the appellants.

Milton G. Urner, Milton G. Urner, Jr., and Hammond Urner, for the appellees.

271 **BOYD, C. J.** A bill in equity was filed by Alice M. Baker, a daughter of Nicholas Baker, deceased, against J. Bernard Baker and other heirs of Nicholas, Isabel M. Baker, his widow, Charles W. Nussear, executor of Mary C. Nussear, who held two mortgages against the property of the decedent, and some lien creditors of J. Bernard Baker, for the sale of the real estate left by the decedent, on the ground that it was not susceptible of partition. The executor of Mary C. Nus-

sear assigned the mortgages to Isabel M. Baker, the widow, after the bill was filed. An answer was filed by three of the heirs and a judgment creditor of J. Bernard Baker admitting the allegations of the bill, excepting as to the dower of the widow, and alleging that she was only entitled to dower in the surplus over the mortgages. The executor of Mary C. Nussear filed a disclaimer, alleging that he had no interest in the mortgages, having assigned them to the widow.

Afterward Charles N. Baker, Mary A. Dukehart and Jennie Adelsberger, three of the children of Nicholas and defendants in the equity case, filed a petition therein, alleging that the real estate of Nicholas descended to them, J. Bernard Baker and Alice M. Baker, as his heirs at law, subject to the dower of the widow, and also subject, as to certain portions of the real estate, to the two mortgages, and making other allegations which will be hereinafter referred to. It asked for the appointment of receivers and for general relief. The court passed an order upon the petition appointing Eugene L. Rowe, who was the solicitor for the plaintiff in the bill, and Edward H. Rowe receivers, but the former declined to act. Afterward Alice M., Isabel M. and J. Bernard Baker filed answers to the petition, as required by the statute, and entered an appeal from that order, but the answers cannot be considered by us.

The question for our determination is whether that order was properly passed. Section 192 of article 16 of the code provides that "The court may, at any stage of any cause or matter concerning property, real or personal, on application, ²⁷² or of its own motion, pass such order as to it may seem fit, with regard to the possession of the same, pendente lite, or the receipt of the income thereof, on such terms preliminary thereto (as to security, etc.) as to it may seem just, subject to the same right to move for its discharge, and the same right of appeal as is given in the preceding section." The section (191) referred to provides that "an appeal may be taken by any of such parties from the order granting such mandate or injunction, or the refusal to discharge or dissolve the same in such cases, and in such manner and on such terms as is now allowed in cases of injunction." Section 190 provides that the court can at any stage of a cause or matter, on the application of any party in interest by motion or petition, or of its own motion, order a mandate or injunction, as therein provided. Sections 190-194, inclusive, of the code of 1904, were added to article 16 by the act of 1896, chapter 441, and have since then been in force—being numbered 177-181 in the

code of 1888. What is now section 192 has not hitherto been passed on by this court, but section 190 was referred to in *County Commrs. v. School Commrs.*, 77 Md. 283, 26 Atl. 115; *Supreme Lodge v. Simmering*, 88 Md. 276, 71 Am. St. Rep. 409, 40 Atl. 723, 41 L. R. A. 720; *Baltimore v. Poole & Son Co.*, 97 Md. 67, 54 Atl. 681, and *Horner v. Nitsch*, 103 Md. 498, 63 Atl. 1052. Although it must be admitted that a somewhat liberal construction was placed on section 190, as to the procedure under it, those cases do not throw any light on the question now before us.

There can be no doubt that some of the objections made by the appellants to this petition cannot be sustained, and it is clear that the application for receivers was intended to be under section 192. The petition is filed in the original equity cause, and the proceedings therein are referred to. Inasmuch as the bill and exhibits show the title of the petitioners, it was unnecessary to be more explicit on that subject, as the court had the undoubted right to consider all the proceedings in that cause. It had jurisdiction over the subject matter involved, and apparently over all the parties—although the record does not affirmatively show that all of them had been brought into court by subpoena or orders of publication. Inasmuch, ²⁷³ however, as the appellants brought the record to this court, and it does not show that the parties were not in court, we would, in a proceeding of this character, presume that when the judge below acted all necessary parties had been actually or constructively served with process. Nor can we have any doubt that Mrs. Isabel M. Baker was subject to the doctrine of *lis pendens*, as announced in *Sanders v. McDonald*, 63 Md. 503. The executor of Mary C. Nussear made affidavit to the disclaimer filed by him on June 28, 1907, while the affidavit as to taxes made by Mrs. Baker, as assignee of the second mortgage, was made June 29th (the assignment of the first mortgage not appearing in the record), and the assignment and the disclaimer were filed the same day. We would, therefore, for the purposes of this case, assume that the executor had been brought into court before he made the assignment, in so far as necessary to make her subject to the *lis pendens*, as announced in *Sanders v. McDonald*, 63 Md. 503, without deeming it necessary to consider whether she, having knowledge of the pendency of the cause and being a party in another capacity, as widow, would not be bound, regardless of that question.

But there are other questions involved which present difficulties that seem to us not to have been met by the appellees.

While it is true that the court is authorized by section 192, even of its own motion, to "pass such order as to it may seem fit, with regard to the possession of the same, pendente lite, or the receipt of the income thereof," and, although we deem the power given broad enough to authorize the appointment of a receiver in a proper case, the statute did not mean to abolish the rules on the subject of the appointment of a receiver, which this court had adopted and followed for so many years. It is only when there is enough shown in the proceedings to authorize such step that the court can of its own motion act, or when the proceedings and the application are sufficient for that purpose. The right of appeal is expressly given, and "The rule laid down in the cases cited, that the court will not appoint until the defendant is first heard, unless the necessity ²⁷⁴ be of the most stringent character, is one which can only be enforced upon appeal from the order appointing the receiver": *Voshell v. Hynson*, 26 Md. 83.

In the leading and well known case of *Blondheim v. Moore*, 11 Md. 365, Chief Judge Le Grand announced certain rules for the government of courts in appointing receivers, which have often since been repeated and followed. After saying that the power of appointment must be exercised with great circumspection, that it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve it, that in no case should the court make an appointment merely because it could do no harm, he said: "4. That 'fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved'; and 5. That unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application." Granting that there may be cases in which the enforcement of the fifth rule may not be necessary, if the appointment is made under the provisions of this statute, it is ordinarily the safer rule to follow, and, generally speaking, when the parties are already in court there is no occasion for such delay as might endanger the interests of the applicant if immediate action be not taken. But when the petition does not fully disclose the facts necessary to inform the court of the real situation, such as the right of the petitioner to relief and of the necessity or reason for proceeding without notice to others to be affected—especially if it shows some right of possession of the property or to the rents and profits in another—the court ought not to proceed ex parte. In *Johnson v. Lippert*, 96 Md. 584, 54 Atl. 114, in considering an order

appointing a receiver, the court quoted from *Lamm v. Burrell*, 69 Md. 272, 14 Atl. 682, in which an order granting an injunction was reversed, that "to warrant the court in issuing an injunction a full and candid disclosure of all the facts must be made. There must be no concealment and the *res gestae* must be represented as they actually are. . . . The court must be informed by the ²⁷⁵ bill itself and its accompanying exhibits, if any, of every material fact constituting the case of the plaintiff, in order that it may be seen whether there is a just and proper ground for the application of so summary a remedy. Strong *prima facie* evidence of the facts on which the plaintiff's equity rests must be presented to the court." The principles in regard to a bill for an injunction apply also to one for a receiver: *Miller's Eq. Proc.* 729; indeed, there is often more necessity for strict rules in the latter, as the appointment of a receiver may result in taking from one entitled to them the possession of his property and the income from it.

Keeping the general rules in mind, let us see how far the petition on which the order appealed from was passed complies with them. It alleges: "4. That the said widow is now in possession of a portion of said real estate, while other portions thereof are in the occupancy of tenants under leases providing for the payment of money rents. 5. That the said widow is claiming and demanding from said tenants the whole of said rents accruing from said real estate, while your petitioners, as heirs at law of the said decedent, dispute the right of said widow, either as dowress or mortgagee, to the whole of said rents, and pending the determination of the rights of the respective parties in the premises there is no one authorized to collect said rents, and by reason of said conflicting claims the said rents are remaining unpaid and uncollected. 6. That there is danger of loss and injury to all parties concerned under existing conditions, as heretofore mentioned, and it is to the interest and advantage of all the said parties that a receiver or receivers should be appointed by your honorable court to collect and hold the rents accruing and accrued from the said real estate," etc. It had previously alleged that Isabel M. Baker had taken by assignments the mortgages, and now claims certain interests as mortgagee in certain portions of the real estate in addition to her dower.

It is impossible to know from the petition, or the proceedings in the original case, what portion of the real estate the widow was in possession of, or what portions thereof were in ²⁷⁶ the occupancy of tenants, or whether the tenants were

occupying any of the properties included in the mortgages, and if so what part. It may be, so far as the petition discloses, that all of the properties occupied by the widow and the tenants are included in the mortgages. If they are, *prima facie* she, as mortgagee, is entitled to the possession and to the rents. Both of the mortgages were overdue, and hence were in default. "It is the settled law of this state that upon default the mortgagee is entitled to possession": *Barron v. Whiteside*, 89 Md. 448, 43 Atl. 825, and cases therein cited. "When a mortgagor is allowed to remain in possession after default he is entitled to collect for his own use the rents and profits, but after a demand for possession by the mortgagee or a demand of the rents, then the mortgagee is entitled to the same": *Barron v. Whiteside*, 89 Md. 448, 43 Atl. 825. In that case it was further said that "In order to put an end to the authority of a mortgagor to collect the rents, it is only necessary for the mortgagee to manifest his intention to do so. For this purpose slight acts will be deemed sufficient, and in *Boyce v. Boyce*, 6 Rich. Eq. 302, where, as here, the mortgaged property was in court, a claim for the rents made to the court by a party to the suit in the progress of the cause was all that was required": See, also, *Baker v. Hill*, 100 Md. 130, 59 Atl. 275. The petition shows that the widow was claiming and demanding the rents, and, although it does not in terms say that she was doing so as mortgagee, it does say that the petitioners disputed her right to them "either as dowress or mortgagee"—it does not say that she was not doing so as mortgagee, and, excepting in so far as we have stated, leaves the court in the dark on the subject.

The order appealed from appointed the receivers "to collect and receive all rents accrued and to accrue from the real estate mentioned in these proceedings, during the pendency thereof," and it is clear that, in the absence of some allegation showing a valid reason why the mortgagee should not have the benefit of the general rule, the order, at least in so far as it applied to rents from the mortgaged property, was improvidently passed.

²⁷⁷ But in addition to what we have said, there is nothing in this case to show any imminent danger of loss, or real necessity for appointing receivers, at the instance of the petitioners. Mrs. Baker, as mortgagee, had the right to have a receiver appointed, if necessary for her protection, but that did not give the petitioners the right to do so, and especially not to take the rents from the mortgaged property from her control. There is no allegation or suggestion that the tenants, or any

of them, were insolvent, and that would hardly be suggested as to the widow, for if there is a sale of the property, she will be entitled to distribution on the two mortgages, which do not appear to be disputed or in any way questioned. She could be made to account for the rents, and if she did not in any other way, they could be charged against her distribution. It was not enough to allege that the petitioners disputed her right to the rents, and it certainly was not sufficient to say that "by reason of said conflicting claims the said rents are remaining unpaid and uncollected." The petitioners themselves are causing the conflict, which prevents the rents from being paid and collected—although the mortgagee is *prima facie* entitled to those from the mortgaged property. As was said in *Knighton v. Young*, 22 Md. 359: "There is no allegation that the rents, issues and profits of the real estate, supposed to be subject to dower, will be lost irretrievably, by reason of the insolvency of those receiving them, or that the complainant has not adequate remedy at law for such of the rents as he may be entitled to; it is not sufficient to allege they are in jeopardy, but it must be shown how they are jeopardized."

We have not overlooked the fact that receivers are sometimes appointed to collect rents pending partition proceedings, or that the statute (section 129 of article 16) now authorizes the sale of lands, under a bill such as this, free and clear of mortgages or other encumbrances on said lands, or an undivided interest therein, but being of the opinion that this petition, although taken in connection with the other proceedings in the cause, was not sufficient to authorize the court to appoint ²⁷⁸ receivers, the order must be reversed. As we cannot be sure that it may not become necessary to appoint a receiver to collect some of the rents, we will dismiss the petition without prejudice.

Order reversed, and petition dismissed without prejudice, the appellees to pay the costs, above and below.

A Receiver may be Appointed in a Suit for Partition to take charge of the real estate and collect its rents and profits pending the litigation: *Jones v. Abbott*, 228 Ill. 34, 119 Am. St. Rep. 412. See also *Cain v. Vogt*, 138 Iowa, 631, 128 Am. St. Rep. 216; *Thompson v. Silverthorn*, 142 N. C. 12, 115 Am. St. Rep. 727; note to *Cameron v. Groveland Improvement Co.*, 72 Am. St. Rep. 29.

A Court may, upon a Proper Showing, Appoint a Receiver and issue an injunction without notice to the other side, but only in cases of great emergency, and even then the defendant should be afforded a speedy hearing on a motion to vacate the order: *Tuttle v. Blow*, 176 Mo. 158, 98 Am. St. Rep. 488; *Larsen v. Winder*, 14 Wash. 109, 53 Am. St. Rep. 864.

JONES COLD STORE DOOR COMPANY v. JONES.

[108 Md. 439, 70 Atl. 88.]

PATENT RIGHTS.—A State Court has No Jurisdiction at the suit of the assignee to restrain the assignor of a patent from manufacturing and selling articles covered by it. It may determine what the contract is and in whom the patent is vested, but it has no authority to pass directly upon the question of infringement and issue an injunction. (p. 449.)

PATENT RIGHTS—Contract in Restraint of Trade.—An agreement by the assignor of a patent that for five years he will not patent and dispose of any devices in the line of the business to be conducted with assigned patent, and that he will submit changes or devices conceived by him to the assignees, and if they do not purchase them he will withdraw them and not dispose of them to any other person, is in restraint of trade and unenforceable. (p. 450.)

Lewis D. Syester, for the appellant.

Palmer Tennant and C. A. Little, for the appellee.

440 BRISCOE, J. This appeal is from a decree of the circuit court of Washington county, dissolving a preliminary injunction and dismissing the bill of complaint.

The object of the proceeding was to restrain the appellee from patenting and disposing of certain devices and articles in the line of the cold store business, and from manufacturing, selling or disposing of any cold store doors, or any of the appurtenances or other equipments in connection with the cold store door business, contrary to and in alleged violation of the terms of an agreement set out in the bill of complaint, dated the twenty-seventh day of February, 1906.

The facts of the case appear from the record to be, that the appellee and one W. F. Elgin were partners in the manufacture of cold store doors and appurtenances and other equipments in connection with the cold store business. This partnership continued until the twenty-seventh of February, 1906, when it was dissolved and a corporation, under the name of The Jones Cold Store Door Company of Washington County, was formed by Jones, Elgin and other persons. And in consideration of two thousand five hundred dollars of the capital stock of the corporation paid to each, Jones and Elgin conveyed, transferred and assigned to the corporation all of the property, business, effects, rights and things belonging to the partnership.

This controversy arises and the questions involved are **441** based upon the following provisions of the contract dated the 27th of February, 1906, between the appellee, Jones,

and W. F. Elgin, one of the directors of the appellant company: "I, the said R. E. Jones, in consideration of the sum of two thousand five hundred dollars in stock of the new corporation aforesaid, do hereby agree and consent to set apart, turn over, surrender and give unto the said new corporation, 'The Jones Cold Store Door Company,' all my right, title, interest and every claim I have for services and in any and every manner, to the stock, goodwill, equipment, fixtures, bills receivable and money on hand belonging to the former partnership; and, further, I do assign and turn over to the said corporation all my patents granted, applied for or pending, relating to the purposes aforesaid.

"And I do hereby authorize and direct the commissioner of patents of the United States to enter upon the books thereof the assignment of all my rights, title and interest in and to all patents granted and applied for by me to The Jones Cold Store Door Company of Washington county.

"And I do expressly agree that I will not patent and dispose of to any other corporation, concern or company any device, thing, article or part thereof, in the line of the business hereinbefore referred to for a period of five years from the date thereof, but in the event of such a change conceived of or invented by the said Jones of any of the patents or devices in use, then the said Jones agrees to submit the same to the said company or corporation for their adoption, approval or acceptance, and if the same shall not be accepted, and a price therefor not be agreed upon the same shall be withdrawn by the said Jones, who hereby expressly agrees that he will not dispose of, transfer or assign to any other person, corporation or company any such patent, device or thing for the period above set forth, to wit, five years."

The record shows that in accordance with the terms of the agreement, the appellee, Jones, on or about the second day of March, 1906, assigned and transferred in writing to the appellant corporation his right, title and interest to a patent and ⁴⁴² patent right for "refrigerator door fasteners," and also his right to a certain invention known as a "refrigerator door hinge" for which letters patents had been applied for. These two assignments and transfers were duly entered for record in the patent office of the United States and recorded among the "Transfers of Patents."

The appellee thus agreed that he would not patent and dispose of any device, thing, article, or part thereof, in the line of business to be carried on with the patents assigned, for the period of five years. And further, he agreed in the event of

such a change conceived of or invented of any of the patents or devices in use, to submit the same to the corporation for their adoption, approval or acceptance, and if the same should not be accepted, upon a price to be agreed upon, the same should be withdrawn by him. And he further expressly agreed that he would not dispose of, transfer or assign any such patent, device or thing so withdrawn for the space of five years from the date of the contract.

The appellee remained a member of the corporation, as one of its principal officers, until the 17th of April, 1907, when he sold and transferred all of his stock and severed his connection with the business.

By the seventh paragraph of the bill it is averred that notwithstanding the sale, assignment of the letters patent and of the application for letters patent, and in violation of the written agreement, the defendant is now engaged in the manufacture and sale of cold store doors with their appurtenances and equipment, and that he was using in the construction and manufacture of these doors the very device and plans which he had sold, assigned and transferred to the corporation, and which the plaintiff corporation is now using in their business.

By the eighth paragraph of the bill it is alleged that the said defendant, on or about the fifteenth day of October, 1907, in pursuance of the terms of the said agreement, notified the plaintiff by letter that he would have for their inspection a "self-tightening fastener and self-adjusting hinge," and calling upon the plaintiff to purchase the right to manufacture and ⁴⁴³ sell said devices, but the said plaintiff did not desire, and does not now desire, to acquire the said devices as offered, but the defendant, in violation of the terms of the said agreement, did not withdraw the said devices but is engaged in the manufacture and sale of the same.

By the tenth paragraph it is further averred that it is the manifest intention and purpose of the defendant, in violation of the terms and spirit of the said agreement, to engage in the manufacture and sale of cold store doors and appurtenances, and of other equipment in connection therewith, similar in kind and character with that sold, transferred and assigned to the plaintiff.

The defendant in his answer to the seventh paragraph denies that he has used any of the patents or patent rights, assigned and transferred to the plaintiff, as set forth in the article of agreement. And in his answer to the eighth paragraph he avers that the self-tightening fastener and self-adjusting hinge as now manufactured and sold by him, which

was submitted to the plaintiff, is an entirely different fastener and hinge from that patented, sold and transferred by the defendant to the plaintiff.

The fundamental question, then, raised by the pleadings, and one of the grounds upon which the intervention of the court is sought by injunction, is the infringement upon the rights of the plaintiff as the assignee and owner of the patent rights assigned by the defendant. The case, therefore, being one directly involving the infringement of patent rights under the patent laws, the federal and not the state courts would have jurisdiction to grant the relief under the prayer of the bill.

The rule is well settled that the state courts may determine what the contract is and in whom the patent is vested, but it has no right to say that a party shall be enjoined from using the patent in dispute or in any way pass upon any question arising as to its infringement: *Continental Store Service Co. v. Clarke*, 100 N. Y. 365, 3 N. E. 335; *Pratt v. Paris Gaslight Co.*, 168 U. S. 255, 18 Sup. Ct. Rep. 62, 42 L. ed. 458.

444 In this case one of the allegations of the bill is that the defendant is using the devices covered by the patents, and the defendant is infringing upon its rights secured by the patents. It is not, then, a case where the question of patent rights is only collaterally involved, but where the question is directly presented, as to the infringement of the patents held by the plaintiff. This question is manifestly beyond the jurisdiction of this court and can be determined in a federal court.

Having reached the conclusion that this court has no jurisdiction to determine the issue raised under the sixth, seventh, eighth and tenth paragraphs of the bill, we come to the second question in the case, as raised by the fourth and fifth paragraphs of the bill, involving the true construction of the agreement, and what the contract is.

By the first clause of the contract in dispute the defendant assigned and transferred to the corporation all his patents granted, applied for or pending relating to the purposes of the business, and the assignments were duly made to the company. Manifestly, then, he could not afterward use the patents or manufacture articles under them, because such use would be an infringement on the original patents and in direct violation of the patent laws of the United States, which provides that every patent shall grant to the patentee, his heirs or assigns, the exclusive right to make, use and vend the invention and discovery. But even if the allegations of the bill were sustained in this respect, it would be a case arising under the

patent laws, and, as we have seen, the state courts would have no jurisdiction to grant relief.

The second clause of the agreement, we think, refers to not patenting and disposing of some new or changed articles. The language of the clause is: "That I do expressly agree I will not patent and dispose of any device, etc., or part thereof, in the line of the business, to be conducted with the patents assigned." It does not refer to articles made under the original patents, but those made under some new patents, because it further provides that in the event of such a change of any patents or devices in use (meaning a change conceived of or ⁴⁴⁵ invented, by a new patent), then he agrees to submit the same (that is, the changed patent, or device), and if the same (meaning the new patents and articles under them) if not accepted and a price not agreed on, the same shall be withdrawn, and that he will not dispose of, transfer or assign to any other person any such patent, device or thing (meaning a new patent or article under it).

Now, there is no averment in the bill or proof in the record that the defendant is attempting to patent or dispose of some new or changed article in violation of this clause of the agreement. On the contrary, the defendant avers in his answer that he has not patented and disposed of any device, thing, article or part thereof in the line of the business referred to, and this averment appears to be supported by the testimony.

But assuming the construction of the contract urged by the appellants is correct, we are of opinion that the contract is void and invalid, and cannot be enforced, because it is in general restraint of trade, unreasonable and against public policy: *Guerand v. Dandeleit*, 32 Md. 561, 3 Am. Rep. 164; *Warfield v. Booth*, 33 Md. 63; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 63 Am. St. Rep. 736, 49 N. E. 1030, 41 L. R. A. 185; 24 Am. & Eng. Ency. of Law, 2d ed., p. 849.

There was no ground whatever in the allegations of the bill or on the record to warrant the relief sought in this case by way of injunction, so without prolonging this opinion by discussing the other questions raised in the briefs we shall affirm the decree appealed from dissolving the preliminary injunction and dismissing the bill.

Decree affirmed and bill dismissed, with costs to the appellee.

Worthington, J., dissented.

The Federal Courts have Exclusive Jurisdiction where the question of the validity of a patent is directly involved, and the state courts have no cognizance thereof either at law or in equity. But when

patent rights come in question collaterally, their validity may become a subject of inquiry in the state courts: *Slemmer's Appeal*, 58 Pa. 155, 98 Am. Dec. 248; *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435. A state court has jurisdiction of an equitable action on a bond conditional upon the validity of a patent: *Middlebrook v. Broadbents*, 47 N. Y. 443, 7 Am. Rep. 457. Also to compel performance of an agreement to assign a patent: *Binney v. Annan*, 107 Mass. 108, 9 Am. Rep. 10; *Fuller & J. Mfg. Co. v. Bartlett*, 68 Wis. 73, 60 Am. Rep. 838. See also *Page v. Dickerson*, 28 Wis. 694, 9 Am. Rep. 532; *Hat Sweat Mfg. Co. v. Reinoehl*, 102 N. Y. 167, 55 Am. Rep. 793; *Hovey v. The Rubber Tip Pencil Co.*, 57 N. Y. 119, 15 Am. Rep. 470; *American Circular Loom Co. v. Wilson*, 193 Mass. 182, 126 Am. St. Rep. 409. A state court has no jurisdiction of an action by the owner of a patent to recover compensation for its use from one who has used it without his consent: *De Witt v. Elmira Nobles Mfg. Co.*, 66 N. Y. 459, 23 Am. Rep. 73.

Contracts in General Restraint of Trade are Void, but trade to a certain extent may be regulated and by consequence to some extent restrained, within a prescribed territory not unreasonable in extent: *Harris v. Theus*, 149 Ala. 133, 123 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

KIRBY v. WYLIE.

[108 Md. 501, 70 Atl. 213.]

LESSOR—Obligation to Rebuild or Restore.—In the absence of a covenant in the lease to that effect, a lessor is under no obligation to rebuild or restore the premises in case of their destruction. (p. 455.)

LESSOR—Obligation to Make Repairs.—A covenant in a lease that the lessor shall repair the premises is not implied. (p. 455.)

ACT OF GOD.—Damage by the Elements and damage by the act of God are synonymous; but damage by the elements has reference to sudden, unusual or unexpected action, not to gradual changes and decay. (p. 455.)

ACT OF GOD.—Intervention of Human Agencies.—An occurrence which is directly produced, wholly or partly, by the intervention of human agencies, is not an act of God. (pp. 455, 456.)

ACT OF GOD.—The Destruction of a Building by Gradual Decay and natural causes is not by act of God; such expression has reference to some sudden, unusual or unexpected action of the elements. (p. 457.)

LESSOR—Obligation to Restore Destroyed Building.—A building torn down by order of the building inspector because it has become unsafe through age, decay and alterations made by the lessee and prior tenants is not destroyed by act of God, within the meaning of a covenant in the lease that the lessor will rebuild in case of destruction by such act. (p. 457.)

William S. Bryan, Jr., and William C. Smith, for the appellant.

Charles E. Hill and John Philip Hill, for the appellee.

⁵⁰⁸ BURKE, J. The controlling facts in this case are practically undisputed. In March, 1901, Morris K. Wylie leased to Albert A. Brager the property known as No. 223 West Lexington street for the term of five years, beginning on the first day of January, 1905, and ending on the thirty-first day of December, 1909, at the annual rent of four thousand five hundred dollars, payable in equal monthly installments of three hundred and seventy-five dollars beginning on the first day of January, 1905. It was provided that the lessee should have the option of continuing the tenancy for another term of five years, provided he gave a written notice at least six months before the 31st of September, 1909, of his intention of availing himself of this option. The lease provided that the lessor should keep the roof of the building in good order and condition. This was the only obligation as to repairs assumed by the lessor, and in other respects the lessee covenanted to keep the premises in good order and condition. On the eighth day of November, 1902, Brager assigned his interest in the lease to Fred M. Kirby, the appellant. Morris K. Wylie is now dead, and under his will and appropriate proceedings had in the orphans' court ⁵⁰⁹ his reversionary interest in this property became and is now vested in his widow, Mrs. A. E. O. Wylie, the appellee in this case.

In April, 1907, Mr. E. D. Preston, the building inspector of Baltimore City, under the power conferred upon him by the charter and the ordinances of Baltimore City, condemned the building, because in his judgment it was in a dangerous condition and a menace to the safety of persons and property. In consequence of this condemnation the building was torn down.

In the lease from Wylie to Brager there is found this covenant: "If the said premises are destroyed or rendered untenable by fire, flood, the elements or act of God at any time prior to the commencement of this lease or at any time during the continuance of this lease, or any renewal thereof, the said lessor shall within a reasonable time rebuild and restore the same at his own expense, and if such damage or destruction shall take place during the continuance of the term hereby created or in any renewal thereof, all rents reserved hereunder shall cease until the said premises are rebuilt or restored ready for occupancy again."

In May, 1907, the appellant filed a bill of complaint in the circuit court No. 2 of Baltimore City based upon the above-quoted covenant. The ground upon which the bill rests is

stated to be that on or about the fifteenth day of April, 1907, during the continuance of said lease, the premises became and were rendered untenable by the elements and the act of God, of which the said landlord had due and timely notice, and demand had been made upon the said defendant to immediately and within a reasonable time rebuild and restore the same at her own expense; but that the defendant had refused and still refuses to abide by and perform the covenants and agreements on her part as she had covenanted and agreed to do. The specific relief prayed for was that the covenants and agreements in the said lease might be specifically enforced, and that the defendant be decreed to, within a reasonable time at her expense, rebuild the said store No. 223 West Lexington ⁵¹⁰ street, so that the same might be restored to a tenable condition. There was also a prayer for general relief. Testimony was taken in open court upon the issues made by the pleadings, and from the decree dismissing the bill the plaintiff has appealed.

The evidence shows that the building was an old one; that it was originally a dwelling-house, and that by the removal of partition walls and other changes and alterations, which weakened the structure, it was converted into a store. From 1892 to 1900 a Mr. Eisenberg occupied the building as a dry-goods store. He made extensive improvements to the property. He put in a new front extending from the pavement to the roof, and removed the third floor, thus making the front a two-story building. A Mr. Pickering, who followed Eisenberg as a tenant of the property, also made a number of repairs and alterations in the building, and thereafter, in December, 1902, transferred his interests in the premises to the appellant, who occupied the premises as a store. Before Mr. Kirby took possession of the building two iron girders had been placed above the roof from the east to the west walls of the front building, and iron rods from these girders had been extended down to support the stair framing and second floor. These iron girders had been placed above that portion of the building from which the third floor had been removed. The west wall of the building, extending back for some distance from Lexington street, was a four-inch wall, and the rest of the wall was nine inches in thickness. There was a one-story structure, in a very bad condition, attached to the rear of the building, and used as a receiving department. After the plaintiff had acquired the assignment of the lease from Brager he made costly improvements to the property. Among other things he cut through the walls between numbers 223

and 225 West Lexington street, and made three large openings on the first floor, and one opening in the basement.

In the report made to Mr. Preston, the building inspector, by J. S. Busiek and C. E. Stubbs, two employes of his office, the reasons why the building was condemned are stated as follows: ⁵¹¹ "No. 223, on roof of this building, there are two iron beams supporting stair headers below which have not sufficient bearing, these should be remedied at once: the roof girders are badly sagged and walls under one are cracked; there is also a break in east wall which seems to be a straight joint. The joists of the receiving department are 3" x 10" Va. 2' centers-18' 6" span, good for only 54 lbs. per square foot." Mr. Preston, when asked to state what he found the general condition of the building to be, replied: "Well, the general dilapidation and depreciation from age, wear and tear, and affected more or less by frequent alterations which had taken place." It is no doubt true that decay and disintegration resulting from old age had weakened the strength and affected to some extent the safety of the building; but it is by no means clear that it should, or would have been condemned, or caused to have been taken down for that reason alone."

It is apparent from the evidence that the unsafe condition of the building was really due to the insufficient thickness of a part of the wall, and more particularly to the removal of the third floor, and to the iron girders placed upon the top of the building and the cutting by the plaintiff of the large openings through the walls on the first floor. The building was torn down by Mr. Bresman, and this witness, who was produced by the plaintiff, testified that the removal of the third floor weakened the building; that the taking away of this floor weakened the four-inch wall, and that the heavy weight of the roof being on it the big girders pressed the wall out. Asked to state what caused the dilapidated condition of the building he said: "Well, taking out that floor in the first place, of course weakened the building: the ceiling, I judge, was about fifteen feet high, and taking the joists out weakened the walls to a certain extent, and cutting those openings out, the four-inch wall was not strong enough to hold the weight of the roof, and these two iron beams thrown across the roof twenty feet long, and these long rods down to the second floor was the cause of buckling this wall in the center; it was only a matter of time for the whole thing to go down." This witness, having taken the ⁵¹² building down, had the very best opportunity to learn the true causes of its unsafe

condition. His evidence was corroborated in these particulars by witnesses Jones and Owens. Mr. Owens testified he thought that the weakening of the four-inch west wall was mainly caused by cutting the large openings and the removal of the third floor.

Upon this state of facts the question to be decided is: Does this proof show that the premises were destroyed by the elements or act of God within the meaning of the covenant? If not, the decree appealed against must be affirmed; because, confessedly, there is no other covenant by which the lessor assumed the obligation to rebuild, or restore the demolished premises. In the absence of an agreement to that effect the law imposes no such obligation on the landlord. This is a settled rule upon the subject. In *Gluck v. Mayor etc.*, 81 Md. 315, 48 Am. St. Rep. 515, 32 Atl. 515, it is said: "The common law has always thrown the burden of repairs upon the tenant, although it imposes no obligation on him to make them unless he covenants to do so: *Taylor on Landlord and Tenant*, sec. 327. A covenant is never implied that the lessor will make them: *Moyer v. Mitchell*, 53 Md. 171; *Sheets v. Sheldon*, 7 Wall. 416, 19 L. ed. 166; *Gott v. Gandy*, 2 El. & B. 845; *Pomfret v. Ricroft*, 1 Wms. Saund. 321, 322N; *Kramer v. Cook*, 7 Gray, 550; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47. So unvarying is this doctrine that even a court of equity will not compel the landlord to expend in making repairs the money received by him upon fire insurance policies after the destruction of the demised premises, unless he has expressly agreed to so apply the proceeds. Nor will a court of equity, when the premises have been burned down and the landlord has collected the insurance, prevent him from suing for the rent, even though he refuses to rebuild, if he be under no covenant to repair."

It appears to be settled by the authorities that damage by the elements and damage by the act of God are synonymous, or convertible terms in the law of leases. The expression "act of God," in its broad and comprehensive sense, includes many acts which the law does not recognize as sufficient to exempt from responsibility. To the Christian mind many events and occurrences may be ascribed, either mediately or immediately, to an act of God, which the law would not regard as such. The legal meaning of the term is not perhaps susceptible of a definition which will include every case to which it may be applied. There appears, however, to be a unanimous concurrence in the authorities that an occurrence which is directly produced, wholly or partly by the interven-

tion of human agencies, is not an act of God within the meaning of the law. In 1 American and English Encyclopedia of Law, 584, 585, will be found a number of definitions of this term and instances of its application, and in every case the event or occurrence declared to be an act of God was "something superhuman in contradiction to the act of man." It was said by this court in *Fergusson v. Brent*, 12 Md. 9, 71 Am. Dec. 582, that "it is difficult exactly to find, in all cases, what is an act of God." "By the act of God is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeding from physical causes alone, such as the violence of the winds, or seas, lightning, or other natural accidents"; per Lord Mansfield, in *Forward v. Pittard*, 1 Term Rep. 27; 2 Greenleaf on Evidence, sec. 219. This definition is about as accurate and specific as, perhaps, any that could be given. It excludes all circumstances produced by human agency, so that if divers causes concur in the loss, the act of God being one, but not the proximate cause, it does not discharge the carrier.

As we have seen from the examination of the evidence that many of the causes which led to the condemnation and removal of the building were due, in a large measure, to changes and alterations made by the plaintiff and others, it cannot be successfully claimed, under the principle stated, that the building was destroyed by the elements, or the act of God, within the meaning of the law, and upon this ground alone the decree should be affirmed. But if it be conceded that the destruction of the building was caused by gradual decay from natural causes, we have found no case, nor have we been referred to any, where it has been decided that a loss resulting from such ⁵¹⁴ a cause was an act of God, within the meaning of the law. According to the adjudged cases, the courts have held that such an expression has reference to some sudden, unusual, or unexpected action of the elements.

The case of *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686, does not support the contention of the appellant, because the question as to whether ordinary decay resulting from old age was an act of God was not presented for decision in that case, although there are some general expressions in the opinion which indicate that the court might have so held had the question been directly in issue. But that question did not lie so squarely in the pathway of the judgment that the case could not be adjudged without deciding it, and, therefore, it cannot be accepted as a judicial precedent upon the point. The loss in that case was caused

by a fire, and the court said that "no fault in connection with it is charged upon the defendant, and it seems to be taken for granted on both sides that the fire was accidental. We may, therefore, assume that the fire was one which occurred without traceable fault, and that it is to be classed as a calamity for which no one is responsible, except as he may have expressly undertaken to do so."

In *Harris v. Corlies, Chapman & Drake*, 40 Minn. 106, 41 N. W. 940, 2 L. R. A. 349, the court laid down the safe and reasonable rule upon the subject: "Every case of damage to or destruction of human structures, not caused by animal force, may in one sense be said to be caused by the elements, as, for example, ordinary, gradual decay, but it would hardly be claimed that such a case would be within the meaning of the provisions of the lease. Or suppose, because of the manner of its construction, it should be proved, when winter arrives, that the basement was untenable because of cold, it would scarcely be urged that this case came within the terms of the lease. We think that the language of the lease refers only to some sudden, unusual or unexpected action of the elements occurring during the term, such as flood, tornadoes or the like, extraordinary disasters, not anticipated by either party, the efficient causes of which originated after the term began, and which either destroyed the building or left it in a materially and ⁵¹⁵ essentially worse condition than it was when leased." This rule has been applied by the courts of New York, California, Connecticut and Mississippi. Being of opinion, for the reasons stated, that the appellee, under the facts disclosed by the record, is not bound by the covenant contained in the lease to rebuild the destroyed building, the decree must be affirmed.

Counsel for the appellant contended that the bill ought not to have been dismissed even if the court found that the appellee was not bound to rebuild; but that there should have been a decree in his favor for the expenses incurred by him in removing the condemned building. But whatever the rights of the appellant might be in this respect they cannot be determined in this case; because there is no evidence in the record that he had expended any money in removing the building. We have no power to remand the cause except from matter appearing upon the record at the time of the reversal or affirmance of the decree from which the appeal is taken: *McCann v. Sloane*, 26 Md. 81.

Decree affirmed, with costs to the appellee above and below.

A Lessor is Under No Obligation to rebuild or restore a building destroyed without his fault, if he has not covenanted to do so: *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 61 Am. St. Rep. 554; *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362; nor is he under any obligation, in the absence of a covenant to that effect, to repair the demised premises (*Phelan v. Fitzpatrick*, 188 Mass. 237, 108 Am. St. Rep. 469; *Dalton v. Gibson*, 192 Mass. 1, 116 Am. St. Rep. 218), even when they become defective through decay or deterioration: *Petz v. Voigt Brewery Co.*, 116 Mich. 418, 72 Am. St. Rep. 531.

The Meaning of the Expression "Act of God," as used in the law, is considered in *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Fay v. Pac. Improvement*, 93 Cal. 253, 27 Am. St. Rep. 198; *Blythe v. Denver etc. Ry. Co.*, 15 Colo. 333, 22 Am. St. Rep. 403; *Norris v. Savannah etc. Ry. Co.*, 23 Fla. 182, 11 Am. St. Rep. 355; *Richmond etc. R. R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446; *Smith v. Western Railway*, 91 Ala. 455, 24 Am. St. Rep. 929. A loss or injury is said to be due to the act of God when it is occasioned exclusively by natural causes such as cannot be prevented by human care, skill and foresight: *Wald v. Pittsburg etc. R. R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332.

BERNHEIMER BROTHERS v. BAGER.

[108 Md. 551, 70 Atl. 91.]

EMPLOYER'S LIABILITY—Prop to Sustain Wall During Excavation.—Where an employer in excavating for the foundation of a building places a heavy prop against adjoining walls to sustain them, he should not be satisfied with taking ordinary measures to secure it for the safety of his employés working under and about it. (p. 463.)

EMPLOYEE'S LIABILITY—Prop to Sustain Wall During Excavation.—Where an owner of land in preparing to excavate for the foundation of a building places a heavy prop against adjoining walls to sustain them, his employés thereafter engaged to work under and about the prop have a right to assume that he has exercised reasonable care to make it safe. (p. 464.)

EMPLOYER'S LIABILITY—Safe Place and Appliances—Delegation of Duty.—A master owes a duty to his servants to furnish a reasonably safe place to work, and he cannot delegate this duty to others so as to avoid his obligation. (p. 463.)

EMPLOYER'S LIABILITY—Prop to Sustain Wall During Excavation.—When the owner of land in excavating for the foundation of a building insecurely places a heavy prop against an adjoining wall to sustain it, and subsequently an employé of an independent contractor (engaged by the land owner to remove old structures) digs at the base of the prop so that it falls, the land owner is liable for injuries sustained by one of his employés working under the prop. (p. 465.)

EMPLOYER'S LIABILITY—Safe Place—Independent Contractor.—The duty of an employer to furnish his employés a safe place to work cannot be delegated to an independent contractor. (p. 465.)

EMPLOYER'S LIABILITY—Prop to Sustain Wall During Excavation.—Where a land owner in preparing to excavate for a building places a heavy prop against adjoining walls to sustain them, which prop afterward falls and injures one of his employes, he cannot escape liability by showing that the injured man's fellow-servants were negligent either in erecting the prop or in digging away its foundation. (p. 466.)

EMPLOYER'S LIABILITY—Contributory Negligence.—In an action by an employe against his employer for personal injuries, he must not show in his evidence that he failed to use due care, yet if contributory negligence, or any distinct affirmative matter of defense, is relied upon by the defendant, the burden is on him to prove it. (p. 467.)

Albert E. Donaldson, Robert Crain, O. F. Hershey and Walter L. Clark, for the appellants.

S. S. Field and Philip M. Golden, for the appellee.

551 **BOYD, C. J.** This is an appeal from a judgment obtained by the appellee against the appellants for injuries sustained by the former by reason of the alleged negligence of the latter. The defendants were engaged in the construction of a building in the city of Baltimore, and the plaintiff was employed by them as a laborer. At the time of the injury he was at work in the cellar, on the excavation for the foundation. The lot of the appellants fronts on the north side of Fayette street and runs back to Marion street—adjoining on the west a building known as Nixon's hotel. In making a foundation of sufficient depth it became necessary to underpin a part of the Nixon wall, as the foundations of the Bernheimer building went below the level of those of the Nixon property. A prop was put against the Nixon wall, at a point about twenty-five feet above the ground, and the other end rested on a piece of joist placed against the rear end of a wall of the kitchen of one of the buildings on the appellants' property, which was being torn down. The witnesses differed as to the length of the prop, but it was apparently about forty-two feet long. The joist, which was two inches thick and twelve inches wide, rested at the bottom upon some bricks which were in a bank of sand and clay and described as the footing of the wall. A few feet above the bank a cleat was nailed to the joist and the lower end of the prop rested on it. The prop was constructed of two timbers about six by six inches, spliced together by boards six inches wide and two inches thick nailed on the four sides, and there was a brace under it made by what is called a king piece, which was at right angles to it, and from the end of that
555 boards were run up obliquely to the prop for the purpose

of making it more rigid. Boards were also run from the prop to the wall of a house on Fayette street, which was parallel with the prop, and were fastened to the window frames of that house. There were also some props against the house on Fayette street, which extended under the large one spoken of, although not placed there to support the latter. The appellee was working under the main prop when it fell, and one of the boards which was broken off struck him, causing the injuries complained of.

Two exceptions were taken to the admissibility of evidence, but as the first question objected to was answered in such way as could not possibly do the appellants any injury, it will be unnecessary to further refer to it. The plaintiff first offered evidence to show that the witness was competent as an expert, and then asked him a hypothetical question as to whether it was safe to construct a prop as therein stated. He replied that it was a hard question to answer and did not express an opinion. Another was then asked him, and the witness replied: "If, as you say, the board was supported on sand, and didn't have a wide base to support it, it naturally wasn't safe; sand makes a good foundation when confined and well surrounded." It is difficult to see how that answer could injure the defendants—especially when taken in connection with his cross-examination. What he said could scarcely be disputed. It is therefore useless to discuss those exceptions, for if there was any error in permitting the questions to be asked the answers were harmless.

The remaining bill of exceptions presents the rulings on the prayers. The court granted the first, second, fourth and fifth offered by the plaintiff, and rejected all (eleven) offered by the defendants. It also overruled special exceptions to the second and third of the plaintiff, but as it rejected the third, the special exception to it need not be considered.

We will first consider those of the defendants. The first, second and third sought to take the case from the jury on the ground that there was no legally sufficient evidence to entitle ⁵⁵⁶ the plaintiff to recover. As the first and third referred to the pleadings, we will examine the declaration. It alleges that the defendants "negligently and insecurely constructed" the prop, or beam, as it is therein called; "that because of the negligence and carelessness of the defendants in erecting and constructing said beam, insecurely and unsafely, said beam fell down, striking the plaintiff while he was attending to his work, and without notice or warning"; and that

“although it was the duty of said defendants to furnish said plaintiff a safe place to do his work and safe surroundings, yet they neglected to do so, and because of the negligent way in which the defendants erected and put in position, extending from one side of the building on which they employed the plaintiff to the other side thereof, a long, heavy beam which fell by reason of said defendants’ negligence, and which the defendants knew said beam was dangerously constructed, but the plaintiff did not know it,” etc. It will be observed that while the negligence relied on refers, for the most part at least, to the insecure and unsafe erection and construction of the beam, the narratio also alleges that the beam “fell by reason of said defendants’ negligence”—not by reason of defendants’ said negligence. Just what was intended by that expression is not altogether clear, but it apparently did not mean to confine the negligence to the erection of the prop—although it does not seem to us to be very material in considering those prayers. Mr. Preston, the building inspector of the city, and others said that the prop was safe in the way in which it was erected. Mr. Preston not only occupies that official position, but he was also in the employ of the appellants, and was one of the defendants in this case—although it was subsequently non proessed as to him.

But, notwithstanding the evidence of Mr. Preston and others, there were facts before the jury from which they were authorized to conclude that the prop was not securely and safely erected. It could not be expected that those that had been connected with its erection would testify to anything other than what they did—indeed, it would be doing them an injustice to say that they did not believe that it was properly ⁵⁵⁷ erected, as it would have been gross, if not criminal, negligence on their part to place it in such a position unless they did so believe. But the plaintiff and the jury were not concluded by their opinions. It was admitted that when the prop was erected a contract had been let to George W. Howser & Company to tear down all the old buildings on the lot and excavate the cellar, which included the ultimate removal of the bank upon which the prop rested. Of course, we do not mean that it was intended by the appellants, or those acting for them, that the bank should be removed while the prop was still on it, but it must have been understood that they would excavate near the bank, and they knew they would eventually remove it. Mr. Townsend, the foreman of the appellants, testified that the bank was four or five feet wide on the top, sloped down on a grade of about forty-five degrees,

and was about six feet high. He also said that the joists, against which the lower end of the prop rested, was at or about the end of the wall of an old kitchen, in the rear of the lot.

At the time of the accident the kitchen wall had been taken down to the first floor, and the joists and the floor had been taken out. The wall was still about seven or eight feet above the bank, and there was a cross-wall at the corner which Mr. Townsend said strengthened it. The joist, set up against the wall, was not nailed or fastened to it, and, in the language of the plaintiff, "It led down into the ground a little, only for a short ways, . . . there were only two courses of brick there and they were loosened, and there was no strength at all to carry the prop, except just the footing where it was on." It was shown that before the accident he did not know how the prop was fastened or how deep the joist was in the bank, and that no warning had been given to him about it. Mr. Townsend, Mr. Preston and other witnesses said that it was not necessary to fasten the joists to the wall or put the end of it in the ground, as the weight and pressure of the prop would keep it in position. But the fact is that something caused the prop to slide off the joist, and the east end of it fell clear ⁵⁵⁸ (north) of the corner of the wall, and the joist also fell down after the prop fell. The west end of the prop, after it fell, rested on the three props which had been placed against the north wall of the building on Fayette street—they having undoubtedly been the means of saving from injury, possibly death, other men working under the large prop.

There was, therefore, some evidence before the jury from which they could properly draw the inference that the prop had not originally been safely erected—especially in view of the fact that the ground was intended to be excavated at and about the bank, and that the bank itself would eventually be removed. If the appellants' theory be correct—that the accident was occasioned by a colored man named Mosby digging on the bank—then there did occur just what might reasonably have been anticipated. Mosby testified that on the morning the prop fell he was told by his employer, Mr. Shott, of the firm of Howser & Co., to dig on the bank, and that he was digging about two feet from the foot of the prop when it fell; that he did not strike it and no one had warned him not to dig. Mr. Townsend testified that he had notified either Mr. Shott or Mr. Radecke, the foreman of Howser & Company, not to allow the bank of earth to be disturbed, but he was not certain which of them he so notified, and thought it was Mr.

Radecke. At any rate, Mosby said Mr. Shott told him to do the digging, and even if Mr. Townsend notified both of them, it only shows the necessity of not taking chances and merely relying on such instructions, instead of fixing the prop in the beginning in a way that it would not be liable to be thrown down by the carelessness or ignorance of others. There was not even a notice placed on the bank warning the workmen not to dig or otherwise disturb it. There is certainly nothing in the evidence that would necessarily convince the jury that the joist, or some kind of timber, could not have been placed deep enough and be fastened to the wall so as to make it safer than it was, and when it was known that a contract had been let to make the excavations, including that very bank, it was not an unreasonable precaution to require to be taken. When ⁵⁵⁹ the lives and limbs of those who were to work in that place were at stake, the appellants, and those representing them, ought not to have been satisfied with the ordinary means of securing a prop from which there would be little or no danger, when somewhat extraordinary conditions existed—owing in part to their undertaking to place the control of the excavation in the hands of others.

The master's liability for personal injuries to his servant is one of the most familiar subjects in courts of law, by reason of the great multitude of people occupying that relation, but the liability varies very much, according to the circumstances of each particular case. Certain general principles are, however, well established, and it only remains to apply some of them to the facts in this case. It is a fundamental rule that the master must exercise ordinary and reasonable care to avoid unnecessary injuries to his servant in the course of his employment. While he is permitted to delegate to others certain duties, there are some which he cannot relieve himself of, or avoid the responsibility for, if there be a failure to discharge them to the injury of the servant. One that is required of him, in this as well as in other jurisdictions, is providing and maintaining safe machinery and appliances and a reasonably safe place for the work undertaken by the servant. Necessarily there are some exceptions to these as well as to most general rules. For example, where a place is out of repair and dangerous, and the employé undertakes to make it safe, he assumes the additional risk arising from the existing condition of the work or the place: *Eckhardt v. Lazaretto G. Co.*, 90 Md. 177, 44 Atl. 1017. So if he accepts an employment, or continues in it, with knowledge of the danger, he cannot ordinarily hold his employer liable, and other like

illustrations might be given. If such were not the law, an employer could not have repairs made in dangerous places without in effect becoming an insurer of his employé.

But are such exceptions applicable to this case? There were, of course, certain risks which the appellee assumed, injuries from which his employers would not be liable for, but ⁵⁶⁰ when he went into the place where he was engaged to work he had a right to assume that his employers had exercised reasonable care in securing this prop, which had been erected before he went there, and that the place at which he had been put to work was reasonably safe. He was not engaged in making it safe, but was working in a place which presumably had been made safe, excepting in so far as the work he was doing was likely to make it unsafe. As was said in *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, 37 L. ed. 772, quoted with approval in *Am. Tobacco Co. v. Strickling*, 88 Md. 500, 41 Atl. 1083, 69 L. R. A. 909: "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and machinery, and when he employs one to enter his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary." It was not suggested in the evidence that the appellee had any cause to suspect that there was any danger of this prop falling, and it cannot be denied that it was, as located, dangerous, unless it was properly secured. The bottom of the joist was far enough in the sand to be hidden and the appellee had the right to assume that the prop was safely erected. We are of the opinion, as we have already intimated, that there was sufficient evidence of the want of such reasonable care as was required in placing the eastern end of the prop to go to the jury, and the first, second and third prayers of the defendants were therefore properly rejected.

The defendants' fourth and seventh prayers were offered on the theory that as Mosby was in the employ of George W. Howser & Company, and they were independent contractors, there could be no recovery. It may be that the prop would not have fallen if Mosby had not dug away part of the bank, but inasmuch as there was some evidence that it was not originally placed as it should have been, that cannot relieve the appellants. We have already seen that they employed Howser ⁵⁶¹ & Co. to make the excavations, and that included

in their contract was the removal of the bank on which the prop rested. There is not even any satisfactory evidence that the appellants, or their representatives, ever cautioned Mr. Shott, or anyone except Mr. Radecke, not to disturb the bank, and the uncontradicted testimony of Mosby was that he was instructed by Mr. Shott to dig there. Mr. Shott doubtless believed that the appellants had properly secured the prop, and if it had been secured by putting the joist lower into the earth, or by fastening it to the wall, or both, the digging might, and in all probability would, not have disturbed it at all. It would be carrying the doctrine of independent contractor beyond what the law authorizes to permit an owner of property to thus insecurely erect a dangerous instrument over where his employés were to work, and then escape the result of his negligence by letting the work to be done to a contractor. The appellants were under obligation to use reasonable care in protecting their servants while they were engaged in the work, and could not thus shift the responsibility.

The general rule as to independent contractors is thus qualified by the authorities: "A person or corporation on whom positive duties are imposed by law cannot avoid liability for injuries resulting from failure to perform such duties, by employing a contractor for the purpose; nor, in such a case, is the fact that the injuries resulted from the contractor's negligence a defense": 16 Am. & Eng. Ency. of Law, 197. Illustrations of that rule are given, and on page 199 of that volume it is said: "A master's duty to furnish to his employés a safe place to work cannot be delegated to an independent contractor." This court has announced similar views in several cases. In *City & S. Ry. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643, 21 L. ed. 485, after citing *De Ford v. State*, 30 Md. 179, and *Mayor v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395, we referred to *St. Paul Water Co. v. Ware*, 16 Wall. 566, where the question is fully discussed, and added that there were many cases in this country and England to the effect that "when the employer owes certain duties to third persons or to the public in the execution of a work, he cannot relieve ⁵⁶² himself from liability to the extent of that duty by committing the work to a contractor." In *Bonaparte v. Wiseman*, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482, Judge Schmucker, in considering the question, referred to *De Ford's* case, as holding that "the distinction is well established between the cases

in which, when work is being done under a contract, an injury is caused by negligence in a matter collateral to the contract and those in which the thing contracted to be done causes the mischief. In the former class of cases the employer is not liable for the injury, but in the latter he is." After quoting from *Ohio South. R. R. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701, the general rule as to independent contractors, he further quoted from that case: "But this principle has no application where the resulting injury, instead of being collateral and following from the negligent act of the employé alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an employé of an independent contractor." That doctrine was thus announced in *City & S. Ry. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643, 21 L. ed. 485: "Even if the relation of principal and agent, or master and servant, do not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him, as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work."

So without referring to other questions, such as the statement in the prayers that the undisputed evidence shows that Howser & Company were notified and warned by the appellants not to dig away or disturb the support, we think the fourth and seventh prayers were properly rejected.

The fifth, sixth, ninth and eleventh prayers relied on the defense of negligence by fellow-servants—either in erecting the prop or digging away the bank. Without discussing the different phrases of that question, presented by the prayers, a ⁵⁶³ sufficient answer to them is that the master cannot delegate his duty to provide a reasonably safe place for his servants to work in: *Philadelphia etc. R. Co. v. Devers*, 101 Md. 341, 61 Atl. 418; *Pikesville etc. R. v. State*, 88 Md. 563, 42 Atl. 214; *Baker v. Maryland Coal Co.*, 84 Md. 19, 35 Atl. 10, and other authorities that might be cited.

There was no evidence to support the eighth prayer, in reference to the danger being obvious to the plaintiff or his seeing Mosby removing the bank. It is not only contrary to the uncontradicted testimony of the appellee, but is utterly

so to the whole theory of the appellants, that they did not know that Mosby was digging at the bank. What was said in the recent case of *United Ry. etc. Co. v. Cloman*, 107 Md. 681, 69 Atl. 379, is sufficient to show that we do not approve of such prayers as the tenth. It was perhaps not as objectionable as it was in that case, but it was liable to mislead the jury. One illustration, in addition to what was said in *Cloman's* case as to the extent of injuries alleged in the declaration, will suffice to show how the jury might be misled. While it is true that a plaintiff in cases of this character must not in presenting his testimony show that he failed to use due care, yet if contributory negligence, or any distinct, affirmative matter of defense, be relied on by the defendant, the burden is on him to prove it: *Tucker v. State*, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181; and yet the jury might not understand the distinction, if a prayer like the tenth is granted.

From what we have already said, it is apparent that, in our opinion, there was no error in granting the first, second and fifth prayers of the plaintiff, or in overruling the special exception to the second. His third was rejected, and we do not understand the exception to the fourth to be urged. It is the ordinary prayer in reference to the measure of damages, and we see no ground for complaining of it.

It may in some respects be a hardship on the appellants to be held responsible for the injuries sustained by the appellee, but as we find no reversible error in any of the rulings of the lower court and the case was properly submitted to the jury, the judgment must be affirmed.

Judgment affirmed, the appellants to pay the costs above and below.

It is the Duty of an Employer to furnish his employé with a reasonably safe place to work in and reasonably safe appliances to work with. This duty is a continuing one, and the employé has the right to assume that it has been and is being performed. Moreover, the duty is absolute and cannot be delegated by the employer so as to escape responsibility for its performance: *Yazdewski v. Barker*, 131 Wis. 494, 120 Am. St. Rep. 1059; *Superior Coal & Min. Co. v. Kaiser*, 229 Ill. 29, 120 Am. St. Rep. 233; *Columbian Enameling Co. v. Burke*, 37 Ind. App. 518, 117 Am. St. Rep. 337; *Barto v. Iowa Tel. Co.*, 126 Iowa, 241, 106 Am. St. Rep. 347; *McMillan v. North Star Min. Co.*, 32 Wash. 579, 98 Am. St. Rep. 908; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281, and note; note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884.

The Negligence of Independent Contractors and the liability therefor are discussed in the note to *Covington etc. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 382. Subsequent cases on this question are *Boyd v. Chicago etc. Ry. Co.*, 217 Ill. 332, 108 Am. St. Rep. 253; *City of Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. Rep. 221; *City of Richmond v. Sitterding*, 101 Va. 354, 99 Am. St. Rep. 879.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

BRADFIELD v. BRADFIELD.

[154 Mich. 115, 117 N. W. 588.]

DIVORCE—Residence, Provision Concerning is Mandatory.—The provision of the statute to the effect that no divorce shall be granted unless the parties applying therefor shall have resided in the state for one year immediately preceding the time of filing complainant's petition is mandatory, and no court has authority to act unless such residence affirmatively appears. (p. 469.)

DIVORCE—Residence for the Purpose of, cannot Consist of Intention Only.—If a wife leaves her husband and his residence in this state and goes to another state, with intent not to return to him, and so informs him, she must be deemed to continue her residence in such other state, if she remains there, excepting during a period of visiting with relatives in this state, though she testifies that she intended to make her residence here and returns here for the purpose of commencing her suit. (p. 471.)

DIVORCE—Residence of Plaintiff, Failure of Defendant to Deny.—The admission of the defendant in his answer of the residence of the plaintiff to be in the state as alleged in her complaint does not confer jurisdiction on the court, if in fact such residence is shown to the court to be elsewhere. (p. 471.)

Suit for divorce by a wife against her husband. Decree for the complainant, and appeal by the defendant.

George G. Moore and Cyrus A. Hovey, for the complainant.

Rufus G. Lathrop, Bowen, Douglass, Whiting & Murfin and Francis A. Stace, for the defendant.

116 McALVAY, J. A decree was granted complainant in this suit for divorce on the ground of extreme cruelty and nonsupport, and she was given the custody of two children. Defendant appeals, and alleges as reasons for reversing and setting aside the decree that the court did not have jurisdic-

tion, (a) because of the nonresidence of complainant; (b) because of the failure to notify the prosecuting attorney of the pendency of the suit as required by law; (c) because the decree is not supported by the evidence.

The provision of our statute upon the matter of the residence of a complainant is as follows:

"No decree of divorce shall be granted by any court in this state in any case unless:

"First, the party applying therefor shall have resided in this state for one year immediately preceding the time of filing the bill or petition therefor": 3 Comp. Laws, sec. 8624.

The provision is mandatory, and no court in this state has any authority to grant a decree of divorce unless it affirmatively appears that complainant has resided within the state as required by the statute. In determining whether in this case complainant was a resident of the state under this law, and in any case where residence is to be determined, the intention coupled with the acts of the party must both be considered. Intention has always been given large consideration, but claimed intention without acts to support it is not controlling. In this case the undisputed facts disclose that complainant resided with her husband in Grand Rapids, in this state, for several years after their marriage; that two children were born to them; that in June, 1904, complainant with these children, a girl and a boy, went to visit her aunt in Pontiac, and to attend a wedding there, at which the children were to act as ribbon bearers; that she intended to return, but instead, without the knowledge of defendant, was induced to take the children and go with her mother to Atlantic City, New Jersey. The record shows that her mother resided at Atlantic City, New Jersey, and her father resided at Butte, Mont. These parties had before this had differences. They are both highly educated, refined and cultivated people. Complainant was the daughter of wealthy parents, and at the time and since her marriage has received from her parents and friends diamonds, personal property, and cash to the amount of more than twenty-five thousand dollars. Defendant was a young lawyer of good character, but without means, starting in his profession. Complainant's father was always violently opposed to the marriage of these parties. It is undisputed, as the record shows, that complainant did not intend to separate herself from her husband, and not again return to him, until January 10, 1905. At that time she so wrote him, and the determination then formed has been persisted in, and not been revoked. She had remained at her mother's residence in

Atlantic City from the time she went there as above stated until the time this letter was written.

It is admitted by counsel for complainant that, until she determined to live separately from him, and refused to return to her home in Grand Rapids, his residence continued to be her legal residence. As already stated, she has never revoked her determination to separate and live apart from her husband, and, after she so announced to him, she continued to live in New Jersey. Whatever negotiations between the parties looking toward a reconciliation were had, were the acts of a relative or a friend. Complainant never sought them, and always imposed conditions which she knew defendant could not by any possibility meet. Both she and her counsel insist that she then changed her residence to Pontiac. This contention is based entirely, as far as that time is concerned, upon her testimony that such was her intention. There is no evidence in the case that she so declared at the time. The court must discover from the record whether there are any acts and doings of complainant to support this claim, or whether it was simply an undisclosed intention. She remained in New Jersey for three months next following ¹¹⁸ January 10, 1905. Her first return to Michigan was in April, 1905. She remained in the state six months, spending the time in Pontiac and Grand Rapids. Her aunt testified that she was visiting her and some friends in Grand Rapids. Complainant testifies that while in Grand Rapids she packed her household goods. She returned to New Jersey sometime in September, 1905, and continued to remain there, with her children, at her mother's home, until August, 1906, when she came to Michigan for the express purpose of instituting this suit. The bill of complaint was filed September 7, 1906. At this time she was at her aunt's house in Pontiac, and testifies that she was visiting her. During this period she testifies that she attended to the removal of her furniture from Grand Rapids, at about Thanksgiving time, and arranged to establish her home in Pontiac. Her aunt testifies that she remained about two weeks after Thanksgiving, and then "rushed home to be with her children Christmas." The removal of her furniture at or about the time the bill was filed in this cause is the first act disclosed by this record done by complainant to establish her residence in Pontiac. The record shows that complainant, during thirteen of the twenty months intervening between her separation from her husband and the commencement of this suit, was living within the state of New Jersey; that her children lived there all of the time and were

sent to school; that when she left Michigan and her husband she selected her place of abode in New Jersey, and by her acts became a resident of that state, thereby losing her residence in Michigan; that at the time of filing her bill she was not a resident of Michigan. Those who were nearest to her at the time so understood it. Her father testified: "My daughter and her children have made their home with my wife for nearly four years."

Mr. O'Brien testified: ¹¹⁹ "She was then living with her father and mother at Atlantic City." He is an eminent lawyer of Grand Rapids, who knew these parties well, knew the circumstances of the case, and counseled her at her father's request.

It is urged that, even should the court hold that complainant was not a resident of this state within the meaning of the statute, defendant, by admitting in his answer the allegation of the bill relative to her residence, is precluded from raising the question. Such admission did not confer jurisdiction upon the court. If the law were otherwise, the very purpose of the statute would be defeated, and collusive and fraudulent divorces encouraged. Such holding would be against public policy. Upon this question the conclusion of the court is founded upon reason and supported by authority: *Smith v. Smith*, 10 N. D. 219, 86 N. W. 721. In this case the court said: "Residence must be established to have been within the letter and spirit of the statute before the action was commenced, or the court acquires no jurisdiction of the subject matter of the action. . . . Nor would her admission in her answer of plaintiff's residence confer upon the court any jurisdiction in this respect. . . . It is against the policy of the law that divorces be decreed by consent of the parties immediately interested. It is likewise against the policy of the law that courts should grant divorces to any applicants save bona fide residents of this state."

The supreme court of Indiana, in discussing this question, says: "In every divorce suit the state, for the enforcement of its policy concerning the marital relation, constitutes the third party, and no admission can be made by the other parties which will affect the public interest": *Prettyman v. Prettyman*, 125 Ind. 140, 25 N. E. 179. See, also, *Schmidt v. Schmidt*, 29 N. J. Eq. 496; *Bennett v. Bennett*, 28 Cal. 599. It will not be necessary to discuss any other questions raised. The decree of the circuit ¹²⁰ court is reversed, and a decree will be entered dismissing the bill of complaint, without costs.

Moore and Carpenter, JJ., concurred.

GRANT, C. J., and BLAIR, J. We concur in the above opinion, and we also are of the opinion that complainant made no case upon the merits.

To Effect a Change of Domicile for the Purpose of Obtaining Divorce, not only must the residence at the place chosen for the new domicile be actual, but to the factum of residence there must be added the animus manendi: *Magowan v. Magowan*, 57 N. J. Eq. 322, 73 Am. St. Rep. 645. It is said that the domicile of the wife follows that of her husband when her separation from him is without justifiable cause: *Loker v. Gerald*, 157 Mass. 42, 34 Am. St. Rep. 252.

Residence, What and Where It is and How Lost or Exchanged, is the subject of a note to *Berry v. Wilcox*, 48 Am. St. Rep. 711. When a residence is once established, the presumption is that it continues, and the burden of proof is on the party who claims that it has been changed. To bring about a change of residence, an intention to change is not sufficient, but the change must be actually made, which can be only by abandoning the old and permanently locating in the new place of residence: *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205. See, also, *Grimestad v. Lofgren*, 105 Minn. 286, 127 Am. St. Rep. 566.

MORRIS v. VYSE.

[154 Mich. 253, 117 N. W. 639.]

FRAUD, Averment of Sufficient to Invoke the Interposition of Equity Against Persons not Actively Participating in the Fraud.—An averment in a bill that V., by fraud, artifice and undue influence, obtained certain moneys of F., and with them purchased real property, taking conveyances in the name of R. and K. to hold for the use of V. in furtherance of the fraud, sufficiently discloses the fraud to warrant relief against R. and K., as well as V. (p. 475.)

FRAUD, Suit to Reach Property Acquired by—Remedy at Law.—A suit lies to reach real property purchased with moneys acquired by fraud, artifice and undue influence practiced by one person over another, though the person practicing the fraud is not alleged to be insolvent, and the property has been placed in the names of others to hold for her benefit. (p. 476.)

JURISDICTION Where Real Property is Sought to be Impressed with a Trust—Place Where may be Exercised.—Where one obtains money in another state by fraud, artifice and undue influence and with it purchases property in this state and causes it to be conveyed to another to hold in trust, a suit to impress such property with a trust in favor of the person so defrauded may be brought in the county in this state in which such real property is situate. (p. 476.)

ADMINISTRATOR, Suit by to Impress Real Property with a Trust.—Where moneys were obtained from a decedent by fraud, artifice and undue influence, and invested in real property to be held for the party guilty of the fraud, the administrator of such decedent may maintain a suit to impress a trust upon such realty as a means of recovering the moneys so invested therein. (p. 477.)

Suit by the administrator de bonis non of Charles L. Fish, deceased, against Tillie Vyse, Maude A. Kuhn and Mary A. Richards to impress certain real property with a trust, and for an accounting. Demurrer sustained as to the defendants Kuhn and Richards and an appeal by the complainant.

Dickinson, Stevenson, Cullen, Warren & Butzel, for the appellant.

Wilkinson & Younglove, for the defendants.

254 MOORE, J. The defendants Kuhn and Richards demurred to complainant's bill of complaint. The court sustained the demurrer, and dismissed the bill as to them. The case was brought here by appeal.

The bill of complaint avers, in substance, that Charles L. Fish, a resident of Cleveland, upward of eighty-four years of age, died in March, 1903, and the appointment of complainant as administrator by the probate court for the county of Wayne, Michigan. It avers that in November, 1902, the defendant Tillie Vyse, by fraud, artifice and the exercise of undue influence, obtained from Charles L. Fish the sum of eleven thousand dollars. The bill details the representations that it is claimed were falsely made. It avers that thereafter Tillie Vyse brought the money to Detroit, and bought therewith real estate, the title to one piece of which she caused to be placed in the name of her sister, and the title to another piece in the name of her mother. It also avers that said Tillie Vyse, by means of fraud and artifice, obtained from Charles L. Fish the further sum of five thousand dollars, which she brought to Detroit, and deposited in her own name in the bank, the name or names of which the complainant is unable to give. The bill further states as follows:

"(10) That the said Mary A. Richards and Maud A. Kuhn have no actual interest in said real estate, but, as your orator is informed and believes, and therefore ²⁵⁵ alleges, are holding the same for the use and benefit of the said Tillie Vyse, and in furtherance of the perpetuation of the fraud practiced by the said Tillie Vyse upon said Charles L. Fish, by means of which she obtained the money aforesaid.

"(11) That your orator is without adequate remedy, except in this court of equity, and he therefore prays that the said Tillie Vyse, Mary A. Richards, and Maud A. Kuhn be made parties defendant to this his bill of complaint, and required to appear and answer the same without oath their answer on oath being hereby expressly waived, and that your orator may be granted relief herein as follows:

“(a) That the said Tillie Vyse may be decreed by this court to hold such moneys fraudulently obtained, as have not been used in the purchase of said real estate, in trust, for your orator as administrator of said estate, and that said Tillie Vyse be decreed to be trustee thereof for the use and benefit of your orator; and that said Tillie Vyse may be required, by a decree of this court, to pay such money, with interest thereon, to your orator as administrator of said estate.

“(b) That the title to the real estate hereinbefore described be impressed with a trust in favor of your orator, as administrator of the estate of the said Charles L. Fish, deceased, and that the said defendants Mary A. Richards and Maud A. Kuhn may be adjudged and decreed to hold said real estate in trust for your orator, as administrator of said estate, to the extent of the money fraudulently received by the said Tillie Vyse from the said Charles L. Fish, deceased, and invested in the purchase thereof, and that such real estate, so purchased by said Tillie Vyse in the name of Mary A. Richards and Maud A. Kuhn may be sold, and out of the proceeds of the sale your orator paid the amount of money belonging to the said Charles L. Fish so invested in said property.

“(c) That your orator may have such other and further relief in the premises as shall be agreeable to equity and good conscience.”

The only averment of fraud as to defendants Richards and Kuhn is as above stated. The bill of complaint does not aver that Tillie Vyse is pecuniarily irresponsible. The defendants Kuhn and Richards demurred to the bill for the following reasons:

256 “(1) That the act charged in the bill of complaint, and on which said bill is based, occurred without the state of Michigan, and that complainant’s intestate was a resident of Cleveland, Ohio, at the time of his death, and that his administrator is a resident of Cleveland, Ohio; that the said Tillie Vyse, against whom all of the wrongs in said bill complained of are charged, is a resident of Cleveland, Ohio, and that the courts of this state have no jurisdiction in the matter.

“(2) That there is no wrong charged against these defendants, nor any such relief sought, as a court of equity should grant.

“(3) That complainant has an adequate remedy in a court of law.

“(4) That said bill does not set forth sufficient facts to entitle complainant to the relief prayed for against them in a court of equity.

“(5) That the complainant is not a proper person to complain of the facts alleged in said bill.”

A demurrer having been interposed to the bill of complaint, its averments must be taken as true.

Reasons 1 and 3 may be considered together, as they are so argued by the solicitors for defendants. 1. Have the courts in this state no jurisdiction in the matter? 3. Has the complainant an adequate remedy at law? It is insisted by the solicitors for the defendants that, as to defendants Kuhn and Richards, there is no charge that the money was procured by fraud, or that they knew at the time, or have known at any time since, that duress, fraud, or undue influence were exerted upon said Fish for the purpose of procuring the property, or that the said Vyse, having, as it is claimed by complainant, procured the property, did anything other than purchase the property in the name of these defendants, she (the said Tillie Vyse), and not the defendants herein, having, by the allegations of the bill, purchased the property; and that, as there is no averment of insolvency of Tillie Vyse, that the complainant has an adequate remedy at law, and that the remedy of complainant, if he has any, is peculiarly within the province of the law side of the court. Quotations are ²⁵⁷ freely made from the decisions of this court, which, it is claimed, sustain the contention. The trouble with this contention, we think, grows out of the assumption that fraud is not brought home to the defendants Kuhn and Richards. It is true they are not charged with being parties to the fraud in procuring the money from Mr. Fish, but it is charged in the bill that Tillie Vyse paid for the real estate with the money she had obtained fraudulently, and caused the title to be placed in the name of her mother and sister, and that they have no actual interest in the real estate, but “are holding the same for the use and benefit of the said Tillie Vyse, and in furtherance of the perpetuation of the fraud practiced by the said Tillie Vyse upon the said Charles L. Fish, by means of which she obtained the money aforesaid.” We think this a sufficient averment of fraud to confer upon the equity court jurisdiction.

The bill charges fraud and undue influence, and seeks to trace and recover specific property held in perpetuation of the fraud.

“In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one’s weakness or necessities, or through

any other similar means, or under any other similar circumstances, which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are terms 'ex maleficio' or 'ex delicto,' are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy ²⁵⁸ of damages against the wrongdoer": 3 Pomeroy's Equity Jurisprudence, 3d ed., sec. 1053. See, also, *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651; *Edwards v. Michigan T. Inv. Co.*, 132 Mich. 1, 92 N. W. 491, and the many cases there cited; *Fred Macey Co. v. Macey*, 143 Mich. 138, 106 N. W. 722, 5 L. R. A., N. S., 1036.

It is the claim of the bill that the fund illegally obtained is traced directly to the real estate situate in Wayne county, and the prayer is that the title thereto may be impressed with a trust in favor of complainant. Section 434, 1 Compiled Laws, provides: "Every suit in chancery shall be commenced in the circuit court for the county in which the property in dispute is situated, if the subject matter is local, and if it is not local, in the county where one of the parties in interest resides, if either is a resident of the state; but if the subject matter is not local, and neither party resides in the state, the suit may be brought in any county; and where it is necessary to file an information or bill in chancery, either to compel the specific performance of contract, cancellation of patents from the state, quiet title, or otherwise to affect real estate," etc.

It is very evident that a decree according to the prayer of the bill cannot be made without its affecting the real estate described in the bill.

What we have said applies also to reasons 2 and 4 of the demurrer.

5. That the complainant is not a proper person to complain of the facts alleged in said bill. It is argued that at the common law the title to real estate of a deceased vested at his death directly in the heir, and the administrator had no right

of possession to it. The statutes of Michigan subsequently gave the administrator a qualified right of such possession for a particular purpose; and that this qualified right is given because it may become necessary to exercise it in the settlement of the estate for the purpose of paying claims against the estate, and, there being no claim in the bill that there are debts, the administrator may not bring this case. One of the troubles ²⁵⁹ with this argument is that it does not take cognizance of the fact that the property which the bill avers was fraudulently obtained was personal property, and remained so long after the death of Mr. Fish. Until settlement and distribution of an intestate estate, the personal property would rightly be in the custody of the administrator: See *Cullen v. O'Hara*, 4 Mich. 132; *Hollowell v. Cole*, 25 Mich. 345; *Albright v. Cobb*, 30 Mich. 355; *Parks v. Norris*, 101 Mich. 71, 59 N. W. 428. At the time of the death of Mr. Fish, under these authorities, the only person who could have brought an action for the recovery of this money was the administrator. It was not only his right, but it was his duty, to institute an action to obtain it. The fact that the personal property has been used to purchase real property does not do away with that right.

The decree is reversed with costs. The defendants will be given the usual time in which to answer the bill of complaint.

Montgomery, Ostrander, Hooker and McAlvay, JJ., concurred.

Constructive Trusts in Real Estate, raised by law in cases of fraud, are discussed in the note to *Insurance Co. of Tennessee v. Waller*, 115 Am. St. Rep. 786.

MAYER v. MAYER.

[154 Mich. 386, 117 N. W. 890.]

ALIMONY, Decree for, Effect of.—A decree for alimony in the case of a divorce a vinculo made without reserve, although payable in installments, is final, and cannot be changed after its enrollment. (p. 481.)

ALIMONY, Decree for, Entered in One State, When may be Enforced in Another.—A decree for alimony in favor of a wife in a suit for divorce a vinculo, where there is no reserve by the court or the statute of the power to change it, may be enforced by a judgment of a court of another state whereof the parties have become residents. (p. 481.)

DECREE OF DIVORCE Awarding Sum for Support of Children When not Enforceable in Another State.—Where in a decree

of divorce an order is made that the husband pay the wife a specified sum monthly for the support of their children, and a statute of the state authorizes the court to modify its order whenever circumstances render a change proper, an action cannot be maintained in another state to recover arrears alleged to be due under such order. Application must be made to the court wherein the order was entered. (p. 482.)

ALIMONY, Decree for, When not Enforceable by Contempt Proceedings in Another State.—Though a decree of a court of another state having jurisdiction of the cause and the parties awards alimony to a wife, and the award is final, and an action may be maintained in this state to obtain judgment for the arrearages, such judgment cannot be enforced by proceedings for contempt, where the only authority given by the statute is to punish disobedience to an order for alimony made in a suit for divorce. The suit in this state based upon a decree in the other state is not a suit for divorce within the meaning of this statute. (p. 483.)

Willard E. Warner, for the complainant.

Frazer, Griswold & Slyfield, for the defendant.

387 MONTGOMERY, J. Complainant and defendant were formerly husband and wife. On the 20th of April, 1896, the district court of the first district of Oklahoma passed a decree dissolving the marriage between the parties, and awarding the custody of five minor children of the parties to the defendant upon the following terms and conditions: "The said children are to be sent to the public schools during the school year, and said children are not to be sent out to work unless by permission of the court or judge. The plaintiff is to have the right to visit the said children at their home between the hours of 9 A. M. and 9 P. M. on Wednesdays and Saturdays of each week without interference or molestation from the defendant, the court reserving the right to modify the order in regard to the children at any time."

The decree further adjudged that the complainant should pay to defendant as alimony for the support of herself the sum of twenty-five dollars per month, payable monthly, such payments to cease on defendant's death or in case defendant should marry again. The decree then proceeds as follows: "It is further ordered that the plaintiff pay to the defendant for the support and maintenance of the children the sum of ten dollars per month for each of said children, payable to the defendant monthly, said payments to continue until each of the said children shall have arrived at the age of twenty-one (21) years, or shall have married, or until the further order of the court. As a condition precedent to the payment of alimony by the plaintiff, the defendant is required to turn over to the plaintiff his books, literary, and

professional, also the instruments of his profession now being in the possession of the defendant, also his private papers, pictures, and photographs, and the plaintiff may withhold the payment of said alimony until this order is complied with, the cost of packing and shipping to be paid by the plaintiff."

388 The complainant, who was the defendant in the divorce proceedings, afterward removed to New York, and the defendant removed to the city of Detroit, in this state, and complainant later also removed to the city of Detroit and filed the bill in this case, which sets up, in substance, that she has substantially complied with all the terms of the decree on her part, but that the defendant has failed to make payments of the amount of alimony due to complainant of twenty-five dollars per month, that he has failed to keep up the payments awarded to her for the care and support of the children, and that there is now due on each item a large sum of money. The circuit judge found that there was unpaid to complainant for her support at the date of the decree seventeen hundred dollars and fifty cents, and that there was unpaid to complainant of the sums which she was entitled to receive for the support of the children three thousand one hundred and seventy-two dollars and thirty-four cents, and gave a decree for the total amount of four thousand eight hundred and seventy-two dollars and eighty-four cents, payable forthwith. The decree not having been complied with, upon proper proceedings had, the defendant was adjudged guilty of contempt for failure to comply with the decree, and an appeal has been taken to this court from the original decree, and also from the order adjudging the defendant guilty of contempt, and the questions involved in both orders are before the court for determination.

The case presents three questions:

1. Whether a decree for alimony made in a court of a sister state, where no reservation of a right to modify the decree appears in the decree itself, and where no such right is conferred upon the court by statute, is such a final determination of the rights of the parties as to create an obligation enforceable in our courts.

2. Whether the award of money for the care and support of the children, as in this case, where there is a reservation in the decree of a right to modify or change the order, either in the statute or in the decree itself, is such a final decree or order as is enforceable in the courts of this state.

3. Whether, if such decree is either wholly or in part enforceable within this state, it may be enforced by proceed-

ings as for contempt on the failure of the delinquent to comply with the order of the court in chancery.

³⁸⁹ The case of *Barber v. Barber*, 21 How. (U. S.) 582, 16 L. ed. 226, affirms the right of a wife, under a judicial decree of separation from bed and board, who has been awarded alimony by the courts of the state of New York, payable in installments, to maintain a suit in equity in a court of the United States in the state of Wisconsin by her next friend to enforce the payment of such alimony. It was said in the course of the opinion:

“Courts of equity will interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court in England. Such a jurisdiction is ancient there, and the principal reason for its exercise is equally applicable to the courts of equity in the United States. It is that when a court of competent jurisdiction over the subject matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed. Then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony. . . .

“The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the states have jurisdiction.”

This case was cited as an authority in *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761, and in *Wagner v. Wagner*, 26 R. I. 27, 57 Atl. 1053, 65 L. R. A. 816, and, if the holding be limited to a case in which a final award of alimony has been made in a sister state, with no power reserved in the court, in the decree ³⁹⁰ itself or inherent in the court under the law, either the common law or the statute law, to modify or amend the decree as to the amount, its .

authority should be said to remain unshaken. It will be noticed that, as to the award of alimony to the wife in this case, the decree contains no reservation of authority to subsequently modify the decree. The statute of Oklahoma was introduced in evidence by the defendant, and the only provision which bears upon the power of the court in such cases is as follows: "When a divorce is granted, the court shall make provision for guardianship, custody, support and education of the minor children of the marriage, and may modify or change any order in this respect whenever circumstances render such change proper": 2 Okl. Rev. Stats., sec. 4838.

It will be seen that this limits the statutory authority to modify the decree to the subject of the allowance for the support and education of the minor children. It is contended in the brief of the defendant's counsel that this right exists in a court of equity independent of statute. We do not agree with this contention. On the contrary, we think the authorities generally sustain the proposition that a decree for alimony in a case of divorce a vinculo, made without reserve, although payable in installments, is final, and cannot be changed after enrollment of the decree: See *Sampson v. Sampson*, 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349; *Livingston v. Livingston*, 173 N. Y. 377, 93 Am. St. Rep. 600, 66 N. E. 123, 61 L. R. A. 800; *Kamp v. Kamp*, 59 N. Y. 212; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. In most of the states the power to amend the decree as to alimony is reserved to the court by statute, but in the absence of such reservation of authority, or of a reservation in the decree itself, we think the determination should be treated as final. We think the decree for the arrears due the wife is within the authority of the court, and should be affirmed. But different considerations control as to that portion of the decree which found in favor of the complainant for the arrears in payments for the support of the minor children.

³⁹¹ A well-considered case, which has become a leading case upon this question, is that of *Lynde v. Lynde*, reported in 41 App. Div. (N. Y.) 280, 58 N. Y. Supp. 567, in 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979, 48 L. R. A. 679, and in 181 U. S. 183, 21 Sup. Ct. Rep. 555, 45 L. ed. 810. In that case an action was brought in the supreme court of New York to recover upon the final decree of the circuit court in chancery of the state of New Jersey, which New Jersey court had adjudged that the plaintiff was entitled to recover of the defendant seven thousand eight hundred and forty

dollars and a counsel fee of one thousand dollars, and that the defendant should pay to her permanent alimony at the rate of eighty dollars per week from the date of the decree, and to give security for the payment of the several sums directed, etc. On the hearing of this case the appellate division held that, in so far as the decree of New Jersey adjudged the defendant to be indebted to the plaintiff in a certain sum at the date of its rendition, it was a final adjudication, and entitled as such to recognition in the court of a sister state, established a debt against the defendant, and had extraterritorial value and force. It also found that, so far as the decree made provision for the payment of alimony in the future, it remained subject to the discretion of the chancellor, and lacked conclusiveness of character, and recovery was therefore limited to the amount found due at the date of the decree. From this decision both parties appealed to the court of appeals, where, upon a very full discussion of the subject, and a full review of the case of *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, the court affirmed the judgment. From this decree both parties again appealed to the supreme court of the United States. The opinion was delivered by Mr. Justice Gray, and contains the following: "The decree for the payment of eight thousand eight hundred and forty dollars was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might, at any time, alter it, and was not a final judgment for a fixed sum."

³⁹² The conclusion reached in *Lynde v. Lynde* has been followed in *Page v. Page*, 189 Mass. 85, 75 N. E. 92, in *Israel v. Israel*, 148 Fed. 576, 79 C. C. A. 32, 9 L. R. A., N. S., 1168, and in *Sistare v. Sistare*, 80 Conn. 1, 125 Am. St. Rep. 102, 66 Atl. 772, while the authority of the case is questioned in *Wagner v. Wagner*, 26 R. I. 27, 57 Atl. 1058, 65 L. R. A. 816. In speaking of the latter case, the supreme court of Utah, in *Hunt v. Monroe*, 32 Utah, 428, 91 Pac. 269, 11 L. R. A., N. S., 249, says: "This is the only case decided after the *Lynde* case, . . . which holds to the doctrine that a judgment like the one at bar may be sued on in a sister state before the state court . . . has fixed an absolute sum due and payable at some time prior to the bringing of the action thereon."

So far as our examination has extended, we have also failed to find any other case in which the doctrine of the *Lynde* case has been either misapprehended or repudiated.

It follows from what we have said that the decree, in so far as it contains an award for the arrears in payments accruing to the defendant for the care and custody of the minor children, should be reversed, without prejudice to the right of the complainant to apply for relief to the court of Oklahoma: See, also, *Nixon v. Wright*, 146 Mich. 231, 109 N. W. 274.

The remaining question is whether the remedy by proceedings as for contempt is open in this case. In the absence of a statute authorizing attachment for nonpayment of permanent alimony, it has been held in this state that such remedy is not open: See *North v. North*, 39 Mich. 67. We have a statute, however, which provides (Act No. 230, Pub. Acts 1899): "Every court of record shall have power to punish by fine and imprisonment, or either, any neglect or violation of duty in the following cases: The disobedience or refusal to comply with any order of such court for the payment of alimony, either permanent or temporary, made in any suit for divorce."

³⁹³ It is to be noticed that the authority conferred by this statute is limited to suits for divorce. The present suit is not a suit for divorce. It is a suit brought for the purpose of obtaining a money decree based upon a judgment of another state, and does not call upon the court to consider the question of divorce at all. As was said in *Page v. Page*, 189 Mass. 85, 75 N. E. 92: "In this commonwealth the authority to grant alimony is now derived wholly from the statutes. . . . Upon this petition, therefore, we cannot make any inquiry as to the proper amount to be allowed as alimony, nor can the order of the Maine court as to alimony be enforced in any of the ways set forth in our statutes. . . . We can have no part in the matter until the question of amount has been there settled, and even then we cannot make use of the statute proceedings because they are not applicable."

The order adjudging the defendant guilty of contempt will be set aside. The decree below is modified as indicated by this opinion, and the defendant will recover costs of this appeal, to be applied upon the decree awarded complainant.

Ostrander, Hooker, Moore and McAlvay, JJ., concurred.

The Effect of Foreign Decrees of Divorce are discussed in the notes to *Felt v. Felt*, 83 Am. St. Rep. 616; *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 553; *Montgomery v. Consolidated etc. Co.*, 103 Am. St. Rep. 328. As a rule, a decree of divorce, if the court has jurisdiction, has the same effect in every other state as in the state where rendered, and is conclusive of the merits of the controversy,

no matter what fraud may have intervened: *Forrest v. Fey*, 218 Ill. 165, 109 Am. St. Rep. 249, and see the note thereto; *Joyner v. Joyner*, 131 Ga. 217, 127 Am. St. Rep. 220.

A Decree for the Payment of Future Alimony or Maintenance which is inconclusive in its character by reason of the reservation to the court which made it of the unrestricted right to change or annul it at discretion, and which is not enforceable in the state of its origin otherwise than by special processes exclusive of execution, and of judgment thereon and execution, is not one creating such a debt of record as will entitle it to or justify extraterritorial enforcement: *Sistare v. Sistare*, 80 Conn. 1, 125 Am. St. Rep. 102; *Van Horn v. Van Horn*, 48 Wash. 388, 125 Am. St. Rep. 940.

ADAMS v. CENTRAL CITY GRANITE, BRICK AND BLOCK COMPANY.

[154 Mich. 448, 117 N. W. 932.]

MECHANIC'S LIEN—Property Which may be Included Within.—Under a statute providing for a lien upon a house or other structure and its appliances and upon the entire interest of the owner in and to the lot or piece of land not exceeding one quarter section, or if in any city or village not exceeding the lot or blocks upon or around or in front of which the improvement is made, it does not follow because a block in a city is divided into lots that the lien may not attach to more than are covered by the structure. A factory building, though upon certain platted lots only, may be said to be built upon the contiguous territory in the block necessary to the convenient use and enjoyment of the building. (p. 489.)

MECHANIC'S LIEN—Extent of Property Covered by and Evidence to Limit or Explain.—It is a general rule that the lien attaches to the extent of the statutory limit, and the claimant need aver and prove only that the quantity of land on which he claims a lien is within that limit. If the owner seeks to have a smaller quantity of land held subject to the lien, it is for him to present a reason and the facts supporting it; and if the claimant seeks an apparent enlargement of such quantity, he should by averment and proof advance the reasons in support of his demand. (p. 490.)

MECHANIC'S LIEN for Factory Building, When Restricted to Lots on Which It Stands.—Where the owners of several blocks of land, each of which is divided into lots, erect a building standing partly on four of the lots, intending to engage in the manufacture and sale of brick, tiles, etc., and a considerable number of the lots contain materials useful for such manufacture and intended to be used therein, this does not warrant the extension of the lien over lots on no part of which the building stands. (p. 491.)

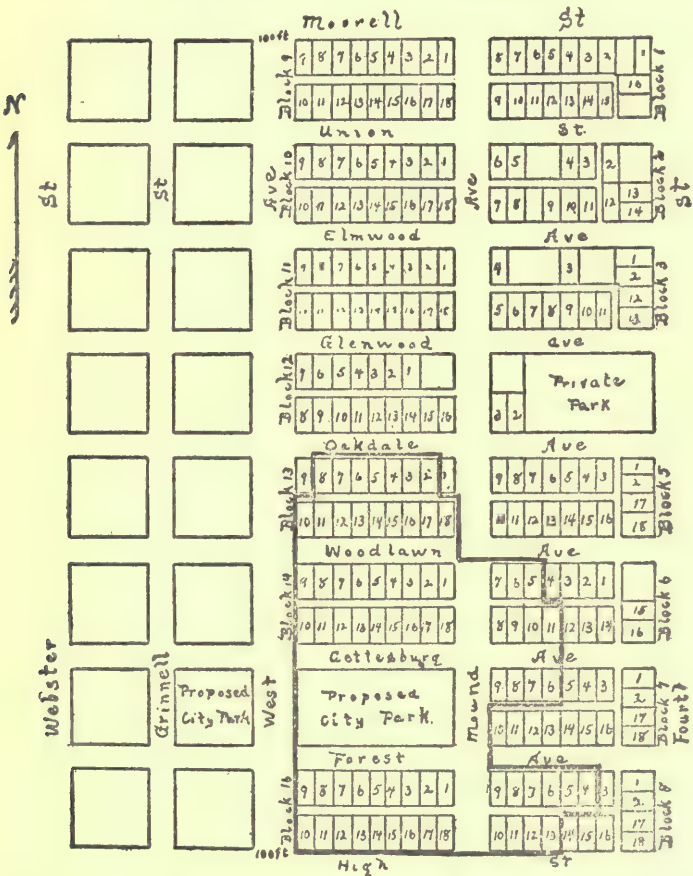
MECHANIC'S LIEN—Contract Extending the Quantity of Land Covered by, When not Established.—The fact that the owners of property, or their representative, told a person furnishing the material to be used in the erection of a building thereon that the company owned ninety-one or ninety-two lots that ought to satisfy any demand that would grow out of such building does not indicate that the parties, by the contract or otherwise, attempted to fix the quantity of land to which the lien should extend. (p. 491.)

MECHANIC'S LIEN—Mortgagee is not Affected by Waiver by Owner.—If the owner of land waives compliance with some condition essential to the creation or enforcement of a mechanic's lien against his property, this cannot affect his mortgagee, nor subordinate the latter's lien to that of the claimant of a mechanic's lien. (p. 492.)

Richard Price, for the complainant.

Wilson & Cobb, John F. Henigan, Arthur Brown and Edson R. Sunderland, for the defendants.

450 OSTRANDER, J. The material and labor for the value of which liens are claimed entered into the construction of a factory building in Jackson Mound addition to the city of Jackson. The plat is shown by the accompanying diagram.



451 The lots are sixty-six feet wide. The debtor corporation acquired its property after the plat had been made and

recorded and by the platted descriptions, including, however, the streets and alleys. Some work had then, and has since, been done upon the streets, but not by the city, and the plat had never been accepted by public authority. The property was assessed by the city in accordance with the plat. The building, the only one upon the land described in the decree, is one hundred and eighty feet long and forty-nine feet wide, and rests upon lots 7, 8 and 9, and possibly on a few feet of lot 6, in block 14. The debtor corporation was organized to manufacture and sell brick, blocks, tile and posts. It has never engaged in the business. Its capital is thirty-five thousand dollars, of which thirty-two thousand dollars was contributed, as appears by the articles of association, in the following property:

“Lots five (5), six (6), seven (7), eight (8), nine (9), ten (10) and eleven (11), block six (6); lots (6), seven (7), eight (8) and nine (9), block seven (7); lots four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12) and thirteen (13), block eight (8); block thirteen (13), except lots one (1) and nine (9); block fourteen (14); block fifteen (15), and block sixteen (16), of Jackson Mound addition to the city of Jackson; including all rights to alleys and streets, passing through or along said real estate.”

Upon block 14 and extending to block 6 is a mound containing material—sand and gravel supposed to be suitable and valuable for the products proposed to be turned out by the factory. Upon other lots and blocks is similar material, lying, at certain points, some distance below the surface of the ground. The mound or knoll had been examined and tested. It is estimated that fifty thousand dollars' worth of the material, at ten cents a load, lay on blocks 14 and 6, above street grade. The lots, for the purpose of dwellings, are worth about two hundred dollars each. Some of them were sold by the corporation. The lienors claimed, and the court below gave them, a lien upon the building and upon other of the property, described in the decree as ⁴⁵² “Lots four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), and eleven (11), in block six (6); lots six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), and thirteen (13), in block eight; lots two (2), three (3), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block thirteen; lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in

block fourteen; lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block fifteen (15); lots one (1), two (2), three (3), four (4), five (5), six (6), sixteen (16), seventeen (17), and eighteen (18), in block sixteen (16)."

The bill was taken as confessed by the debtor corporation. The contestant and appellant is mortgagee of the premises covered by the decree. The amount of the liens, with costs, is more than fifteen hundred dollars. The principal contention, with some of the reasons advanced by the trial court for granting the decree, is indicated by the following quotations from the opinion:

"There is a peculiar question in this case, a new one in Michigan, I think. The land upon which the building was placed, upon which a mechanic's lien is claimed, and for the foreclosure of which the bill was filed, has been platted. It embraces a large number of lots owned by the defendant company. After it was platted the defendant company found that the sand, which lay to a considerable depth on a large number of these lots was available, in its opinion, for the manufacture of brick of a certain kind. It undertook to establish its factory upon the land to utilize this material in the manufacture of this brick. It intended to take all of the material on these lots that was fit for this use and subject it to such use, which might require a large number of years. As it has been spoken of in the case, they thought it would not be used up in the lifetime of any of them then entering into the company.

"Now, it is insisted here that the lien cannot extend any further than the very ground on which the factory was built, because they say the statute limits to the lot or ground in front or around the lot which goes with it. Yet complainant says that the factory, which occupied, if two lots, not more than two, would not be of any particular use, ⁴⁵³ except as the raw material lying upon a large number of the other lots could go with it.

"In order to hold with counsel for complainant, it is necessary for the court to possibly enter a new field, and make a decision without precedent in Michigan, although the principle contended for by complainant's counsel has been recognized, and is recognized, in the text-books on mechanics' liens.

"It may be said to be true by platting this land it was separated into lots, and not more than a lot should go with the building upon it, and if this were a dwelling-house, that argu-

ment would be unanswerable. But it was after this land was platted that the defendant company acquired it. And the defendant did not contemplate the immediate use of that portion of the land upon which this sand lay for use as city lots, but had intended to take off the sand, and then the lots would remain after the sand was exhausted. And it would be true the factory of itself would be of no use except as they had raw material to keep it running. So it seems to me that, as to that part of the property upon which this sand lay, the owners themselves practically ignored the division into lots and blocks.

“It is true they went on and improved some of the streets in part, but they may not have deprived them of the right to take the sand suitable for manufacturing purposes from the streets and reduce their grade, as they reduced the grade of the lots by taking off this material.

“But there are some of these lots that were not available for use in connection with the factory. The company contemplated they would take their manufactured brick and build houses on these lots, and sell them, and then perhaps, as a lot was graded down by exhausting the sand upon it, it would build upon that and sell.

“I find difficulty in determining whether the lien ought to extend, not only to the factory and the ground occupied by it, but to these lots upon which the sand existed, or whether simply to the sand itself, the material fit for manufacturing, and then leave the lots. The proposition is a new one. There might be a difference in extending a lien to the lots, or extending them to the material fit for manufacturing purposes that is upon the lots. There may be separate interests in land. One man may own the timber and another one may own the surface for farming purposes. Another one may own a strata of ⁴⁵⁴ coal one hundred feet below the surface, and below that there may be a strata of something else that somebody else may own.

“I feel confident that the parties, in establishing the factory there, meant that all the material fit for use in the factory should go with it as a part of its property; and, in building the factory, I think the lien of the man who furnishes the labor and material should extend, not only to the building, but to everything that became part of that entity, and which was treated as an entity. Otherwise, assuming that this material is valuable for the purposes intended, I would give a lien simply on the building, and then without the material to use in manufacturing the building would be comparatively

worthless. Somebody else could acquire the material and put up another factory. I don't think that result ought to be reached."

The decree establishes the lien upon lots, as distinguished from the material upon or in the lots. The further contention is made that the lien of Marion A. Dayton is not established, for the reason that he did not serve upon the owner of the property the statement required by 3 Compiled Laws, section 10713.

The statute provides for a lien "Upon such house, building, machinery, wharf, . . . and other structure, and its appurtenances, and also upon the entire interest of such owner, . . . in and to the lot or piece of land, not exceeding one quarter section of land, or if in any incorporated city or village, not exceeding the lot or lots upon or around or in front of which such improvement is made": Act No. 17, Pub. Acts 1903, amending 3 Comp. Laws, sec. 10710.

The theory of the bill, as disclosed by the allegations therein, is that the building is an improvement to or on all of the land mentioned in the decree, and is advanced, not by statement of facts showing the relation between the factory and the land, but by the broad averment that it constitutes "a valuable and permanent improvement on the same." The statute limits the area of the land to which the statutory mortgage attaches to the lot or piece ⁴⁵⁵ of land upon which the building or other structure is erected. And in no event can the quantity exceed one hundred and sixty acres of land in the country, or the lot or lots upon which the improvement is made if in an incorporated city. The use of the words "lot or piece of land" in one portion of the law, and the use of the words "lot or lots" thereafter, with reference to property within a city, requires us to hold that the words, where last employed, mean the surveyed lots, in conformity with which the plat is made. And as without this second limitation it might be a question of fact whether the lien should attach to a larger or smaller piece of land, so with the limitation by acres, and by surveyed lots, it may be a question of fact whether the lien shall attach to all or a part only of the land within the maximum quantity fixed by the law. It would not necessarily follow because a structure had been erected upon some part of a farm of one hundred and sixty acres, that the lien extended to one hundred and sixty acres. And it does not necessarily follow because a block in a city is divided into lots, that a lien may not attach to more of those lots than are covered, or partly covered, by the structure erected. A factory building, though built upon

and covering only two platted lots in a city block, may be said to be built upon contiguous territory in the block necessary to the convenient enjoyment and use of the buildings. Assuming an entire block to have been selected as a proper site for, and devoted to the use of, a factory and its material and products, it would be a narrow construction of this statute which would in all cases limit the lien to the particular lots upon which a particular building stood: See, generally, 2 Jones on Liens, 2d ed., c. 34, and notes; Boisot on Mechanics' Liens, c. 8; 27 Cyc., p. 221 et seq. As to construction of the statute, see *Smalley v. Northwestern Terra-cotta Co.*, 113 Mich. 141, 71 N. W. 466.

It is the general rule that the lien attaches to the extent of the statutory limit, and the lien claimant need aver and prove no more than that the quantity of land on which he claims a lien is within that limit. If for any ⁴⁵⁶ reason the owner seeks to have a smaller quantity of land held subject to the lien, it is for him to present the reason and the facts supporting it. But if the claimant, as in this case, seeks an apparent enlargement of the statute quantity of land, he should, by averment and proofs, advance reasons and facts in support of his demand. It is clear that a lien extending to the building and to lots 6, 7, 8, and 9, block 14, may be sustained. No reason appears for limiting the quantity of land to less than the area of these surveyed, contiguous lots, upon some portions of each of which the structure rests. Such a lien is supported by the facts and by the express language of the statute. No facts supporting a decree enlarging this area are set out in the bill. The decree recites that the court finds "that the premises upon which such building was constructed, and upon which it constituted an improvement, is described," etc. The building is not, in fact, an improvement of all of the land containing the deposit of material supposed to be valuable for manufacturing purposes. It would be quite as much an improvement, except to the land on which it rests, if it were erected outside of the addition. No criticism being made of the bill, and no objections, based upon the lack of averments, to the introduction of testimony appearing, we have examined the testimony. We find no testimony supporting the conclusion that the building is "constructed" upon the land described in the decree. The learned trial court correctly stated that the building was erected for the purpose of utilizing the deposit found upon some of the land. At the best, this would devote the deposit, separate from the land, to manufacturing purposes. There is no testimony tending to

prove that the lots, as distinguished from the deposit of material, were ever treated as any part of the manufacturing plant. Indeed, the contrary appears. It was intended, so far as intention appears, to sell the lots after removing the deposit to a desired level. There is some testimony tending to prove that certain lots, the location ⁴⁵⁷ and descriptions of which we cannot ascertain, were convenient, and will be necessary, for storing manufactured products. We do not understand that any such lots are included in the decree. The testimony is too indefinite to warrant us in finding that any particular lots, other than those already described, were treated as a part of the lot or piece of ground upon which the building was constructed. Testimony was introduced tending to prove that the lienor Adams, before delivering lumber for the building, raised some question about how he would be paid, and a representative of the debtor corporation told him that the scheme would undoubtedly be a success; and, if it was not, there were ninety-one or ninety-two lots owned by the company that ought to satisfy any demand there would be growing out of the erection of such a building. We are not called upon to determine whether, and, if at all, in what manner, the statutory limits of a mechanic's lien may be extended by contract. We find nothing in the testimony which indicates any attempt of the parties to fix, by contract or otherwise, the quantity of land to which a lien should extend. We conclude that the statute and the facts require a modification of the decree, and that the lien extends to the building and to lots 6, 7, 8, and 9, block 14, only.

The bill was filed by claimant Adams, and claimant Dayton is made a defendant. Claimant Dayton contracted with the owner to do the carpenter work and to also furnish certain materials. Performance called for expenditure of labor, and he employed men to do the necessary work. He furnished labor and materials besides those required by his original contract. In his answer he avers that he furnished services, labor and material for building the structure in question, for which he has not received his pay; that he duly filed a statement claiming a lien upon the premises; has instituted no proceedings at law to recover the amount due him. These facts are proven. He asserts that each of the parties claiming a lien should share pro rata in the proceeds of any sale of ⁴⁵⁸ property ordered by the court, and that said lienors should be preferred to any and all other holders of liens and encumbrances upon the property. After the building was erected, and before this claimant had filed notice of his lien,

the owners mortgaged the property in question and other property to the appellant. Dayton did not, at any time, render to the owner a statement under oath of the number and names of laborers in his employ and of every person furnishing materials. He was paid, from time to time, sums of money, the total of which nearly equals the original contract price. His contention here is ruled against him by *Kerr-Murray Mfg. Co. v. Kalamazoo H. L. & Power Co.*, 124 Mich. 111, 82 N. W. 801, unless it can be said that, because Dayton paid his men weekly, and had paid for all material furnished for the building, and because he had, before filing a lien, agreed with the owner upon the balance due him remaining unpaid, the case is to be distinguished from the one referred to, and is ruled by *Walker v. Syms*, 118 Mich. 183, 76 N. W. 320, and *Bollin v. Hooper*, 127 Mich. 287, 86 N. W. 795. Claimant is here asserting, not merely a demand against his debtor, but a lien upon real estate in which others besides the owner claim an interest as lienors: *Wiltsie v. Harvey*, 114 Mich. 131, 72 N. W. 134. The owner could not waive compliance with the statute so as to bind the mortgagee, appellant: *Dittmer v. Bath*, 117 Mich. 571, 76 N. W. 89. The case is not within the rule or exception of *Walker v. Syms*, 118 Mich. 183, 76 N. W. 320, or of *Bollin v. Hooper*, 127 Mich. 287, 86 N. W. 795.

The decree in favor of claimant Dayton is reversed, and a decree will be entered in this court in accordance with this opinion, and the record and cause remanded to the circuit court for further proceedings. Appellant will recover costs of this appeal from complainant, and from his codefendants.

Montgomery, Hooker, Moore and McAlvay, JJ., concurred.

The Lien of a Mechanic includes not only the buildings on which his work was done and the land on which they stand, but also the land about the buildings used with them and necessarily or reasonably convenient to their use: *Bank v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325. But under a statute extending a mechanic's lien upon a building to the land necessary for the convenient use and occupation thereof, the court cannot set aside forty acres with a dwelling on the ground that that amount of land is necessary for its convenient use. The statute does not contemplate that the dwelling shall include lands sufficient to support the owner while living therein: *Cowen v. Griffith*, 108 Cal. 224, 49 Am. St. Rep. 82. See, also, *Badger Lumber Co. v. Marion etc. Co.*, 48 Kan. 182, 30 Am. St. Rep. 301; *Jarvis v. State Bank*, 22 Colo. 399, 55 Am. St. Rep. 129.

MEISNER v. DETROIT, BELLE ISLE AND WINDSOR FERRY COMPANY.

[154 Mich. 545, 118 N. W. 14.]

CARRIER OF PASSENGERS—Duty of to Receive Persons Desiring Transportation.—A common carrier of passengers must receive for transportation anyone presenting himself and offering to pay his fare, irrespective of his past or present character, if there is nothing in his condition or conduct when he so presents himself to justify his exclusion. (p. 495.)

THE OWNERS OF THEATERS, Circuses, Racetracks, Private Parks and the Like are not Bound to Receive Any Person in or to their places of amusement unless there is some statute regulating their business and providing the terms and conditions on which it may be carried on. The right to enter such place is a mere license, which, though granted, may be revoked. (p. 495.)

COMMON CARRIERS—Owners of Parks Operating Excursions Thereto—Right of to Exclude Persons.—Persons owning an island in a navigable river, maintaining there places of resort and amusement and operating a ferry thereto and carrying various excursions, are not common carriers, and therefore are not obliged to receive every person who offers himself for transportation and tenders the requisite fare. (p. 495.)

Sloman & Sloman, for the appellant.

Gray & Gray and Elliott G. Stevenson, for the appellee.

546 GRANT, C. J. The defendant is organized under chapter 175, sections 6646-6659, 2 Compiled Laws. Its articles of association declare its purpose to be "to own and operate ferries on the Detroit river, between the city of Detroit, and the towns of Walkerville, Windsor and Sandwich, Province of Ontario, and Belle Isle, and such other places on the Detroit river and St. Clair river as the business and interests of the public and said corporation may from time to time require." Belle Isle is a public park, comprising an island in the river and owned by the city. Between the places mentioned it runs ferries, and, as to traffic between those places, is a public common carrier of passengers. The defendant purchased Bois Blanc island, situated in Canadian waters, near the mouth of the Detroit river, opposite to and about a quarter of a mile from Amherstburg, Canada. It owns the entire island, except a tract reserved for lighthouse purposes and three small cottage lots. Upon its property defendant has erected a cafe, dance-hall, cottage for women, shelters and amusement buildings of various kinds, laid out walks, drives, bicycle paths, baseball and athletic grounds, bathing beaches, etc. Upon these it has expended about two hundred thousand dollars. It owns and runs a boat from Detroit to its park

on Bois Blanc island twice daily. This boat, the steamer "Columbia," will carry from three thousand to three thousand five hundred passengers. A smaller boat, the "Papoose," licensed to carry one hundred and fifty passengers, runs between Amherstburg and Bois Blanc. The island being located in Canadian territory, defendant's boat, the "Columbia," is required to stop at Amherstburg, going and coming, to take on a customs inspector. It caters largely to women and children. It owns its own docks used on this route. No liquor is allowed to be sold on the island or on the boats. It provides special policemen to patrol the island, to prevent all conduct and disturbances which would annoy its patrons. Its boat, the "Columbia," carries excursions of various societies to the island, selling tickets at a reduced rate to such societies, which make a profit by reselling them at the regular rate. During the season of 1906 there ⁵⁴⁷ were about one hundred and seventy-six of such special excursions. Plaintiff was refused passage from the city of Detroit to Bois Blanc on two occasions. He had purchased tickets for these trips from societies which gave these excursions. The contracts between the defendant and these organizations contained the following provision: "The party of the first part reserves the right to refuse to accept tickets sold or furnished to any person whom they believe to be possible objectionable passengers. Tickets sold or furnished in violation of this contract will not be accepted."

The tickets also contained the following provision: "This ticket is sold subject to the agreement between the Detroit, Belle Isle and Windsor Ferry Company and the above organization, and must be exchanged for the excursion ticket at wharf on date of the excursion."

On attempting to pass the gate on to the steamer plaintiff was refused admission. The reason given on each occasion was that on a former occasion he had engaged in a disturbance upon the boat to the annoyance of passengers and crew. He brought this suit to recover damages for refusal to carry him as a passenger. The action is in tort, alleging a breach of defendant's duty as a common carrier of passengers. The court directed a verdict for the defendant, except as to the price of the ticket which plaintiff had purchased. He was permitted to recover for this amount, with interest.

Is the defendant, in its business between Detroit and its park on Bois Blanc island, a public common carrier of passengers, obliged by law to accept any person who offers himself as a passenger? This is the important question in this suit.

If it be answered in the affirmative, it follows that no person or corporation can own a private park, private docks, its own means of transportation, and control its pleasure grounds, and means of transportation thereto, without becoming a common carrier, obliged to transport anyone ⁵⁴⁸ who presents himself as a passenger. The sole business in which the defendant is engaged with these two boats is carrying passengers to and from its private pleasure grounds. It caters to a particular class of people. It desires to keep out those whom, for reasons of its own, it deems objectionable. Unless it did this, it would not secure the class of patrons it desires. If it secures the better class of people, which its managers probably believe would make the enterprise a success, beneficial financially to themselves and attractive to respectable people, it must exclude the rough, boisterous and rowdyish element from its boats and grounds. It is not engaged in the general carriage of passengers for business and pleasure. It invites such persons and parties as it chooses, and upon such terms as it chooses to make, to visit its own grounds, provided, as above stated, with the means of entertainment, amusement, and sport. It is in all essentials as private an enterprise as that of a theater, a circus, or a racetrack.

Counsel do not disagree as to the law of common carriers of passengers. Anyone, no matter what his character is or has been, presenting himself for transportation to such carrier, is, upon paying his fare, entitled to be transported, provided there is nothing in his condition or conduct when he presents himself to justify his exclusion. This rule does not apply to the owners of theaters, circuses, racetracks, private parks, and the like, unless there be some statute regulating their business, and providing the terms and conditions under which that company's business may be carried on. It appears to be settled by the authorities that these are private enterprises, under the control of private parties, and that they may license whomsoever they will to enter and refuse admission to whomsoever they will. Their own interests prompt fair and just treatment to those whom they invite to their places of pleasure. The right given to enter such places is a mere license, and after the right to enter is granted it may be revoked. So, also, the right to enter ⁵⁴⁹ may be refused to anyone: *People v. Flynn*, 189 N. Y. 180, 82 N. E. 169; *Collister v. Hayman*, 183 N. Y. 250, 111 Am. St. Rep. 740, 76 N. E. 20, 1 L. R. A., N. S., 1188; *Pearce v. Spalding*, 12 Mo. App. 141; *Purell v. Daly*, 19 Abb. N. C. 301; *Burton v. Scherpf*, 1 Allen (Mass.), 133, 79 Am. Dec. 717; *McCrea v. Marsh*, 12 Gray (Mass.), 211,

71 Am. Dec. 745; *Horney v. Nixon*, 213 Pa. 20, 110 Am. St. Rep. 520, 61 Atl. 1088, 1 L. R. A., N. S., 1184; *Wood v. Leadbitter*, 13 Mees. & W. 838.

Wood v. Leadbitter, 13 Mees. & W. 838, is very similar in its facts to this case. It is cited with approval in several of the above-cited cases. Pleasure grounds of this character are not necessities of life, any more than are theaters and racetracks; and, unless restrained by some provisions of their charters, their owners can impose any terms of admission they choose. No such restraints are imposed upon the defendant in this case. The defendant can exact an entrance fee at the park, or it can compensate itself by charging for transportation to it and admit its patrons otherwise free to the park. The ride upon the boat and the use of the grounds are part of the same scheme for pleasure furnished by the defendant to those whom it may choose to carry. It is perhaps due to the plaintiff to say that he denies the improper conduct charged against him, but his rights in no sense depend upon the reason given for his exclusion.

The judgment is affirmed.

Blair, Hooker, Moore and McAlvay, JJ., concurred.

A Common Carrier is One Who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and everyone who undertakes to carry for compensation the goods of all persons indifferently is, as to liability, to be deemed a common carrier: *Jackson etc. Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432.

As to What Persons a Carrier may Refuse Transportation, see the note to *Illinois Cent. R. R. Co. v. Smith*, 107 Am. St. Rep. 298.

The Law of Theaters and Like Shows is the subject of a note to *Horney v. Nixon*, 110 Am. St. Rep. 525. The question is further considered in the subsequent case of *Collister v. Hayman*, 183 N. C. 250, 111 Am. St. Rep. 740.

BLAKELEY v. WHITE STAR LINE.

[154 Mich. 635, 118 N. W. 482.]

AMUSEMENT, PLACES OF—Assumption of Risks of Danger. If sports are carried on at places allotted to them at pleasure resorts, visitors who go to the vicinity of these places to witness sports assume the risk of the danger. (p. 499.)

BASEBALL GROUNDS and Games, Risks Assumed by Visitors **at**.—Visitors standing in a position that may be reached by balls used in a game of baseball played at the usual and known place assume

the risk of injury from the throwing or batting of balls incident to the game. (p. 499.)

AMUSEMENT, PLACES OF—Liability of Owners for Injury Through Games Played in Unusual Places.—The owners of pleasure resorts may not permit dangerous sports to be played in parts other than those set apart for them, and one injured by such sports while in a place where he had been invited to be may recover therefor. (p. 499.)

AMUSEMENT PLACES, Duty of Owners of.—The owner of a place of public amusement owes the duty to persons attending there either to prevent a dangerous game at an unusual place, or to notify them and other visitors that it is to be played, and to keep a reasonable number of watchmen and servants to see that the grounds are protected from the playing of dangerous games. (p. 499.)

AMUSEMENT, PLACES OF, Throwing of Baseball at, When must be Deemed Wild or Careless.—If visitors are attending a place of public amusement and recreation, and certain other persons commence throwing and catching balls, and throw one of such balls with such force that, in striking the ankle of a bystander, it breaks the bones, such ball-throwing must be regarded as wild and reckless if carried on at an unusual place and where the public had no right to expect it. (p. 500.)

THE OWNER OF A PARK is Bound to Protect Its Invited Guests from unusual occurrences which may result in serious damage to its patrons, if he has the requisite notice and knowledge. (p. 500.)

AMUSEMENT PLACES, Right of Visitors at.—If, in a public place of amusement, places are established for dangerous sports, visitors may properly assume that they may visit other places without being exposed to dangers from the same sports. (p. 501.)

Clarence P. Milligan, for the appellant.

Gray & Gray, for the appellee.

636 GRANT, C. J. The defendant owns and operates a line of boats running from Detroit to various places on the St. Clair river. It owns and controls a pleasure resort known as "Tashmoo Park." It makes no entrance charges to visitors, but makes its profit by carrying passengers to and from the park. It has furnished various means of amusement, including a baseball ground known as "the diamond," a dancing pavilion, and places for other forms of amusement. On June 18, 1905, the retail clerks of Detroit gave a special excursion to the park, and were given by the defendant the right to the possession of the diamond for the purpose of playing baseball. Plaintiff went to the park with this excursion. When the excursion arrived the diamond was in possession of a club of players known as the "Mohawk Club." They surrendered, evidently under the instruction of the defendant, the diamond to players of the retail clerks. Some members of the Mohawk Club on leaving the diamond went outside, between it and the pavilion, where a dance was in progress, and commenced pitch-

ing and catching balls. Plaintiff stood near the pavilion, with his back to the players, watching the dance. A ball was thrown toward the pavilion. The catcher failed to catch it, and it struck the plaintiff's ankle with such force that it broke the bones. Plaintiff brought this suit, alleging negligence on the part of the defendant, its agents, and servants: "To keep and maintain its park and recreation grounds ⁶²⁷ in an orderly manner, . . . and to see that all dangerous games, diversions and recreations, in which there was an element of danger to patrons and the public, should not be played upon any portion of its park except that set aside for such diversions and amusements, and not in places in said park in close proximity to the paths and spots where passengers and patrons were accustomed to be and to gather, and at places not intended for the exercise and carrying on of such pastimes and diversions."

The declaration further avers the duty of the defendant to employ and maintain in its park agents and servants for the purpose of seeing to the care, safety and security of its patrons, and a violation of its duty. At the close of the plaintiff's case the court directed a verdict for the defendant. In so directing, he stated: "The game of throw and catch would not be a dangerous game where it is conducted in a way that is not wild and erratic, and there is nothing in the testimony to indicate that it was extremely wild and careless, or that the conduct of the little game that was being conducted would be such that people must take notice of, those people who are supposed to look out for the comfort and safety of the people in the park. It is just such a game as people visiting a park of this kind might naturally expect to be conducted there, and which they must look out for. They must look out for the dangers incident to such a game."

Counsel for each party cite with approval, as the law applicable to this case, the statement of Justice Cooley, in his work on Torts (page 605): "One is under no obligation to keep his premises in safe condition for the visits of trespassers. On the other hand, when he expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

This rule has been cited with approval by this and many ⁶³⁸ of the courts of other states. The difficulty lies only in applying the rule to the facts of a given case. We find, how-

ever, no difficulty in applying the rule to the facts here. Plaintiff was invited to the defendant's park or pleasure ground to spend the day. In so far as various sports were allowed to be carried on in places allotted for them, visitors who went to the vicinity of these places to witness the sports undoubtedly assumed the risk of danger. In this case the defendant had marked off grounds for the game of baseball. It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk. They can watch the ball and may usually avoid being struck. Plaintiff had no reason to anticipate a game of throw and catch off the diamond, and in close proximity to the dancing pavilion. The defendant should not have permitted such a game in close proximity to a crowd of visitors, without giving notice, or making proper arrangement for the protection of its visitors. There is testimony from which a jury might infer that this game, in this unusual place, had been going on for a sufficient length of time to give notice to the defendant's agents or superintendents that it was in progress, and that a woman had been struck nearly a half hour before, and seriously injured by a ball thus thrown. The owners of pleasure resorts may not permit dangerous sports to be played in places other than those set apart for them. This plaintiff was standing where he had been invited. He was not in any danger from a ball game played at the customary place. The defendant owed him a duty, and that was either to prevent the game at that unusual place, or to notify him and other visitors that it was to be played. It was likewise its duty to keep a reasonable number of watchmen or servants to see that its grounds were protected from ⁶³⁹ the playing of games as dangerous as this was. It may safely be inferred that this ball was thrown with all the force and swiftness with which the thrower was capable. The result justifies the inference. This may not be "extremely wild and careless" ball-throwing as between players who were on their guard, or as to visitors who were warned that the game was in progress; but as to those who were not warned, and who have no knowledge of it, I do not agree with the circuit judge that it was not "wild and careless throwing."

We held in *Cousineau v. Muskegon Traction & L. Co.*, 145 Mich. 314, 108 N. W. 720, that a common carrier of passengers owning a park owed a duty to the plaintiff, a girl, to protect

her from the crowd as she was attempting to enter one of its cars. For the same reason there given, the owner of the park is bound to protect its invited guests from unusual occurrences which may result in serious danger to its patrons, if he has the requisite notice or knowledge. The rule we have thus enunciated as applicable to this case is sustained by the following authorities: *Selinas v. Vermont State Agricultural Society*, 60 Vt. 249, 6 Am. St. Rep. 114, 15 Atl. 117; *Richmond etc. R. Co. v. Moore's Admr.*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; *Lane v. Minnesota State Agricultural Society*, 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708; 1 *Thompson on Law of Negligence*, sec. 998; *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563, 58 Am. St. Rep. 709, 67 N. W. 479, 33 L. R. A. 598, 50 Neb. 214, 69 N. W. 757; *Indianapolis St. Ry. Co. v. Dawson*, 31 Ind. App. 605, 68 N. E. 909; *Williams v. Mineral City Park Assn.*, 128 Iowa, 32, 111 Am. St. Rep. 184, 102 N. W. 783, 1 L. R. A., N. S., 427, 5 Am. & Eng. Ann. Cas. 924, and note. See, also, *Larkin v. Saltair Beach Co.*, 30 Utah. 86, 116 Am. St. Rep. 818, 83 Pac. 686, 3 L. R. A., N. S., 982, 8 Am. & Eng. Ann. Cas. 977. Invitation is sufficient. Pecuniary profit to the owner is not essential: 1 *Thompson on Law of Negligence*, sec. 968; *Davis v. Central Congregational Society*, 129 Mass. 367, 37 Am. Rep. 368.

The learned counsel for the defendant cite and rely upon *Steele v. City of Boston*, 128 Mass. 583, and other similar cases. In that case the public park was "traversed by divers footpaths, leading in different directions," ⁶⁴⁰ with openings in the fence, to give access to and from the adjoining streets. One of these paths had been fitted up by the public authorities for boys to coast upon with sleds. They had built a bridge over an intersecting path, and had stationed a policeman at the foot of the path to keep people from walking on it. It had turned water on it so that it might freeze and render the path slippery. The plaintiff deliberately walked along this path and was injured by a coaster. The court used the following language: "If a private person owned a similar park to which he had given the public free access, we are at a loss to see how he could be held liable for an accident like that of the plaintiff. Such person might, if he saw fit, set apart and fit for use one of the paths for the recreation of youth in coasting, and if anyone should, as was the case with the plaintiff, choose to enter upon the path, seeing that it was set apart for this purpose, he would do so at his own risk, and could not hold the owner responsible if he was injured by a passing sled."

The court further held that, if the path were in a public highway, the plaintiff could not maintain his suit because the statute gave no right of action. That case does not apply to this.

So the defendant in its private park may establish places for a sport dangerous to those visitors who choose to come within the radius of danger, without incurring liability for an injury. Visitors, however, may properly assume that they may visit other places without being exposed to the dangers of the same sport elsewhere.

Judgment reversed and new trial ordered.

Blair, Hooker, Moore and McAlvay, JJ., concurred.

The Law of Places of Amusement, such as theaters and shows, is the subject of a note to *Horney v. Nixon*, 110 Am. St. Rep. 525.

If the Owner or Occupier of Premises, either directly or indirectly, induces people to come thereon, he thereby assumes an obligation that the premises are in a reasonably safe condition, so that persons there by his invitation shall not be injured by them or in their use for the purpose for which the invitation was extended. This rule has been applied to the owner of a racecourse who is giving thereon public exhibitions of racing: *Hart v. Washington Park Club*, 157 Ill. 9, 48 Am. St. Rep. 298; to an agricultural society giving a fair: *Dunn v. Agricultural Society*, 46 Ohio St. 93, 15 Am. St. Rep. 556; to the owner of a park who invites the public there to view an exhibition of fireworks: *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 81 Am. St. Rep. 512; to a street railway company which maintains a place on the line of its road for exhibitions of marksmanship: *Thompson v. Lowell etc. Ry. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323; and to the proprietors of a bathing resort: *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 116 Am. St. Rep. 818. The managers of a university athletic association who erect a stand to which they charge an admission fee to view a game of football are in the position of proprietors of a public resort, and it is their duty to see that the structure is in a fit and proper condition for such use, and to exercise a high degree of care to prevent disaster. They are not insurers of safety; they do not contract that there are no unknown defects not discoverable by the use of reasonable means, but they do contract that except for such defects the stand is safe: *Scott v. University of Michigan Ath. Assn.*, 152 Mich. 684, 125 Am. St. Rep. 423.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

SEIBEL v. HIGHAM.

[216 Mo. 120, 115 S. W. 987.]

DEEDS.—Delivery is not only essential, but it is the final act which consummates a deed. (p. 507.)

DEEDS.—To the Delivery of a Deed It is Essential that there be a giving by the grantor and a receiving by the grantee, with a mutual intent to pass the title from the one to the other. (p. 507.)

DEEDS, Delivery After Death.—If a deed is given by the grantor to a third person to be delivered to the grantee without condition or contingency, and be by that person delivered, though after the death of the grantor, the title passes as of the date of the delivery to the third person, if the grantor at the time had parted with the deed, intending it to take effect as a present transfer. (pp. 507, 508.)

DEEDS.—If a Deed is Given to a Third Person to be Delivered by Him to the Grantee on the Death of the Grantor, and it is so delivered, the title passes. (p. 508.)

DEEDS—Escrow, What is and Its Effect.—The distinguishing feature of an escrow is the delivery of a deed to a third person to await the performance of some condition, whereupon the deed is to be delivered to the grantee and the title is to pass. In such case it is not a deed until the condition is performed. (p. 508.)

DEEDS.—The Depositary of a Deed in Escrow is not the agent of either party, but is a trustee of an express trust with duties to perform for each, which neither can forbid without the consent of the other. (p. 508.)

DEEDS—Escrow.—The Death of a Grantor does not Annul the depositary's authority to do what he was appointed to do, nor does it impair the right of the grantee to perform the condition and receive the deed. (p. 508.)

DEEDS—Escrow, When Becomes Annulled.—If a deed is left in escrow, and the time stipulated expires in which the condition should be performed on which the deed was to be delivered, the escrow becomes a dead instrument. (p. 508.)

DEEDS—Escrow, Delivery of Without Compliance with Condition.—If an escrow is obtained from the depositary without compliance with the condition on which the deed was to be delivered, the title does not pass. (p. 509.)

DEEDS—Escrow, Obtaining Without Compliance with Condition—Innocent Purchaser.—If a deed is delivered in escrow to be delivered on compliance with a designated condition, and the time stipulated for compliance with such condition passes, and the grantor dies and the depositary delivers the paper to certain persons in good faith, believing that they have a right to demand such delivery and will destroy the paper, but it is delivered to the grantees and placed on record, and a quitclaim deed obtained from them, the title does not vest in them, nor in any grantee of theirs, though he is an innocent purchaser. (p. 510.)

VENDOR AND PURCHASER—Innocent Purchaser, Who is not.—If real property is subject to an option, the holder of which knows of certain facts and equities affecting the title, and he obtains a third person to comply with the option and take title by such compliance, the latter cannot be regarded as an innocent purchaser. (p. 511.)

EQUITY—Denial of Relief in Because Complainant does not Come with Clean Hands.—If a deed in trust is taken to secure sundry creditors, the principal of whom, holding much the greater part of the indebtedness, subsequently obtain title and attempt to assert it for their own benefit without consideration of the other creditors, and if such principal creditors afterward make further large expenditures for its preservation and benefit, they cannot be said to come into equity without clean hands in the sense and to the extent requiring the court to dismiss their bill. (p. 514.)

FRAUDULENT CONVEYANCE—Improvements Made by the Grantee.—If one acquiring real property with knowledge that his title is void or is subject to the equity of others, or that the transfer to him may be set aside as fraudulent, places improvements thereon, he is not entitled to have them taken into account in adjusting the equities of the parties to the suit, unless such improvements can be removed without injury to the realty. If it is mining property, the injury meant is that it cannot be repaired by replacing other improvements or equipment of like character at the cost of their present value. (p. 514.)

Ed. L. Gottschalk and A. H. Harrison, for the appellants.

Xenophon P. Wilfley and Harry Clymer, for the respondents.

126 VALLIANT, J. This is a suit in equity to set aside certain deeds to land in Crawford county, alleged to have been procured by fraud.

There is little, if any, dispute as to the facts. The land in question is mining property. The Copper Hill Mining and Smelter Company, a corporation, is the source of title. The affairs of that corporation were under the management of a board of directors composed of Phillip Seibel, John Boepple, Conrad H. Meyer and Charles C. Higham. John Boepple has since died, and his widow, Christine, and two children, Emma and John, are, together with Phillip Seibel, the plaintiffs in this suit, and Meyer and Higham are two of the defendants. The other defendants are Douglas, Thompson, Barnard, Scoble and the Missouri Copper Mountain Mining

Company; their respective interests will be shown in the course of the opinion. August 9, 1892, the corporation executed its promissory note for \$12,500.59 payable to Phillip Seibel, and secured it by deed of trust on the land in question. The note was made to cover various sums of indebtedness, among which were thirty-six items of small amounts aggregating \$1,234, owing to persons not parties to this suit; also one note held by Lafayette Bank for \$1,724.90, one ¹²⁷ note to Meyer, \$3,207.84, one to Higham, \$1567.37, one to Boepple, \$1,877.41, one to Seibel, \$1,516.53, and three for smaller sums to persons not parties to this suit. When the \$12,500.59 note matured it was not paid, and the deed of trust was foreclosed. At the foreclosure sale, the property was bought in by the plaintiff Phillip Seibel under an oral trust agreement (so the petition says) that he would hold it for the sole use and benefit of himself, and Boepple, Meyer and Higham, but there was no proof of that alleged agreement; on the contrary, the proof shows that the agreement was that he would hold it in trust for the benefit of all the creditors whose debts were covered by the deed of trust, and when the note secured by the deed of trust was delivered to him, he agreed in writing to "devote the proceeds of said note when paid, or all that may be realized upon a sale of the property" under the deed of trust, to the payment pro rata of all the several debts which the note was designed to cover and which were enumerated in the agreement. The deed from the trustee to Seibel bears date October 15, 1892; it recites a consideration of \$1,700, but in fact was merely nominal. March 8, 1901, Seibel conveyed the title to John Boepple by deed of that date, wherein the consideration recited is \$5,000, but in fact there was no consideration, except the agreement presently mentioned. Boepple at the same time executed a written acknowledgment that the property was conveyed to him in trust for Seibel, Higham, Meyer and himself, in equal parts, and that in case of sale he would account to them in that proportion. Those four agreed to that. During the period in which Seibel held title, that is, from October, 1892, the date of the foreclosure sale, to March, 1901, when the title was transferred to Boepple, the evidence shows that the four parties, Seibel, Meyer, Higham and Boepple, expended a considerable sum of money, five or six thousand dollars, in taking care of the property, of which Seibel testified that he ¹²⁸ had expended about \$700 more than either of the other three.

March 14, 1901, Boepple executed a lease of the property to defendants Douglas and Thompson, and gave them possession, and at the same time entered into a written agreement to sell

them the property on certain terms. The agreement amounted to what in real estate trade circles is commonly called an option; Douglas and Thompson having the right to purchase the property on or before April 30, 1901, for \$7,000, or on or before September 15, 1901, for \$10,000. In furtherance of that agreement Boepple signed and acknowledged a document purporting on its face to be a warranty deed conveying the land to Douglas and Thompson, and placed the same in escrow in the hands of the St. Louis Trust Company, to be delivered to Douglas and Thompson if they should by April 30, 1901, pay to the Trust Company \$7,000, or by September 15, 1901, \$10,000, for Boepple. On placing the document in the hands of the trust company, Boepple also placed in its hands a paper signed by himself declaring that the money to be paid to the trust company by Douglas and Thompson pursuant to the option agreement would, when paid, belong equally to Meyer, Higham, Seibel and himself, and the trust company was authorized to so distribute it. All this transaction with the trust company was done with the knowledge and consent of Seibel, Meyer and Higham. Before the option expired—that is to say, June 23, 1901—Boepple died testate, leaving his property in proportions named in the will to his widow and two children, who are plaintiffs in this suit. Douglas and Thompson concluded they did not want to purchase the property; they let the period of their option expire. A year after the death of Boepple, to wit, June 26, 1902, Higham went to the trust company, and, representing himself as agent of Boepple, requested that the escrow be delivered to him, and it was done; he signed the name ¹²⁹ of “John Boepple by W. C. Higham” to the receipt. He did not inform the trust company that Boepple was dead, and the trust company did not know that fact. After Higham got possession of the escrow he wrote to Douglas and Thompson, saying that as the option had expired and the title was in them, it would be necessary for them to execute a deed conveying back the title, and he inclosed in his letter a draft of a quitclaim deed to C. H. Meyer, which he requested them to execute and return to him, which they did. Both Douglas and Thompson testified that they had no desire to purchase the property, and that after the option had expired, it was represented to them by Mr. Higham that it would be necessary for them to quitclaim in order to clear the title on the record, and they thought it was a friendly transaction in which all the parties interested were agreeing, therefore they executed the quitclaim to Meyer.

After the escrow and the quitclaim deed had been obtained in the manner above mentioned, they were put on record, and then Meyer and Higham undertook to find a purchaser for the property. They made a contract with one Graham, whereby they gave him an option on the property for \$2,200, he paying \$200 down for the privilege. After some delay Graham negotiated a sale to one Barnard, who paid him the \$200 he had already paid, and paid Meyer the remaining \$2,000 and took from him a warranty deed. After his purchase Barnard organized the Missouri Copper Mountain Mining Company, a corporation, of which he is the president. He then conveyed the property by deed to Mrs. Scoble, and she to the corporation; there was no consideration for the deed to Mrs. Scoble or from her to the corporation; these deeds were merely made for the purpose of passing the title from Barnard to the corporation.

130 The evidence shows that neither Seibel, nor Mrs. Boeppe, nor her son, nor her daughter, knew anything about the obtaining of the escrow from the trust company, nor of the procuring of the quitclaim deed from Douglas and Thompson. While Meyer and Higham were negotiating to sell to Graham they tried to get Seibel and Mrs. Boeppe to consent to the proposed sale to Graham, but they refused, and the grant of the option to Graham was made without the consent of Seibel or Mrs. Boeppe. Graham procured the purchaser, Barnard, and at Graham's request the deed was made direct to Barnard, the latter paying to Meyer \$2,000, which with the \$200 already paid by Graham for the option made the total consideration received by Meyer \$2,200. Barnard testified that he knew nothing of the title except what was shown by the record; that he had an abstract of the title which he examined and which his attorney examined. All his information about the property he derived from Mr. Graham. He said: "Mr. Graham explained what the property was and Mr. Meyer was. I do not know whether he explained about Mr. Higham or not; I know when the transaction was made Mr. Higham was there at the time and seemed to have something to say, but I was not doing business with Mr. Higham at all. I did not know he was in the transaction at all. I don't think Mr. Graham mentioned Mr. Higham and Mr. Meyer and Mrs. Boeppe and Mr. Seibel." The evidence showed that Mr. Graham knew that these four—Seibel, Meyer, Higham and Mrs. Boeppe—had interests in the property, but he testified that he did not give that information to Barnard.

The findings of facts by the court are stated in the bill of exceptions, from which it appears that the court was of the opinion that Boepple, at the time of placing the Douglas and Thompson instrument in the hands of the trust company as an escrow, held the legal title in trust for all the creditors whose claims were covered by the \$12,500.59 note secured by the deed ¹³¹ of trust, and the conduct of the four persons, to wit, Boepple, Seibel, Meyer and Higham, showed a conspiracy to convert the proceeds of the property to the payment of the sums due themselves respectively to the exclusion of the other creditors; that the escrow, obtained as it was from the trust company and put on record, was inoperative to pass title; that the doctrine of innocent purchaser was not involved in the case, but that the plaintiffs were seeking to enforce an equitable title which originated in a fraudulent and inequitable transaction, therefore they came with unclean hands and were not entitled to equitable relief; therefore their bill was dismissed.

1. Before proceeding to adjust the equities in the case, let us find where the legal title to the property in question now is.

It was in Boepple in his lifetime, subject to pass to Douglas and Thompson upon the delivery of the escrow to them by the trust company. Did the title pass when Higham obtained possession of the escrow under the circumstances above stated? Blackstone defines a deed to be "a writing sealed and delivered by the parties": 2 Blackstone, *p. 295. Delivery is not only essential, but it is the final act that consummates the deed. Delivery by the grantor to the grantee with the intent to pass the title and acceptance by the grantee with the intent to take the title are absolute essentials in the execution of a deed. Delivery may be made through the hands of an agent, and acceptance may be made through the hands of an agent, but, in whatever form it is done, there must be a giving by the grantor and a receiving by the grantee, with the mutual intent to pass the title from the one to the other: *McNear v. Williamson*, 166 Mo. 358, 66 S. W. 160.

If a deed be delivered by the grantor to a third person to be delivered to the grantee, without condition or contingency, and be by that person delivered to the grantee, even after the death of the grantor, the title ¹³² will pass; the transfer of title will take effect as of the date of the delivery to the third person. But in such case it must appear that the grantor at the time he delivered the deed to the third person intended it to take effect as a present transfer: *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326, 16 S. W. 497. And if a deed

be delivered to a third person to be delivered to the grantee on the death of the grantor, and it be by that person so delivered, the title will pass: 2 Jones on Real Property, sec. 1309. But in neither of those cases was the instrument an escrow, because the delivery to the third person to be delivered to the grantor was without condition and the instrument was beyond the recall of the grantor. "The distinctive feature of an escrow is the delivery of a deed to a third person to await the performance of some condition whereupon the deed is to be delivered to the grantee and the title is to pass": 2 Jones on Real Property, sec. 1302. In such case it is not a deed until the condition is performed. The depositary of an escrow is sometimes spoken of as the agent of the grantor and sometimes as the agent of both parties, and whilst that may be correct, in a limited sense, yet, strictly speaking, he is not an agent at all; he is a trustee of an express trust, with duties to perform for each which neither can forbid without the consent of the other. If he were the agent of the grantor, his agency would cease on the grantor's death, and he would have no authority to receive the purchase money from the grantee and deliver the deed. But the death of the grantor does not annul the depositary's authority to do what he was appointed to do, and it does not impair the right of the grantee to perform the condition and take down the deed: 2 Jones on Real Property, sec. 1312. Boepple in his lifetime could not have withdrawn the escrow from the trust company without the consent of Douglas and Thompson before the expiration of the period of their option, but after that period had elapsed he could have done so. Boepple died before ¹³³ the period of the option expired. Douglas and Thompson declined to avail themselves of their privilege to purchase and allowed the option to expire. The paper in the hands of the trust company then lost its vitality, and the trust company might have destroyed it without injury to anyone, or it might have given it to Boepple's heirs to be destroyed, but, in whosoever hands it was, it was a dead instrument. In that stage of the case Higham went to the trust company, and representing himself to be the agent of Boepple, concealing the fact that Boepple was dead, demanded and received the paper from the trust company, signing Boepple's name to the receipt. That, of course, he had no right to do. Even if he had, by false representation during the life of Boepple, obtained possession of the paper, and had delivered it to Douglas and Thompson, without the performance of the conditions by them, it would have conveyed to them no title; in such event the legal effect on the title would not have been

different if the paper had been stolen from the desk of the depositary: 2 Jones on Real Property, sec. 1315. By what we have just said in relation to the legal effect of the paper after it had come into the possession of Higham, it is not intended to say that there was no difference, viewed from a moral standpoint, between the act done and the stealing of the paper, for, from that standpoint, in this case, there is a difference. Higham testified that he thought he had a right to do what he did, and if he really thought so his opinion was not altogether without foundation, because he owned a considerable interest in the property, was active in negotiating the Douglas and Thompson option and in the placing of the paper in the hands of the trust company; he was perhaps ignorant of the law, and did not know that if he had ever been the agent of Boepple the death of Boepple terminated his authority. But, whatever he may have thought as to his rights or his authority, his act was unlawful. Even after he received the paper from ¹³⁴ Douglas and Thompson he did not deliver it to them; they have never had it in their possession; they never authorized him to receive the deed for them and they have never claimed to have any title under it; they were induced to execute the quitclaim to Meyer on the statement to them by Higham that it was necessary to clear the title on record. All this may have been done under a mistaken view of the law, but if so, it was all unlawful. We hold that no title passed to Douglas and Thompson and none by their quitclaim to Meyer. The legal title, therefore, remained in Boepple until his death and at his death it passed to his heirs or devisees in trust for the same purposes that he had held it.

2. Respondents contend that even if Meyer had no title, the present corporation, the Missouri Copper Mountain Mining Company, is an innocent purchaser for value and its title must be protected.

The argument in support of that claim proceeds on the theory that the trust company was the agent of the grantor, and if wrong had been done it was the fault of the grantor in selecting a careless agent, and that if one of two innocent persons must suffer it should be that one through whose act the wrong was permitted. As we have already said, the depositary of the escrow is not, strictly speaking, the agent of either of the parties, though in a limited sense he may be considered the agent of both, but the law of agency is too remote from the status of the depositary of an escrow to govern the case. In this instance, the depositary did not, wrongfully or otherwise, deliver the escrow to Douglas and Thompson. The circumstances indicate that the trust company considered it a dead

instrument and returned it to one who appeared to be acting for the grantor and interested only in its destruction. A case might arise, between a grantor and the assignee of a grantee who had fraudulently obtained ¹³⁵ possession of the escrow, in which the grantor's conduct might be condemned as so negligent that he could not, in good conscience, gainsay the assignee's title derived from the fraudulent grantee, but no such case now occurs to us, nor do the facts of this case justify any such inference. Here the grantor was dead, and there was no misconduct or neglect on his part to be inferred. There is no hint of an improvident or careless selection of a depository. This court has held that where a grantee in an escrow fraudulently obtained possession of the instrument and placed it on record, no title passed to him, nor to an entirely innocent purchaser under him: *Taylor v. Davis*, 72 Mo. 291. There was more cause to consider the purchaser an innocent one in that case than in this. We hold that under the circumstances of this case the title of the defendant corporation is not beyond accountability to the plaintiffs for their interests in the property, even if the defendant had bought without notice of those interests.

3. Is the defendant corporation that now holds the title an innocent purchaser? Whatever right it has to that distinction is derived from Mr. Barnard; the deeds from Barnard to Mrs. Seoble and from her to the defendant corporation were without consideration, and were designed only to pass to the corporation the title which Barnard acquired from Meyer.

After Higham had acquired possession of the escrow and had obtained from Douglas and Thompson the quitclaim deed to Meyer and had put both instruments on record, he and Meyer undertook to find a purchaser for the property and at last negotiated an option to Graham for \$2,200, for which option Graham paid \$200 down—that is, he paid that much of the proposed purchase money, to be forfeited if he should fail to pay the balance. He let the period of his option pass without exercising it, then he asked for an extension, ¹³⁶ which after some negotiations was finally agreed to, and the right to purchase at that price was extended ten days. During that extended period he induced Barnard to buy the property at the option price. In his testimony, referring to Mr. Graham, Mr. Barnard said: "He [Graham] paid \$200 on this option, and I paid him that back; I was not continuing the option, I was buying the property." And Mr. Graham testified: "I claim that Mr. Barnard purchased that altogether independent with my rights in the premises and he simply repaid me or made

me good for what I paid on account." These quotations from their testimony are made to show that they both tried to convey the idea that Barnard's purchase was independent of Graham's option, but that is only their opinion of the legal effect of the transaction; the facts do not justify the opinion. The facts are that after Graham obtained the extension, and within that extension, he approached Barnard and solicited him to advance the money to purchase on the terms of the option, and within that extension Barnard closed the transaction by paying Meyer \$2,000 and Graham the \$200 he had paid on the option. Barnard testified that when Graham spoke to him about buying the property he told him he had an option on it, and showed him the paper; it was signed by Meyer. Graham testified: "When this option was finally closed out, the title to the property was taken in the name of Mr. Barnard." Graham had the right, under his option, to buy the property by paying \$2,000 in addition to the \$200 he had already paid, and at the closing of the transaction he was there prepared, with the help of Barnard, to exercise that right of purchase at that price, and he did exercise it, directing the deed to be executed to Barnard instead of himself. Whether Barnard could at that time have bought the property for that price, if Graham had not had the option, we do not know; we only know that with the option he did obtain the property by paying ¹³⁷ \$200 to Graham and \$2,000 to Meyer, and that he availed himself of the Graham option in the transaction to get the property at that price. That put him in Graham's shoes. When Graham bought his option he knew that Meyer held the title in trust for himself, Higham, Seibel and the Boepple heirs or devisees, as their respective interests might appear, and he also knew that Seibel and Mrs. Boepple were not consenting to the sale to him. If Graham had first concluded his purchase and had placed his deed on record and had afterward negotiated an independent sale to Barnard, who had bought knowing nothing except what the record showed, we would have had a different case. Under the circumstances of this case we hold that Barnard was not an innocent purchaser. In fact, instead of being an innocent purchaser, he and Graham are rather in the attitude of conspiring with Meyer and Higham to wrong Seibel and the Boepple heirs.

4. The learned chancellor was of the opinion that the plaintiffs' claims, which they were seeking by this suit to enforce, were founded on a conspiracy between Seibel, Boepple, Meyer and Higham to defraud the other creditors of the Copper Hill

Mining Company whose claims were covered by the deed of trust and for that reason dismissed their bill.

There is no maxim which a court of equity more unequivocally insists upon than that he who comes asking its aid must come with clean hands. A court of equity will not aid a party to commit a fraud. One difference between a court of law and a court of equity is that in the one tribunal legal rights usually prevail, while in the other something more is required; the cause, besides having the law on its side, must commend itself to good conscience and justice; if it have only law on its side, equity will generally leave it to be disposed of in a court of law. But a court of equity will look into the very spirit of the transaction and decide ¹³⁸ for itself whether a cause, otherwise meritorious, is based on such a dishonest purpose as to justify a refusal to entertain it.

On the ninth day of August, 1892, when the \$12,500.59 note was delivered to Seibel, he signed a paper agreeing to devote the proceeds of the note when paid, or the proceeds of the sale under the deed of trust, to the payment pro rata of all the claims of creditors covered by the note. He became the purchaser at the foreclosure sale in October, 1892, and held the title until March, 1901, nearly nine years, when he transferred it to Boepple. This transfer to Boepple was pursuant to an agreement between the four, Seibel, Boepple, Meyer, and Higham, to the effect that Boepple should hold the title in trust for them, and Boepple signed a trust agreement to that effect, agreeing to divide the proceeds of a sale of the property equally between the four. To the extent that that agreement was designed to cut out the other creditors, it was fraudulent in the sense that it was a willful doing of an unlawful act, and, as between themselves, Seibel and Boepple were no more or no less to blame than Meyer and Higham. But to say that one has committed an act that the law condemns as fraudulent, merely because it was unlawful and willfully done, does not always imply that the party was guilty of moral turpitude. In the every-day struggle for gain in business transactions, men, morally blinded by their own interests, often excuse themselves by construing the circumstances under which they are placed as justifying acts which, if viewed from a disinterested standpoint, they would condemn. There were circumstances in this case which, if not justifying these four men in what they did, at least offered a not unreasonable excuse for their act, in a moral, if not a legal, sense. Of the \$12,500.59 note covered by the deed of trust \$9,903.15 were owing to these four men. In that estimate is included a note of

\$1,724.90 held by the Lafayette Bank, but on which Boepple, Seibel and ¹³⁹ Meyer were indorsers. The rest of the \$12,500.59 note, to wit, \$2,597.44, was made up of small sums owing to thirty or forty different persons who were also stockholders in the Copper Hill corporation. The corporation was insolvent and in a bad way financially. The property required care and expense to preserve it, and the evidence showed that between the date of the trustee's foreclosure sale at which Seibel became the purchaser in October, 1892, and the date of the transfer of title from Seibel to Boepple in 1901, these four men had expended five or six thousand dollars in taking care of the property. During all that time these other creditors took no notice of the property and contributed nothing to its care. In fact, those creditors are not complaining now so far as the record shows. If we may assume that they have paid any attention to it, we must conclude that they are tacitly acquiescing in what has been done. If the amount that these four men expended in taking care of the property be added to the amount due them in the mortgage note, the sums would aggregate considerably more than the total debt covered by the deed of trust.

The amount so advanced to take care of the property was approximately twice as much as was owing to all the thirty or forty other creditors, and considering the comparatively small sums due each of those, it is not to be wondered at that they did not take any further notice of the property or trouble themselves to preserve it. We are not intending to convey the idea that we find any excuse for crowding them out on account of the smallness of their claims, but we are intending to say that if these four men came to the conclusion that they ought in justice to be paid for their outlays for taking care of the property before those other creditors, and, knowing that the property would not bring enough to pay them and pay the others also; if they concocted a plan to appropriate to themselves all that they could get for the property, whilst the plan ¹⁴⁰ was not legal and therefore was a technical fraud, yet we find no moral wrong in the act. In fact, if these four men, instead of taking the remedy in their own hands, had come with their petition into a court of equity stating the facts and asking that, when the property came to be sold, they should be reimbursed for necessary expenditures made for its preservation out of the proceeds of the sale before the debts secured were paid, the chancellor would have been apt to consider their prayer a reasonable one. The last bottomry bond on a ship and its cargo is given priority over former ones in courts

of admiralty, on the theory that the last was necessary to preserve the property for all interested. That is a principle of equity. The fact of those advancements to preserve the property during the nine years the title was held by Seibel, during all which time they were trying to sell but could not, came out in the trial rather incidentally than purposely, but it was shown by the evidence and was not disputed. If the price paid by Barnard is to be taken as the fair value of the property, it was not sufficient to pay for its keeping, much less to pay anything on the mortgage debt. Under all the circumstances we do not think that the plaintiffs' cause is so lacking in merit or so darkened with fraud as to justify a dismissal of their bill.

5. Defendants introduced evidence over plaintiffs' objection tending to show that since the defendant corporation has been in possession of the property it has placed on it improvements to the value of \$20,000 or more. The nature of the alleged improvements, whether they consisted of permanent buildings or movable machinery, whether or not they really added value to the property, was not shown. Defendant corporation could not, by placing improvements on the property, infuse any force into its void title, and since the defendant took possession charged with knowledge of plaintiffs' interests and made whatever ¹⁴¹ improvements it did make in defiance of those interests, it is not entitled to have those improvements taken into account in the adjustment of the equities growing out of these complicated transactions, unless the improvements can now be removed without injury to the real estate as mining property. Of course, if they are valuable improvements or equipments to the mining plant their removal would necessarily reduce the value of the plant as it now stands, taking the improvements or equipments into account, but by the term "injury to the real estate as mining property," used in connection as above, we mean injury that cannot be repaired by replacing other improvements or equipments of like character at the cost of their present value.

As we have already said, the legal title to the property was in John Boepple, subject to the trust agreement signed by him that he would divide the proceeds of the property when sold equally between Seibel, Meyer, Higham, and himself. He died holding that title subject to that trust and the title descended to his heirs or devisees and there it remained when this suit was begun. As to the numerous other creditors whose claims were covered by the original deed of trust, they are not parties to this suit and can take no part in the decree. They have never asserted any claim, have given no attention

to the property, have never even made any demand on the trustee. The circumstances indicate that they have abandoned whatever original rights they may have had. It has now been fifteen years since the foreclosure of the deed of trust. It is probable that each thought his claim was not worth the trouble and cost of a lawsuit. At all events, they are not here asking for anything, and any decree that may be rendered in this cause can neither benefit nor injure them. As to defendants Meyer and Higham, they are asking nothing at the hands of the court, and they would be entitled to nothing ¹⁴² if they were asking, because they have already helped themselves. They sold the property (or attempted to do so) to Barnard and got from him the purchase price; that transaction closed out all their interest. But whilst their deed to Barnard conveyed no title to the property, yet it did convey to him whatever rights they had in the proceeds of the property when it should be sold, which were two-fourths, the other two-fourths being one in Seibel, and one in the Boepple heirs or devisees. The debts due to Meyer and Higham in the original deed of trust were somewhat larger than those to Seibel and Boepple, but when the property was conveyed by Seibel to Boepple the four parties agreed that their respective interests should be equal; it may be that in equalizing their interests they took into consideration the advances made to preserve the property during the nine years the title was held by Seibel, but however that may have been, they agreed to equality and that is sufficient.

In so far as any claim that either party may have to especial favor at the hands of a court of equity, we do not discover that one stands in any better light than the other. The conduct of each shows that he was seeking his own interest and leaving everyone else to take care of himself. Therefore, when it comes to making an equitable division of the property among them we find neither entitled to especial consideration over the others. It would neither be right to give the plaintiffs the benefit of the defendants' improvements if it can be avoided nor would it be right to allow the defendants, by tearing away and removing their improvements, to injure the real estate as mining property. Besides, as against these alleged improvements is to be considered the fact that the defendants have been in possession of the property several years, and if they have made profit out of it the property has to that extent paid for the improvements.

¹⁴³ The most equitable adjustment that we can make of these interests is as follows:

The judgment is reversed and the cause remanded to the circuit court, with directions to cause an account and inventory

to be taken showing in detail the character, quantity, original cost, present value and present condition of the improvements, machinery and equipments placed on the property by the defendant corporation since it came into its possession; showing also the present value of the property with the improvements and its present value without the improvements, and whether or not the improvements are in their nature permanent and enhance the value of the property; showing also whether or not in whole or in part, and if in part what part, the improvements can be removed and the effect on the land as mining property of the removal; and showing also the profits, if any, made by the defendant corporation out of the property since it came into possession. And if on the coming in and confirmation of the account it should appear that the present value of the improvements is greater in value than the profits so found, the court will, by an appropriate order, permit the defendant corporation, if it sees fit to do so, to remove the improvements to the extent of the present value thereof over the profits so found, provided the court finds that the same can be removed without injury to the land as mining property as that term is above explained in this opinion, such removal to be made at the defendant corporation's expense and within such time as the court may name. But if on such accounting the profits so found equal or exceed the present value of the improvement, machinery and equipments, no removal will be allowed. After removal in part as above prescribed, if there should be such removal, the court will estimate to what extent the improvements not removed enhance, if at all, the value of the land as mining property, or, if there should be no removal, then the ¹⁴⁴ court will estimate that to what extent the improvements as a whole enhance, if at all, the value of the land as mining property, and then the court will enter a decree that the property in question, describing the land as it is described in the petition, and the improvements remaining (or the improvements as a whole if there should be no removal) be sold by the sheriff of the county at public auction to the highest bidder for cash, and after deducting the court costs and costs of sale divide the proceeds of the sale as follows: Find the proportion that the value of the improvements that are sold with the property bears to the present value, as the court may find it, of the whole property, and set apart to defendant corporation the same proportion of the net proceeds of the sale and the rest of the proceeds divide into four parts, giving one-fourth to the plaintiff Seibel, one-fourth to Mrs. Boepple, as executrix

of the will of John Boepple, and the remaining two-fourths to the defendant corporation; provided, however, that if the court, on the accounting, should find that the profits derived from the operation of the property equal or exceed the value of the improvements, no part of the proceeds of the sale will be set apart to defendant corporation on account of the improvements, but the proceeds will be divided in four equal parts as above prescribed, one-fourth to plaintiff Seibel, one-fourth to Mrs. Boepple, as executrix, and two-fourths to the defendant corporation. The sale to be made within sixty days from the date of the decree, and on such notice as to time, terms and place as are prescribed by law for sales of real estate by the sheriff under execution; the sale is to be by the sheriff reported to the court for its rejection or confirmation, and if rejected the court will order a resale; on confirmation of the sale by the court the sheriff will execute to the purchaser a good and sufficient deed of conveyance.

Graves and Woodson, JJ., concur.

Lamm, P. J., not sitting.

A Deed Placed in Escrow Beyond the Control of the Grantor, to be delivered to the grantee upon the grantor's death, is valid: *Fulton v. Priddy*, 123 Mich. 298, 81 Am. St. Rep. 201. See, also, *Lippold v. Lippold*, 112 Iowa, 134, 84 Am. St. Rep. 331; *Culy v. Upham*, 135 Mich. 131, 106 Am. St. Rep. 388; *Griswold v. Griswold*, 148 Ala. 239, 121 Am. St. Rep. 64; *Martin v. Martin*, 76 Neb. 335, 124 Am. St. Rep. 815. Whether, in a given case, the delivery of a deed to a third person, to be delivered by him to the grantee after the grantor's death, is to be deemed a delivery in praesenti or not, is generally a question of fact depending upon the conduct and intention of the parties to the transaction. To constitute a delivery in praesenti, the grantor must deliver the deed to the third person for the benefit of the grantee ultimately and in some way express his intention to that effect, and the grantor must at the time of such delivery to the third person part both with the possession of the deed and with all dominion and control over it: *Grilley v. Atkins*, 78 Conn. 380, 112 Am. St. Rep. 152. See the discussion of this question in the notes to *Wellborn v. Weaver*, 63 Am. Dec. 243; *Wilson v. Carrico*, 49 Am. St. Rep. 219; *Brown v. Westerfield*, 53 Am. St. Rep. 554.

STATE v. WEBB.

[216 Mo. 378, 115 S. W. 998.]

MURDER by Counseling Another to Commit Suicide.—At the common law, if one counseled another to commit suicide, and the other, by reason of the encouragement and advice, killed himself, the adviser was guilty of murder as an aider and abettor, if present when his advice was carried out. (p. 522.)

CRIMINAL LAW—Conspirator, Right of to Abandon the Design.—Although several conspire to do a criminal act, there is a place of repentance, so that before the act is done either may abandon his design and thus avoid committing the criminal act. (p. 522.)

SUICIDE—Abandonment of Compact or Conspiracy to Commit, When Complete so as to Relieve the Party not Participating.—Under the statutes of Missouri every person deliberately assisting another in the commission of self-murder is guilty of manslaughter, but if, after two have entered into an agreement to commit suicide, one of them changes his mind and endeavors to dissuade the other, the former is not guilty, if, notwithstanding such dissuasion, the other persists and succeeds. It is not essential to the defense of the accused that the decedent led him to believe in good faith that the purpose to commit suicide had been abandoned, and afterward killed himself of his own volition. (p. 523.)

SUICIDE—Burden of Proof on a Prosecution for Advising and Encouraging.—On a prosecution for assisting another in self-murder, where it appeared that the defendant and the decedent agreed to commit suicide, but the defendant testified that he abandoned his purpose and endeavored to persuade the decedent to do likewise, and thought she had abandoned her purpose, it is error to instruct the jury that the defendant must assume the burden of showing that the killing was done by decedent of her own volition and not under the influence or advice of the accused or assistance of the defendant. (p. 524.)

MURDER by Assisting in Suicide—Instruction.—On a prosecution for advising, encouraging and assisting in suicide, where the evidence tends to show that the decedent and the defendant first agreed that both would commit suicide, but the defendant testified that he changed his mind and endeavored to dissuade the decedent, an instruction asked by the defendant to the effect that if the jury believe from the evidence that the defendant procured a pistol with which he and the decedent intended to commit suicide, and afterward changed his mind and tried to escape from the consequences of the agreement, but the decedent refused to permit him to do so, and that on account of physical weakness he could not by force leave her, and that she did the shooting, then the defendant did not deliberately assist her in self-murder, and is not guilty of manslaughter in the first degree, should be given. (p. 525.)

Ben A. Reed, W. J. Courtney and Martin E. Lawson, for the appellant.

Elliott W. Major, attorney general, and John M. Atkinson, assistant attorney general, for the state.

383 GANTT, P. J. The defendant has appealed to this court from the conviction of manslaughter in the first degree,

at the November term, 1907, of the circuit court of Clay county.

The prosecution was begun on November 7, 1906, by the prosecuting attorney of Clay county filing an information in the circuit court, duly verified, wherein he charged the defendant with having on the eleventh day of October, 1906, feloniously, deliberately, premeditatedly, on purpose and of his malice aforethought, shot and killed one Inez Webb. He was duly arraigned and entered his plea of not guilty, and the cause as above stated was tried at the November term, 1907.

The evidence tended to show that at the Peddicord Hotel in Smithville, Clay county, on the morning of the eleventh day of October, 1906, the defendant, Jesse Webb, and Inez Webb or Walkup were both shot. Defendant received a pistol bullet near the heart, and the deceased received three bullet wounds near the heart and one through the head. She died immediately. Prior to the shooting for some months both the defendant and the deceased worked at the State Hospital for the Insane at St. Joseph, Missouri. They had associated together for some time, and the evidence tended to show that he was a consumptive. He quit work at the hospital October 1, 1906, and she quit work some two days later. They were both employed at the hospital as day nurses. He had been employed at the hospital about two years, and she had been employed there from seven to twelve months. They had been associated together for about two months. Dr. Woodson, the superintendent of the hospital, testified that Webb was run down and not strong, and he had prescribed malt and cod liver oil for him. After leaving the hospital, defendant went down into ³⁸⁴ the city of St. Joseph to live, and deceased followed him and they remained together, holding themselves out as man and wife. After remaining a few days in St. Joseph, they went to Plattsburg to visit his relatives, where they remained a few days. While there he was very sick. They left Plattsburg, saying they were going to Hot Springs, Arkansas, for his health, and started, but went to Smithville, where they remained several days. At Plattsburg the deceased said that when the defendant died she wanted to die too. The defendant in his testimony stated that she suggested that they commit suicide, but he refused. After reaching Smithville, however, they agreed to commit suicide together, and wrote letters to their relatives indicative of their intention so to do. The deceased bought morphine, which they both took on Monday night, but

they waked up about 1 o'clock on Tuesday. The deceased then said she would get some strychnine. She got it and they took it Tuesday night. The strychnine did not kill them, and they waked up about 10 or 11 o'clock Wednesday morning. The defendant then got the deceased to telephone to a Mr. James Reed at Trimble, Missouri, to come to him at Smithville, and Reed, in response, arrived at Smithville that evening at 5 or 6 o'clock. Prior to Reed's arrival at Smithville, however, defendant purchased a revolver from a Mr. Dougherty, who was a clerk in a hardware store, and who loaded the revolver for him. When Reed arrived at Smithville the deceased and the defendant were in bed. She represented herself as Mrs. Webb, and Reed sat down on the edge of the bed, and the defendant requested him to take defendant to Edgerton to his brother, Louis Webb. Reed started to get defendant's clothes for him, but the deceased got between Reed and the clothes and told him that defendant was not going away from there; if he did, she would follow him and kill him. Reed then left them and told them he would be back in the morning,³⁸⁵ but before he reached the hotel the next morning both of them had been shot. Reed testified that the defendant was awfully weak and was spitting blood, and he could scarcely hear him talk. The defendant testified that the evening before the shooting he abandoned his purpose to destroy himself. And after Reed left the hotel that evening he had a long talk with the deceased, endeavoring to persuade her to give up the idea of suicide, and he thought she had given it up, and they then agreed to take the pistol back to the store in the morning and get back what money they could; that the pistol was then put under the pillow until morning and they went to sleep. He was awakened the next morning by something against his breast. As he opened his eyes, she said, "Here is where we die," and shot him. He testified that he knew no more until he heard the parties breaking into the room. The shooting occurred about 8:30 Friday morning. When the people broke into the room they found the deceased dead and the defendant in a spasm. One of the witnesses testified that before they broke in the door he heard the man saying "Shoot me again." The other witness heard this statement, but he thought it was immediately after he got into the room. Defendant testified that he did not know in which hand the deceased held the revolver, that he had no recollection of her shooting herself.

The statement of the defendant was offered in evidence, which had been taken by the coroner, but the defendant testified that he had no remembrance of making any statement whatever. The statement was signed before the coroner by defendant's mark. In this statement the defendant said his wife did the shooting, and as soon as she shot him she lay down on the bed and shot herself two or three times. She put her arms around his neck and said, "Oh, Jess, are you dead?" She said this, however, before she shot ³⁸⁶ herself. He also stated that they were married a week before at Topeka, Kansas, and then went to St. Joseph and Plattsburg and then came to Smithville; that he had a hemorrhage from his lungs, which caused him to get off at Smithville. They had started to Hot Springs. His reason for wanting to die was that he had tuberculosis and did not think he could live long anyway, and she said her reason for dying was because she loved him and did not want to live without him. He also testified that his wife wrote a letter to her father and one to a Mrs. Hart. And he wrote one to his sister and mother, and they left a note requesting the landlady to mail the letters and notify his brother.

The court instructed the jury on murder in the first degree and on manslaughter in the first degree. As the jury found the defendant guilty of manslaughter only, the charge of murder is eliminated from the case. The fifth instruction is in the following words:

"If the jury believe from the evidence that deceased committed suicide, and that defendant counseled, advised and assisted deceased to do so, then, even though defendant may have changed his mind before the act was committed and endeavored to dissuade her from such purpose, then the mere fact that defendant did change his mind and endeavor to dissuade her will not excuse defendant from such counsel, advice and assistance, if any, unless you believe that deceased led defendant to believe in good faith that she had abandoned such idea, and then afterward killed herself of her own volition, and not under the influence of his counsel, advice and assistance, if any, to do so. And if he did counsel, advise and assist her to commit suicide, and she afterward killed herself, the burden is on defendant to show that such killing ³⁸⁷ was done of her own volition and not under the influence of his advice, counsel or assistance, if any."

The questions presented for our consideration relate entirely to the correctness of the instructions given and refused.

1. Under the common law, if one counseled another to commit suicide, and the other, by reason of the encouragement and advice, killed himself, the adviser was guilty of murder as an aider and abettor, provided he was present when his advice was carried out. It was ruled in *Rex v. v. Tyson, Russ. & Ry.* 523, that if two persons mutually agree to die together, and, in pursuance of the agreement, each attempts to kill himself, but the means employed to produce death takes effect on only one, the survivor is guilty of murder. But, under the statute of this state, section 1822, Revised Statutes of 1899, "Every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter in the first degree." The crucial point in the case is as to the correctness of instruction No. 5 as above set out in the statement of the cause. It will be noted that this instruction required the jury to find, first, that the deceased committed suicide, and, second, that the defendant counseled, advised and assisted her to do so. And then directed the jury that even though the defendant changed his mind before the criminal act was committed and endeavored to dissuade her from such purpose, then the fact that he did change his mind and endeavor to dissuade her will not excuse him from such counsel, advice and assistance, unless the jury believe that the deceased led the defendant to believe in good faith that she had abandoned such idea, and then afterward killed herself of her own volition, and not under the influence of his counsel, advice and assistance, if any, to do so. The diligence of counsel has not availed to find a precedent ³⁸⁸ for this instruction, and we have been unable to find any, and accordingly the correctness of this instruction must be determined upon reason and the analogies of the law.

In effect we take it that this prosecution is based upon the theory of a conspiracy between the defendant and the deceased that each should commit suicide, and the instruction directs the jury in effect that although the defendant withdrew from the conspiracy before the suicide was committed by deceased, and although he endeavored to dissuade her from her purpose to kill herself, these facts did not excuse the defendant from his previous agreement and advice to commit suicide, unless the deceased led the defendant to believe that she also had abandoned such idea, and then killed herself of her own volition. It is a general principle of the criminal law that although several parties conspire to do a criminal act, there is a place of repentance, a *locus penitentiae*, so that before the act is done, either one or all of the parties may

abandon their design and thus avoid committing the criminal act: *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. Rep. 531, 27 L. ed. 698. This principle is familiar in the law of homicide. Thus it is said: "Though a man should be in the wrong in the first instance, yet a 'space for repentance is always open, and where a combatant in good faith withdraws as far as he can, really intending to abandon the conflict,' and his adversary still pursues him, then, if taking life becomes necessary to save his own, he will be justified": *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14; 1 Bishop's Criminal Law, 5th ed., sec. 871; *Horrigan & Thompson on Self-Defense*, 227; 4 Blackstone's Commentaries, 184. The instruction seems to concede this principle of permitting the defendant to abandon his previous intention of committing suicide, and agreeing that the deceased should also do so at the same time, but this right is made dependent upon the fact that the deceased also abandoned her purpose to commit suicide and led the defendant to believe, in good faith, that she had done so. It seems to us that this qualification of the right is not reasonable or based upon a sound principle. If there is anything in the doctrine of a space for repentance, it seems to us when the defendant abandoned his purpose of committing suicide and endeavored to persuade the deceased to also abandon it, that he had done all that the law could exact of him. If, in spite of his announced intention to refuse to go further in the criminal purpose and his persuasion and advice to also abandon such a purpose, the deceased proceeded to kill herself, then it was her own act, and one which the defendant cannot, and ought not, in any way, in our opinion, be held responsible, and, under the circumstances, he could not properly be convicted of deliberately assisting her in the commission of self-murder.

But the instruction is, in our opinion, also bad in that it places the burden on the defendant to show that the suicide of the deceased was committed of her own volition and not under the influence of defendant's advice and counsel. We think this instruction violates the rule that in a criminal prosecution the burden is upon the state to establish the guilt of the defendant and not upon the defendant to prove his innocence: *State v. Hickam*, 95 Mo. 322, 6 Am. St. Rep. 54, 8 S. W. 252; *State v. Hardelein*, 169 Mo. 579, 70 S. W. 130.

In the last-cited case it is said: "Where a defendant pleads not guilty and admits nothing against himself, as in the case at bar, the burden of proof is on the state to first make out a case against him which would entitle it to go to the jury,

but this does not change the burden of proof, which remains with the state throughout the trial, and whether or not the evidence is sufficient to overcome the presumption of innocence of defendant, and to establish his guilt beyond a reasonable doubt, when all of the evidence ³⁹⁰ on both sides, including the presumptions, is considered, is for the consideration of the jury: 1 Bishop's New Criminal Procedure, 4th ed., sec. 1050: *State v. Darrah*, 152 Mo. 522, 54 S. W. 226."

Our best judgment is that upon both of these grounds this instruction was erroneous, and should not have been given in this form. It denied the defendant the right to repent of his ill-considered promise to commit suicide with the deceased, and erroneously placed the burden upon him of proving his innocence instead of requiring the state to prove his guilt beyond a reasonable doubt.

2. Error is also assigned upon the refusal of the court to give instructions A, B, C and D requested by the defendant.

Instruction D is in these words: "If the jury believe from the evidence that the defendant procured a pistol with which he and the deceased intended to commit suicide, and afterward changed his mind and tried to escape from the consequences of such an agreement, but deceased refused to permit him to escape therefrom, and on account of physical weakness he could not by force leave her, and that she did the shooting, then defendant did not deliberately assist her to commit self-murder, and is not guilty of manslaughter in the first degree." This instruction contains the substance of instruction C requested, and announces the opposite of the instruction 5 given by the court, which we have just held erroneous. In our opinion this instruction D was a proper one, and should have been given, and instruction numbered 5 given by the court should have been refused. We think there is no error in refusing instruction B requested by the defendant, as the court had fully covered that proposition in its own instructions, and the same can be said as to instruction A.

3. Counsel complains also of instruction numbered 11 given by the court, which is the ordinary instruction ³⁹¹ in regard to the presumption arising against the defendant from statements made against himself. Counsel concede that this instruction is ordinarily a correct one, but that it should not have been given in the peculiar circumstances of this case, because the alleged statement made by the defendant to the coroner was made, if at all, when the defendant was in a very critical condition, suffering from a pistol-shot wound near the heart and weakened by disease, and was too weak to sign his

name, and that the instrument itself indicates that the writer of it himself was incapable of correctly taking the statement, as indicated by the misspelled words both medical and common. There is much force in this objection. The evidence shows that the defendant could write his own name, and yet he did not sign this statement himself, and it was signed by the coroner and attested only by the mark of the defendant. The defendant testified that he had no recollection whatever of ever having made the statement, and denies making it. We think that under the circumstances of the case, if this instruction should have been given at all, a qualification should have been added thereto requiring the jury to find that the defendant was in such a condition of mind and body as to have been able to have known the answers he was making, and to fully understand the questions propounded to him by the coroner, and that the same was read over to him and that he understood the statements contained in it. While the instruction numbered 11 has often received the approval of this court, it has often been assailed as a comment on the testimony. This court has often ruled that while an instruction may be correct in the abstract, it should always be applicable to the facts in evidence, and we think that the qualification suggested by counsel under the peculiar facts of this case is one that should have been given along with the instruction, if given at all.

³⁹² For the error in giving instruction numbered 5 and the refusal of instruction D, the judgment should be and is reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

All of this division concur.

An Attempt to Commit Suicide is not an indictable offense in the absence of an express statute to that effect: *May v. Pennell*, 101 Me. 516, 115 Am. St. Rep. 334. And the survivor of an attempted double suicide is not guilty of murder, unless the evidence shows beyond a reasonable doubt that he aided or encouraged the deceased to kill himself: *Burnett v. People*, 204 Ill. 208, 98 Am. St. Rep. 206. But the fact that the person killed consented to the killing and that it was in the execution of a joint agreement between the slain and the slayer will not remove the case from murder in the first degree: *Turner v. State*. 119 Tenn. 663, 123 Am. St. Rep. 758.

STATE v. DARLING.

[216 Mo. 450, 115 S. W. 1002.]

CONSPIRACY, Homicide as the Result of.—If several persons conspire to do an unlawful act, and death happens in the prosecution of the unlawful object, all are guilty of homicide. (p. 531.)

HOMICIDE, Guilt of Person Encouraging.—One who advises or encourages another to do an illegal act is responsible for the natural and probable consequences that may arise from its perpetration. (p. 531.)

CONSPIRACY to Whip Another, When Renders All the Conspirators Liable for the Use by One of Them of a Deadly Weapon.—If two or more persons enter into a conspiracy that one of the number shall assault and whip another, and all go together to the place where such other is for the purpose of encouraging the assault upon him, and one of them makes an assault with a deadly weapon resulting in the death of the person assaulted, the use of such weapon must be regarded as the act of all the conspirators, though they did not know that the one who used it had it in his possession or had formed any design to kill, and an instruction in such a case that the jury might return a verdict of manslaughter in the first degree is more favorable to the defendant than he had the right to request. (pp. 534, 535.)

CRIMINAL PROSECUTION—Information, Amendment of Without Reverifying.—In Missouri, an information for murder may be amended by leave of court by inserting in one place the word "deliberately" and in another the word "willfully," without reverifying. (p. 535.)

CRIMINAL PROSECUTION—Information, Amendment of, When not Prejudicial to the Accused.—If an information for murder is amended by inserting the word "willfully," and the accused is found guilty of manslaughter only, he has not been prejudiced by such amendment. (p. 535.)

C. D. Corum, for the appellant.

Herbert S. Hadley, attorney general, and F. G. Ferris, assistant attorney general, for the state.

453 GANTT, P. J. This is the second appeal in this cause. The former appeal was decided at the October term, 1906, of this court, and reported in 202 Mo. 150. That appeal resulted in reversing the judgment and remanding the cause for a new trial.

At the October term, 1907, the defendant was again put upon his trial and convicted of manslaughter in the fourth degree, and his punishment assessed at imprisonment in the county jail for a period of twelve months, and from that sentence and judgment he has again appealed to this court.

The full statement of all the material facts will be found in the opinion of Judge Burgess on the former appeal. Much of the testimony, however, elicited on the first trial was elim-

inated on the last trial, and it will only be necessary to state for the understanding of the questions presented on this appeal the salient and controlling facts.

On the thirteenth day of March, 1905, Samuel Jeffress was killed at the county of Cooper, by Ernest Darling on the farm of Charles Carroll, for whom he was working on that day. At the time of his death he was at work plowing in the field of Mr. Carroll.

The evidence discloses that in the month of December, ⁴⁵⁴ 1904, or January, 1905, Ernest Darling had a fight with one Cramer near the town of Blackwater, in said county. It seems that Cramer was a friend of the deceased Jeffress, and as Cramer had been quite badly beaten in his fistic encounter with Ernest Darling, Jeffress, the deceased, espoused the cause of Cramer and hot words passed between Ernest Darling and the deceased. The evidence tended to show that the deceased was about eighteen years of age and resided with his mother at the village of Nelson, in Saline county, near the Cooper county line. On the 11th of March, 1905, he left his home to work for Mr. Carroll in Cooper county. On the next day, which was Sunday, Emmett Yeager went to the Darling home, where he found the defendant, Silas Darling, his brother Ernest and Dorval Burris. Yeager told Ernest Darling that the deceased was going to work at Mr. Carroll's the next day. Ernest replied, "That will be all right." Ernest Darling then said to Dorval Burris, "Sam Jeffress is going to work out here at Charles Carroll's to-day." Burris replied, "Is he?" and Ernest said, "Yes, and I will get the s—— of b—— to-morrow." Burris then said, "I would like to slip along and see it done. I have got to plow your mother's garden in the morning, but if you will wait until to-morrow afternoon, I will go." After this the defendant, Silas Darling, joined Ernest and Burris, and Ernest said to defendant, Silas, "Sam Jeffress is going to work out here at Charles Carroll's," and defendant said, "Is he?" and turned and left the room, but before going Ernest said to him that he would get him, Jeffress. Burris told Silas, the defendant, that Ernest said he ought to go down to-morrow, and defendant said, "Yes, I believe you ought." That same afternoon Emmett Yeager and Ernest Darling were at the Finley home together. Ernest asked Millie Finley if she knew Sam Jeffress, adding, "He is a pretty good looking boy," to which she replied. ⁴⁵⁵ "Yes," and Ernest said, "Probably he won't look as well to-morrow as he does to-day." On the way home that night Ernest said to Yeager, "I told Sam while he was cussing me

on the street at Blackwater I would get my revenge, and, by God, I will get it, too." On the same Sunday, Burris was riding behind Silas on a horse on the way home from Speece's, when Silas, the defendant, said to him, "I had better go down with Ern to-morrow; Sam might come the knife play," referring to the deceased. After dinner the next day, as the defendant started out of the house he said to Burris that he was going over to Carroll's, to which Burris replied, "No, we will go up and chop cordwood," and then they went toward the barn, where they said they would go and settle upon what they were going to do. While at the barn Ernest, Silas and Burris discussed the subject of going over to Carroll's to whip the deceased. Burris said to Ernest, "Ern, you ought not to go down there, but catch him on the road," to which Ernest replied, "If I don't go over there now, G—— d——, if I don't go now, I won't ever get him."

They started from the barn, Ernest and Silas, the defendant going around on the north side of the house, where there was a pile of scrap iron, and Burris passing through the house to get a drink of water. The three men went on toward Carroll's place. As they came along the road Ernest said it would be a joke if deceased had gone to town. They met Charles Pyatt on the road and said to him that they were duck-hunting. As they approached the Carroll house it was agreed that the defendant should do the talking, and he asked to borrow a lister from Mr. Carroll. At the Carroll house the defendant asked Mrs. Carroll where Mr. Carroll was, and being informed by her that he had gone to town, he said, "Well, we will go on down toward the Lamine river and we will meet him." They ⁴⁵⁶ left the house talking about the deceased for some distance, and then sent Burris back for the purpose of learning whether the deceased was about the place. When he came back and joined Ernest and the defendant they saw the deceased at work in the field and went across the field toward him. As they approached him they found him with his team stopped, leaning against one of the handles of the tongueless cultivator, which he was working. He was wearing a pair of gloves, one of which he removed in taking a chew of tobacco. He had in his pocket a small monkey-wrench for use with the cultivator. Burris and the defendant approached the deceased directly in front and engaged him in conversation while Ernest passed around to the rear of the deceased, and, without a word passing between the deceased and Ernest, and without any unpleasant or unusual conversation between the deceased and the defendant and Burris, or

any hostile movement on the part of the deceased, Ernest Darling hit deceased on the side and back of the head with what appeared to be a piece of iron, and the blow felled him to the ground at the cultivator handles. Ernest quickly followed the first lick with blows upon the head of the deceased with this iron, saying as he did so, "You remember how you done me down at Blackwater; I will get even with you." He asked the deceased to halloo "Enough," which deceased did. The head of deceased was beaten down into the ground and he was mangled and bleeding profusely when Burris lifted him, but he was too weak to stand. Thereupon the defendant, Silas, said, "I know what we will do. We will turn the team loose," and said they would make people think the team had injured the deceased. About this time Bill Spry, passing in the distance, was called to the scene by Burris, and to him Ernest said, referring to the deceased, "He called me a son of a b——, and I knocked him over the plow handles with the lines over his shoulder." Spry said, "The ⁴⁵⁷ boy is bleeding a right smart." And Ernest said, "Yes, and let him bleed, d—— him; it is good enough for him." The deceased was taken to the home of Mr. Carroll by the defendant, his brother and Burris, and died just as he reached the house. The defendant declined to help the deceased into the wagon, or to take him out when they reached the house, saying that he did not want to get blood on his hands.

Witnesses for the state who visited the scene of the tragedy the next morning testified that the earth where the deceased fell bore the impression of his head and the stains of pools of blood. No rocks or other objects which could have been used as weapons were found near the scene, but witnesses for the defendant testified that several days after the killing they found several rocks at this immediate point with blood upon them. After the homicide, Ernest said to Burris, in the presence of the defendant, "You must swear that he called me a son of a b——, and started at me with a monkey-wrench, and that you put it back in his pocket." After the preliminary trial, the defendant told Burris that he must keep his mouth shut and not tell anything. And defendant said that he did not know what to do or think about that monkey-wrench. While in the jail together they had frequent conversations as to what their testimony would be. The coroner testified that he found the monkey-wrench, which had remained in Jeffress' pocket while Ernest was beating him.

The evidence on the part of the defendant tended to prove threats of the deceased against Ernest Darling. These threats

were not communicated, however, to Ernest. There was also evidence impeaching witness Spry. The defendant testified in his own behalf that if his brother Ernest Darling, on the occasion of going to the field, had upon or about his person a piece of iron, he, defendant, was not aware of it. Burris testified ⁴⁵⁸ that he was surprised when Ernest struck the deceased with a piece of iron.

1. The principal ground upon which the defendant seeks a reversal of the judgment is the giving of the following instruction by the court over the objection of the defendant:

“If you believe from the evidence that prior to the killing of Samuel Jeffress, Ernest Darling had formed a design to kill said Jeffress, or to inflict upon him some bodily harm, and he, Ernest Darling, armed himself with a deadly weapon and sought the said Jeffress and assaulted him with felonious intent of killing him, or doing him great bodily harm, and that the said Ernest Darling did assault and kill said Samuel Jeffress; yet if you further believe from the evidence that the defendant, Silas Darling, went with his brother Ernest Darling to the scene of the killing for the purpose of and with the intention, if necessary, to aid, encourage, or to abet his brother, Ernest Darling, in assaulting said Jeffress, but that the defendant did not know that his brother Ernest Darling intended to use a deadly weapon in making such assault, and did not know of a felonious intent on the part of Ernest Darling, but understood at the time that it was the purpose and intention of his brother Ernest Darling merely to whip the said Jeffress, then and in that event the defendant cannot be guilty of any higher crime than manslaughter in the fourth degree.”

It is insisted by the learned counsel for the defendant that this instruction authorizes the jury to find the defendant guilty of manslaughter in the fourth degree, notwithstanding he only entered into the conspiracy with his brother Ernest Darling with the intention merely of assisting Ernest Darling to assault and whip him and not to kill him. “If,” they say, “the jury had been called upon to determine that the defendant and his brother entertained a common intent ⁴⁵⁹ to assault the deceased Jeffress, and that Jeffress was killed in the execution of such common plan by Ernest Darling without resort by him to the use of a deadly weapon, then probably the instruction would have embodied the elements of manslaughter, but to say that a person intending to aid another in making a simple assault on a third party, who does not know that the party whom he intends to aid has a felonious

intent against said party and does not know that his associate has or intends to use a deadly weapon, is guilty of manslaughter when the person he is aiding resorts to the use of a deadly weapon and takes the life of such third person therewith, is a monstrous proposition."

If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide. The act of one of them done in furtherance of the original design is in the construction of law the act of all. And he who advises or encourages another to do an illegal act is responsible for all the natural and probable consequences that may arise from its perpetration: 2 Hawkins' Pleas of the Crown, c. 29; 1 Hale's Pleas of the Crown, c. 34; 1 Russell on Crimes, 24; 1 Chitty's Criminal Law, 264.

As to this familiar statement of the law we understand the learned counsel consent. In its eighth instruction the court advised the jury as to what would constitute a conspiracy between the defendant and Ernest Darling, in these words: "That if the defendant, Silas Darling, with the knowledge of the intention of his brother Ernest to so whip Samuel Jeffress, accompanied his brother Ernest Darling to the scene of the tragedy for the purpose and with the intention of aiding, encouraging or assisting his brother Ernest if necessary in making such assault, and was then and there present at the time of such assault for the purpose and with the intention of aiding, encouraging and abetting his brother Ernest Darling therein if necessary, then the defendant ⁴⁶⁰ was guilty of manslaughter," if, as required in the other instructions, Ernest Darling did kill the deceased in pursuance of that understanding.

In 1 McClain on Criminal Law, section 196, the author says: "It results from the principle stated in the preceding section that everyone connected with carrying out a common design to commit a criminal act is concluded and bound by the act of any member of the combination perpetrated in the transaction of the common design. But it is not necessary that the crime committed shall have been originally intended. Each is accountable for all the acts of the others done in carrying out the common purpose, whether such acts were originally contemplated or not, if they were the natural and approximate results of carrying out such purpose; and the question whether the result is the natural and probable effect of the wrongful act intended is for the jury. Thus, if several persons agree to commit and enter upon the commission

of a crime involving danger to human life, such as robbery, or assault and battery, or resisting an officer, or resisting arrest, all are criminally accountable for death caused in the common enterprise. Thus, also, if the unlawful enterprise is likely to meet violent resistance, all will be liable for a felonious assault committed by one of their number in consequence of such resistance; and if the common design in general involves acts of violence, all who participate in the common plan are equally answerable for acts of others done in pursuance thereof, although the result was not specially intended by them all."

In 1 Wharton's Criminal Law, eighth edition, section 220, it is said: "It is not necessary that the crime should be part of the original design; it is enough if it is one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose. Thus where A and B go out for ⁴⁶¹ the purpose of robbing C, and A, in pursuance of the plan, and in execution of the robbery, kills C, B is guilty of murder."

The doctrine on this particular subject is nowhere better reviewed and announced than in *Williams v. State*, 81 Ala. 1. In that case the court had occasion to consider the statement of Mr. Bishop in 1 Bishop's Criminal Law, seventh edition, 637, in which the learned author says: "If two combine to fight a third with fists, and death accidentally results from a blow inflicted by one, the other also is responsible for the homicide. But if one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable." It is this exception to the general rule upon which counsel for the defendant insists that the instruction given by the court in this case was erroneous, and he cites this statement of the law by Bishop and the case of *Regina v. Caton*, 12 Cox C. C. 624, in support of the proposition. Speaking of this limitation of the rule by Bishop, the supreme court of Alabama says: "The implied agreement here is evidently not to resort to the use of a deadly weapon, and the use of such weapon is, therefore, foreign to the contemplation of the parties, and a departure from the common design. It is said by some of the standard authors that if the specific act agreed to be done was *malum in se*, the responsibility for unintended results would embrace acts arising from misfortune or chance; but otherwise if such specific act was *malum prohibitum* merely, or lawful: 1 Bishop's Criminal Law, 7th ed., sec. 331. In some cases the distinction is taken that where persons un-

lawfully conspire to commit a trespass only, to make all the confederates guilty of murder, the death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a trespass, it will be murder in all, 'although the death happened collaterally, or beside the original design': *State v. Shelledy*, 8 Clarke (Iowa), 477. In another recent case the rule ⁴⁶² was announced that 'if the unlawful act agreed to be done is dangerous, or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not': *Lamb v. People*, 96 Ill. 73. The question in this case, then, would seem to me, whether if five or six men combine together to invade a man's household, and they go there armed with deadly weapons for the purpose of attacking and beating him, and in furtherance of this common design, all of the confederates being present, or near at hand, one of them gets into a difficulty with their common adversary and kills him, all may not be guilty of murder, although they did not all entertain a purpose to kill? The question, we think, must be answered in the affirmative, in the light of both principle and authority. Every man has the right to defend his house against every unlawful invasion, and to defend his person, when within it, against every and all violence, without the necessity of retreat. The experience of mankind shows that very few men will fail to respond to instinct by exercising this right, to the extent even of killing an assailant if necessary. When a mob, conspiring together unlawfully, go to a man's house to do any serious violence to his person, especially in the night-time, as here, they can expect nothing else than to meet with armed opposition, and the inference is not unreasonable that they intend nothing less than to oppose force to force, in the furtherance of their design. The natural and probable consequence of this is homicide—either of one or more of the assailants or of the party thus assailed, and such homicide, when committed by any one of the conspirators, can be nothing less than murder in all who combine to commit ⁴⁶³ the unlawful act of violence, especially if they be near at hand inciting, procuring or encouraging the furtherance of the act of assault and battery."

In *Peden v. State*, 61 Miss. 267, several persons conspired together to take one Walker from his house and whip him.

He was accordingly taken from his bed and severely beaten, and in executing this design one of the confederates struck him a fatal blow with a spade, from which he died. It was held that all were guilty of murder, whether they entertained a purpose to kill Walker or not: See, also, *Brennan v. People*, 15 Ill. 511.

That the evidence in this case fully justified the instruction of the court submitting to the jury the defendant's knowledge and intention of the intended assault and determination on the part of his brother Ernest to whip the deceased, and whether he had gone with him to aid, assist and abet in the assault and battery, there can be no doubt whatever. That such an assault and battery is what the text-writers denominate *malum in se* is also plain. It is to be observed that in this case the method and means by which Ernest was to make this assault were not limited as in the case stated by Mr. Bishop where they agreed to fight with fists only, and one used a deadly weapon without the knowledge of his confederate, but the evidence showed a conspiracy to assault and whip the deceased without any such limitation. As said by the Alabama supreme court, the defendant, knowing of this purpose, and going along to assist in it, could expect nothing else than that the deceased would naturally oppose force to such unlawful design upon his person, as the experience of mankind shows that very few men would tamely submit to such an outrage and indignity, and a natural and probable consequence to such an encounter would be homicide, either of the deceased or of one of them. And the law will hold him responsible for the act of his brother. Most of the adjudicated ⁴⁶⁴ cases hold that he would be guilty of murder in such a case, and he has no cause to complain that the court limited his offense to manslaughter in the fourth degree. We do not think that the court in this instruction lost sight of the question of common design as between Ernest Darling and the defendant. On the contrary, the liability of the defendant throughout the case was predicated upon the fact of his having entered into the unlawful design to assault and whip the deceased. Neither do we think this is a case falling within the principle that where one of the conspirators goes outside of the common plan and commits a fresh and independent act wholly outside and foreign to the common design, the others are not to be held equally guilty of that act.

Taken altogether, we think this instruction was exceedingly favorable to the defendant, and the court did not err in

giving it. It follows from what we have already said that in our opinion the court committed no error in refusing to direct the jury to acquit the defendant.

2. After the information was filed and verified, by leave of the court, the prosecuting attorney amended the same by inserting in one place the word "deliberately" and in another "willfully," but did not reverify the information after the amendment. Defendant moved to quash on the ground that the information was not verified. Section 2481, Revised Statutes of 1899, provides that "any affidavit or information may be amended in matter of form or substance at any time by leave of court before the trial, and on the trial as to all matters of form and variance, at the discretion of the court, when the same can be done without prejudice to the substantial rights of the defendant, on the merits." etc. This statutory provision was ample authority for the action of the court and prosecuting attorney. When the prosecuting attorney added ⁴⁶⁵ the two words over his own signature and affidavit, he amended the information, and there was no need of a new affidavit, which was no part of the information. Clearly the insertion of the word "deliberately" did not affect defendant's rights, as he was found guilty of manslaughter only.

Counsel concede that an information need not be reverified where unimportant amendments are made. We think the statute is a wise and salutary one, and should not receive a harsh construction. A broad distinction exists between allowing the amendment of an indictment, as it is the act of a grand jury, and an information by a prosecuting attorney, made by leave of court. The latter may very properly be made by the officer who prefers it, and when he does amend it, there is no occasion for reverifying it.

3. The complaint as to the remarks of the prosecuting attorney and the action of the court thereon afford no ground for reversal. It is conceded that the language of the prosecuting attorney was not taken in his exact words, and the trial court who heard the argument overruled the point, and we think the whole colloquy taken together fails to show any prejudice. The result shows that the jury were not influenced to find defendant guilty of murder in either degree. The judgment is affirmed.

All of this division concur.

Each Conspirator is Liable, when a conspiracy has once been entered into, for all the acts of his co-conspirators done in furtherance of the objects of the conspiracy: Franklin Union No. 4 v. People, 220 Ill. 355, 110 Am. St. Rep. 248; Jenkins v. State, 35 Fla. 737, 48 Am. St. Rep. 267; White v. People, 139 Ill. 143, 32 Am. St. Rep. 195;

Martin v. State, 89 Ala. 115, 18 Am. St. Rep. 91; Phillips v. State, 26 Tex. App. 228, 8 Am. St. Rep. 471; Bowers v. State, 24 Tex. App. 542, 5 Am. St. Rep. 901.

Where a Conspiracy Between Defendants to assault the deceased is established, and such assault results in killing him, each conspirator is criminally liable for the acts of the other, in the prosecution of the common design, which follow incidentally as one of its natural and probable consequences, even though not intended as part of the original plan: Gibson v. State, 89 Ala. 121, 18 Am. St. Rep. 96.

Each Conspirator is Responsible for the means employed by any of his fellow-conspirators in accomplishing the unlawful purpose in which all are engaged, where the means to be used in the furtherance of such purpose are not previously specifically agreed upon or understood: Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320.

STATE v. MUENCH.

[217 Mo. 124, 117 S. W. 25.]

EQUITY—Jurisdiction in, How Acquired.—Though trusts and their administration are an ancient head of equity jurisdiction, yet jurisdiction of the matter of a concrete case in equity or law is acquired only by the court through pleadings filed, process issued, or appearance entered, and decrees entered within the lines of the issues framed by the pleadings. (p. 543.)

A JUDGMENT is the Sentence of the Law upon the Record. It is the application of the law to the facts and pleadings. (p. 544.)

JURISDICTION—Limitations upon Judicial Power.—A court cannot set itself in motion, nor has it power to decide questions except as presented by the parties in their pleadings. What is decided within the issue is *res judicata*. Anything beyond is *coram non judice* and void. (p. 544.)

JURISDICTION in a Suit to Appoint a New Trustee, When Exhausted.—In a suit having for its purpose the appointment of a new trustee, putting him in place of the old trustee and vesting the new trustee with the title to the property held in trust, the jurisdiction of the court is exhausted when these purposes are accomplished, and it cannot retain jurisdiction over the trust for other purposes. Therefore a provision in the decree appointing the new trustee that the cause be retained in court until its further order in respect to all matters connected with the qualifications of said trustee and the administration of the trust must be regarded as in excess of the jurisdiction of the court and void. (p. 545.)

JURISDICTION—Decree in Excess of—Failure to Appeal from. The failure, in a suit for the appointment of a new trustee, to appeal from the decree does not give any effect to provisions therein in excess of the jurisdiction of the court, nor protect them from collateral attack. (p. 546.)

JURISDICTION—Decree in Excess of—Consent to.—The fact that a decree in excess of the jurisdiction of the court was consented to by counsel cannot impart validity or effect as to provisions so in excess. (p. 546.)

PROHIBITION of Acts in Excess of Jurisdiction.—Where a court in a suit for the appointment of a trustee, after appointing him, undertakes to reserve jurisdiction of the cause, and afterward, pursuant to such reservation, to make new directions for the administration of the trust, such reservation and directions being in excess of the jurisdiction of the court, a writ of prohibition will issue and prevent its further action beyond its jurisdiction. (p. 547.)

T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe, for the relator.

Leighton Shields and Wm. R. Orthwein, for the respondent.

129 LAMM, J. This is an original proceeding on the suggestion of relator for the state's writ of prohibition directed to the Honorable Hugo Muench, circuit judge—the suggestion being within section 4448, Revised Statutes of 1899 (q. v.). Passing a rule that respondent show cause, we let a preliminary writ go. On return coming in, relator moves for judgment on the pleadings and that the preliminary rule be made absolute.

Such is the issue at law up for determination.

The motion confesses the averments of the return. On the other hand, the return practically confesses the averments of fact in the petition. In this condition of things, borrowing from both, we make the following statement of the case:

Camilla S. W. McManus died testate, seised of a great estate in realty in St. Louis, in November, 1905, making her granddaughter, Camilla S. W. Burrows, and her son, Thomas Ward McManus (relator), devisees under her will. To Thomas Ward, one-half of the estate was devised absolutely. One-third of the remainder went to the granddaughter, Camilla, absolutely, as we infer. However that be, two-thirds of the remainder was devised to William F. Crow in trust, said trustee to manage it, give bond and pay the net income over to the granddaughter, Camilla, during her life. If she died before Thomas Ward then the trust estate became his absolute property. If he died before her it became absolutely hers.

The will being probated, Crow qualified as trustee and took possession of the trust estate with the burden of administering it under the will. Among other provisions of the will was this: "I hereby give said ¹³⁰ trustee, or his successors in this trust, full power, with the approval of the St. Louis circuit court, to sell any of the property subject to this trust." In that connection it provides that the trustee is authorized and directed to invest all moneys and the proceeds of all sales of the trust property in ways pointed out.

Mr. Crow died on December 3, 1907, leaving a brother of the half blood, and certain descendants of a brother of the full blood and sisters of the half blood, as his heirs.

The will nominating no successor to the trust, the cestui que trust, Camilla, thereupon brought suit in the circuit court of St. Louis against Thomas Ward McManus as devisee, and said heirs at law of the said trustee. Her petition made averments only pertinent to the following relief and no other: First, the appointment of a trustee in place and stead of William F. Crow, deceased; and second, to divest out of his said heirs the legal title to the trust estate, cast on them by the death of their ancestor, and to vest the same in the court's appointee.

Camilla pointed out in her petition that the live duties of trustee called for not only fine integrity and business capacity, but personal friendship toward her, as cestui que trust, that she was primarily interested in the selection of a new trustee acceptable to her from such standpoints, and that Mr. Crow was selected by her grandmother for that fiduciary relation because he ideally filled the office of trustee. She suggested Henry F. Hafner as Mr. Crow's successor, he possessing the qualifications alleged by her to be incident and necessary to administering the trust.

Thomas Ward admitted by answer all allegations of the petition material to the appointment of a new trustee and the divesting and vesting of the legal title to the trust estate. He joined issue only on those averments relating to the appointment of Mr. Hafner because of his alleged marked friendship to Camilla, ¹³¹ averring that the trustee should stand neutral in that particular and be an impartial person as between him and her.

The adult defendants (heirs of Crow) answered confessing the allegations of the petition and consenting to the appointment of a successor in trust. A minor defendant (one of Crow's heirs) answered through his guardian ad litem, averring ignorance of the facts, pleading his tender years, asking that strict proof be made, and praying the court to protect his rights.

Such other proceedings were had in that cause that it came to judgment on May 4, 1908. At the trial evidence was put in and admissions additional to those in the pleadings were made. Thereupon the court made a finding of facts substantially in accord with the allegations of the petition and spread its finding of record in its decree. Based on such findings, it was ordered, adjudged and decreed that Matthew

Park, Esq., be appointed trustee as successor to William F. Crow, deceased, that the title to the trust estate vested in him by the will be divested out of his heirs at law and vested into the new trustee, who should thereafter have the rights and powers and be subject to the duties and obligations defined in the grandmother's will. The court fixed the trustee's bond at the penal sum of ten thousand dollars, and provided for additional bond in certain contingencies. Adjudging costs, etc., the decree contains the following clause (Note: This clause lies at the root of this controversy): "*It is further ordered, adjudged and decreed that this cause shall be retained in this court, as to the plaintiff and defendant, Thomas Ward McManus, and as to said trustee, Matthew Park, until the further order of this court in respect to all matters connected with the qualifications of said Matthew Park as trustee, and his administration of said trust.*"

¹³² In that proceeding, Sim T. Price and R. M. Nichols were attorneys for Thomas Ward McManus; John B. Denvir, Jr., for the heirs of William F. Crow; and James P. Maginn, for the granddaughter, Camilla. It seems a draft of the decree was prepared, and that such draft bears the following earmarks: "O. K. [signed] Sim T. Price, R. M. Nichols, attys. for Thomas Ward McManus. O. K. (signed), John B. Denvir, Jr."

On the 24th of July, 1908, the trustee filed a motion in the aforesaid cause, calling the court's attention to the fact that it had retained jurisdiction "on all matters pertaining to the administration of the trust herein," and showing to the court that the trustee had retaining counsel, and, in and about the performance of legal services as such, they had rendered services for which they claimed a certain sum, and an order was prayed to allow and pay. Accompanying this motion was an itemized account of length and particularity, stating the dates on which services were rendered and their character and extent. Notice was given of the filing of this motion and, on a day later in July, the parties appeared by counsel. The court having indicated that the attorney's fees should be paid out of the income, and not out of the corpus of the trust estate, Thomas Ward McManus withdrew from the hearing, deeming that, on that view, he had no concern in it. Thereupon the court adjudged and decreed that the trustee pay a certain sum to his attorneys out of the income of the trust estate. It seems that the form of this decree was also drafted and bears the following: "O. K. (signed), R. M. Nichols, attorney for Thomas Ward McManus."

Neither the last judgment nor the original decree, divesting the title of the trust estate out of the heirs of the deceased trustee and appointing Mr. Park as successor in trust and vesting the title in him, was appealed from.

¹³³ So matters stood until October, 1908. On the ninth day of that month a notice was served, entitled in the cause aforesaid and directed to Thomas Ward and Camilla, notifying them, and each of them, that the trustee would on the twelfth day of October, 1908, present a petition in said cause requesting the court to empower him to borrow on the trust property a sum of money sufficient to pay off charges against the estate, praying that directions be given as to the terms and manner of making the loan, and that an order be made determining whether said charges against the trust estate in whole or in part should be paid out of its corpus or income. This notice was served on Thomas Ward on October 9, 1908. As we grasp it, the petition foreshadowed by such notice was filed in the principal cause on the 13th instead of the 12th of October. It sets forth that jurisdiction of the trust estate was retained by the court by its original decree. On such postulate it proceeds to show that notice was given to Camilla and Thomas Ward; it then sets forth a description of the trust property (which we omit) and the appraisal of certain parts of it, and avers it was allotted to the trustee by a judgment in a partition suit in the circuit court of St. Louis; that it was there adjudged that the trustee should pay one-third of the taxes, general and special, existing as charges against the entire estate of Camilla S. W. McManus, testatrix; that said taxes had accrued to a large amount and were running at a punitive rate of interest; that the trustee had no funds to pay them; that the costs in said partition suit (inclusive of commissioners and attorneys' fees), one-third of which was taxed against the trust estate, aggregated thirty-three thousand six hundred and fourteen dollars and forty-five cents, which the trustee was unable to pay for lack of funds; that he had made efforts to sell the unimproved real estate, but that stringency in the money market and the weak demand for that kind of property had prevented a sale; that the trustee believed the financial sky would ¹³⁴ brighten, and that, say in a year, he could obtain a reasonable price largely in excess of that now offered; that a present sale would result in waste and loss to the trust estate; that the attorneys and commissioners in the partition suit would wait no longer for their costs and fees, but proposed at once to sue out an execution on the partition judg-

ment and knock off the property at sheriff's vendue to satisfy it; that such sale, because of the prevailing money market, would work a great hardship on the trust estate by sacrificing it.

Wherefore, he prayed for power to borrow twenty thousand dollars to pay his pro rata of said costs and accrued taxes, to be secured by a trust deed on the corpus of the estate, due two years from date with current interest, and to pay commissioners for securing the loan, "and that the court make such orders and grant him such relief as may appear proper in the premises."

Continuing, the petition avers that certain attorneys have unliquidated charges against the trust estate for legal services rendered in the partition suit during the trusteeship of Mr. Crow; that part of the back taxes accrued in the lifetime of testatrix, part of them are special tax bills for street sprinkling and street improvement; that there is a controversy whether certain items should be charged against the corpus or income of the trust estate.

Wherefore, petitioner prayed the judgment and direction of the court in that behalf.

To the foregoing notice Thomas Ward McManus paid no attention, and to that petition he remained mute, answering not.

Presently, on the twenty-third day of October, 1908, the matter coming on for a hearing, the following decree was entered:

"The above matter coming on to be heard this day, upon the application of Matthew Park, trustee under the will of Camilla S. McManus, deceased, for ¹³⁵ permission, pursuant to the last will of Camilla S. McManus, deceased, to alienate part of the trust estate herein by mortgage or in such other manner as to the court might seem meet and proper in the premises, in order that said trustee may pay charges against said trust estate duly allowed by the St. Louis circuit court in a cause in partition, being numbered 43,345, in division No. 4 thereof, and such other proper costs, expenses, and liens as this court may by proper order direct to be discharged therefrom, and the court having been fully and duly advised in the premises by counsel for trustee and other parties in interest, all of whom have been duly notified of said application as shown by the evidence; and this court having reserved the power in the original decree herein to make such orders in the administration of the trust as might be necessary, it is hereby ordered by this court by virtue of the power con-

ferred by the will of Camilla S. McManus, deceased, that said trustee sell at public auction to the highest bidder the following described real estate lying and being situate in the city of St. Louis, in lieu and stead of the tract of land in the petition described, belonging to and being part of the trust estate of which said Matthew Park now stands seised as such trustee, to wit: [Here follows a description of the real estate to be sold, which we omit.]

“It is further ordered that said sale shall be either for cash or at the option of the purchaser for one-third cash, and remaining two-thirds payable in one and two years from date of sale with interest from date at six per cent per annum, deferred payments to be secured by customary mortgage upon the property sold; said sale to be conducted at the east front door of the court-house in the city of St. Louis, Missouri, at 12 o'clock noon on Monday, the sixteenth day of November, 1908; and that said trustee shall give public notice of said sale by advertisement thereof for twenty days in a daily newspaper printed in the English language in the city of ¹³⁶ St. Louis, the last insertion to be not more than two days previous to the day of sale.

“It is further ordered that said trustee shall further advertise said sale by erecting suitable sign boards on the above described property and by printed hand bills regarding the same and that he be authorized to spend a reasonable sum in whatever methods of advertising as to him may seem necessary.

“It is further ordered that successful bidders for said property shall be required to deposit with said trustee as earnest-money, a certified check for at least ten per cent of the amount to be paid for said property; residue to be paid or secured as aforesaid immediately upon approval of said sale by this court.

“It is further ordered that said sales shall be subject to the approval of this court, and that said trustee, upon conducting same, shall forthwith report said sales to this court for its approval.

“Said trustee is authorized to employ an auctioneer to conduct said sales, and shall, upon approval of court, make and execute such conveyance or conveyances as may be necessary to fully invest title to all said real estate in said purchasers.”

On November 4, 1908, relator filed an affidavit for an appeal from the decree, and his appeal was denied. By virtue of the decree the trustee presently advertised the described

real estate, putting the sale on November 16, 1908; and on November 12th relator filed here his suggestion for prohibition, challenging the jurisdiction of the circuit court to render the decree ordering a sale.

The first and main proposition discussed by counsel is the right (affirmed on the one side and denied on the other) of the circuit court of the city of St. Louis to retain jurisdiction of the administration of the trust estate by its original decree, entered on the pleadings in the principal case. It will be observed there was a clause in that decree pointedly retaining such jurisdiction. ¹³⁷ The trial court evidently held that by virtue of that clause the administration of the whole trust was held in chancery. Accordingly, all subsequent proceedings are entitled as in that case, and are by way of supplemental motions and petitions filed therein—hearings proceeding on mere notice without summons. The argument of respondent runs, first, that the circuit court on its equity side had inherent jurisdiction over the subject matter of trusts, therefore (they argue) the decree was well enough; second, that the will of the grandmother (witness the clause heretofore quoted) contemplated that the trust, in so far as power was given to the trustee to sell real estate, should be administered under the supervision of a chancellor; third, that the original decree was entered by consent; and, fourth, that it was not appealed from. Hence, on one or all said grounds, it is immune from collateral attack.

But we are of opinion that learned counsel, through inadvertence, argue unsoundly in that behalf, and that the preliminary rule in prohibition should be made absolute. This, because:

1. (a) Conceding that trusts and their administration are an ancient head of equity jurisdiction, yet in Missouri jurisdiction of the subject matter of a concrete case in equity or law is only acquired by a court through pleadings filed, process issued or appearance entered, and decrees entered within the lines of the issues framed by pleadings. At the very old common law, pleadings were oral, and some court officer framed issues from these oral complaints. So when Samuel judged Israel, or some Calif dispensed justice in Bagdad, or some Jewish king sat in judgment at the gates of Jerusalem, no form of pleadings was necessary to the hearing of a controversy, and questions of jurisdiction were scarce and of little or no bother. But in modern jurisprudence, a court remains passive until issues are framed in accordance with written law, and ¹³⁸ their judgments must respond to such

issues. A judgment is "the sentence of the law upon the record." It is the application of the law to the facts and pleadings. Any other view would be illogical and tend to confusion and chaos in the administration of justice: *Black v. Early*, 208 Mo. 281, 106 S. W. 1014, and cases cited. Speaking to the point, we quote with approval from a sound authority: "The judicial power can be set in motion in civil matters only by some person—using the word in its broadest sense—in a case against another person. The courts cannot, *ex mero motu*, set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings. The parties, by their attorneys, make the record, and what is decided within the issue is *res adjudicata*; anything beyond is *coram non judice* and void": *Andrews' Stephen's Pleading*, 2d ed., p. 34. See, also, *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. ed. 464.

To the same effect are our own cases. "The subject matter of a suit," says Macfarlane, J., in *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 366, 16 S. W. 595, "when reference is made to questions of jurisdiction, is defined to mean 'the nature of the cause of action and of the relief sought': *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931. 'Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in a given case. To constitute this there are three essentials: 1. The court must have cognizance of the class of cases to which the one adjudged belongs; 2. The proper parties must be present; and 3. The point decided must be, in substance and effect, within the issue': *Munday v. Vail*, 34 N. J. L. 418. A court may be said to have jurisdiction of the subject matter of a suit when it has the right to proceed to determine the controversy or question in issue between the parties or grant the relief prayed. What the controversy or issue, in any case, is, can only be determined from the pleadings. When the court has cognizance of the controversy, as it appears from the ¹³⁹ pleadings, and has the parties before it, then the judgment or order, which is authorized by the pleadings, however erroneous, irregular or informal it may be, is valid until set aside or reversed upon appeal or writ of error."

Referring to the foregoing, let it be admitted, also, for the purposes of the case at bar, that "the question of jurisdiction must be tried by the whole record": *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 366, 16 S. W. 595; *Adams v. Cowles*, 95 Mo. 501, 6 Am. St. Rep. 74, 8 S. W. 711.

Let it be further admitted, arguendo, that the scope of the pleadings and issues in a lawsuit may now and then be somewhat enlarged beyond the strict letter of the pleadings by the construction put upon them by court and counsel at the hearing, and that such theory will bind parties litigant not only on appeal but on a question of *res adjudicata*: *Bragg v. Metropolitan R. R.*, 192 Mo. 331, 91 S. W. 527; *Donnell v. Wright*, 147 Mo. 639, 49 S. W. 874.

Yet none of these admissions aid respondent in this case. There have been presented to us the admissions of fact and a running colloquy between court and counsel at the hearing of the principal case. It is claimed that said admissions and colloquy are part of "the whole record." Conceding (without determining) that fact, yet we find the admissions and observations made in the colloquy are strictly responsive to the plain issues framed by the pleadings in the original case and nothing else. Those issues we have stated. Briefly, they are the appointment of a new trustee, and putting that trustee in the shoes of the old one—i. e., vesting him with the title to the real estate devised in trust by the grandmother's will. Such being the simple, sharp and only issues, the decree invoked thereby should have contented itself with deciding them, and, having set them at rest by the appointment of a new trustee and providing for his bond, and having invested him with title, the power of the court in the subject matter of that particular suit was exhausted and at ¹⁴⁰ end. This certainly is so unless we adopt the heresy that a court, *sua sponte*, may hold a trust estate in its grasp for all purposes of administration under some droll notion that once in chancery for any purpose whatsoever a trust estate is always in chancery for all purposes whatsoever.

A general doctrine, in point, is thus stated: "Upon the entry of a final order or one which becomes final by operation of law, the jurisdiction of the court in the suit in which such order is entered is exhausted, and further proceedings therein may be prohibited": 16 *Ency. of Pl. & Pr.* 1115.

(b) It is argued that the will of the grandmother contemplated that a court of equity might be invoked to approve a sale of real estate by the trustee under the powers donated to him. But, in this connection, it must also be remembered that the grandmother's will, *ex vi termini*, contemplated that a person, not a court, should manage the trust. The finger can be put on nothing in that will even squinting at a wish on the grandmother's part that the execution of the trust raised should be subjected to the traditional delays and ex-

penses of an administration in a court of chancery. The direction in that will that a sale of any of the trust real estate should not be effectual without the approval of a court falls very far short of bespeaking the general judicial exercise of the large power of administering the trust through orders and directions of court. Not only so, but the subject matter of the corpus of the trust estate, the subject matter of the powers donated by the will, and the subject matter of the administration of the estate under those powers were not brought into court in the original proceeding for the purpose of administration then or thereafter; so that we are not called upon to decide whether the administration of that trust could be taken from the shoulders of a trustee selected by testatrix, or his successor named by the court, and put upon the shoulders ¹⁴¹ of a chancellor in a direct proceeding leveled at that end.

(c) It is next argued that the original decree was by consent, and, finally, that no appeal was taken, therefore, the decree was effectual to hold the trust estate in administration. But if the chancellor, as we have held, reached out his arm too far and grasped a jurisdiction not within the issues, then that part of the decree outside the issues became *coram non judice* and void. In that view of the case no appeal was necessary, and the void part of the judgment is subject to collateral attack.

Moreover, while it seems that counsel, "O. K.'d" the decree, whatever that may mean, yet we cannot agree to the doctrine that counsel, ostensibly merely employed in the matter of an appointment of a new trustee to administer a trust estate and to invest that new trustee with title to the estate, thereby and without more held a warrant of attorney from their client to confer jurisdiction on the court to administer the whole trust after the appointment of the new trustee, and all this by placing the hieroglyphic cryptogram, "O. K.," on a decree prepared for entry presumably by counsel, whether in court or out does not appear. To put jurisdiction on counsel's "O. K." is to stand it on an apex instead of a base, to rest it on a sign or symbol, rather than on the pleadings, the issues and the evidence.

2. The decree of sale, singularly enough, is based on a petition directed to the avoidance of any sale whatever, through the expedient of borrowing money to tide over the pressing emergency confronting the trustee in his stewardship. That decree, in any event, is so foreign to the application made that it could only stand on the broad ground

that the whole trust estate and its administration were already held in the hollow of the hand of the chancellor by force of the original ¹⁴² decree, and that he could proceed, of his own motion, to administer the details of the trust. As we have already held that the chancellor had no such jurisdiction in this case, it would be unprofitable to consider the decree of sale from the viewpoint of standing on its own legs; because, the jurisdiction to order that sale being referred back to the clause in the original decree retaining jurisdiction of the whole trust, therefore, as that is the stem on which it grew, when that stem is cut down its support is taken away and it falls to the ground.

Other questions are discussed with vigor and learning by counsel for respondent, but we deem them not vital to the deciding question in the case.

Let the preliminary rule in prohibition be made absolute and the final writ go. We will not adjudge costs against Judge Muench. Let the relator pay them.

It is so ordered.

Valliant, C. J., Gantt, Fox, Woodson and Graves, JJ., concur.

Burgess, J., dissents.

In Order to Confer Jurisdiction upon a court to render judgment, a petition or complaint must be filed therein or the subject matter must otherwise be presented for consideration in some mode sanctioned by the law: *Swing v. St. Louis Refrigerator etc. Co.*, 78 Ark. 246, 115 Am. St. Rep. 38.

The Jurisdiction of a Court is Usually Exhausted upon the entry of judgment: *Buckley v. Superior Court*, 102 Cal. 6, 41 Am. St. Rep. 135; *Bank of Orland v. Dodson*, 127 Cal. 208, 78 Am. St. Rep. 42.

The Writ of Prohibition is the subject of a note to *State v. Superior Court*, 111 Am. St. Rep. 929.

WHITE v. SPENCER.

[217 Mo. 242, 117 S. W. 20.]

HOMESTEAD—Judgment Lien, When Attaches to.—If one holding lands as a homestead in excess of the amount which he is entitled to retain as exempt from execution is subjected to a judgment against him which is a lien upon his property, such lien attaches to the excess of the homestead, and the debtor cannot convey such excess to one of his creditors and enable the latter to hold the property so conveyed free from such judgment lien. (pp. 556, 558.)

JUDGMENT LIEN, When Attaches to a Homestead.—Whenever there is a surplus in a homestead, either in value or quantity, there may be a judgment lien as to such surplus, leaving it to future

selection and admeasurement to determine the exact dimensions of such surplus. (p. 559.)

HOMESTEAD—Execution Sale of—Admeasurement, When Rendered Unnecessary.—Where, upon the issuing of an execution, the debtor and the officer holding the writ discuss the fact that the debtor has more land than he can hold under the statute, and he selects a parcel and conveys all the balance to a creditor whom he desires to favor, and the matter of surplus is dependent on quantity rather than value, the judgment debtor and creditor become bound by the selection thus made to the same extent as if he had followed statutory proceedings under the writ, and the sale under execution of the part thus conveyed is valid. (pp. 559, 560.)

Charles C. Crow and Eastin, Corby & Eastin, for the appellant.

Spencer & Landis, for the respondent.

245 IN BANK.

PER CURIAM. Upon a consideration of this case by the court in bank, the opinion in division was slightly modified in language, and adopted as the opinion of the court in bank, all the judges concurring therein.

IN DIVISION ONE.

GRAVES, J. The facts pleaded and proven in this case can be stated in small compass, which when considered leaves but one sharp issue of law. William E. Gibson was the owner of the west ten feet of lot 32, and all of lots 33 and 34, in block 6, in Carry's addition to the city of St. Joseph, Missouri, which tract made a parallelogram sixty by one hundred and forty feet. The frontage of sixty feet was on Beattie street and that of one hundred and twenty on Twentieth street. Upon this tract was the residence of Gibson, and the whole was fenced as one tract and held, used and claimed by him as his homestead up to May 24, 1902, he being the head of a family. May 1, 1902, the plaintiff herein recovered judgment against Gibson in the circuit court of Carroll county, Missouri, for three thousand two hundred and seventeen dollars and eighty-three cents. On the third day of May following, a transcript of such judgment was filed with the clerk of the circuit court of Buchanan county, wherein was situated the property of Gibson, described as aforesaid. On May 24, 1902, Gibson being indebted to defendant for legal services in the sum of four hundred dollars, did, for ²⁴⁶ and in consideration of that debt, deed to defendant the west ten feet of lot 32, aforesaid, and thirty-three feet off of the north end of lots 33 and 34,

aforesaid. On May 12, 1904, plaintiff in this cause had a general execution issued upon his transcript judgment, and the land previously conveyed to defendant Spencer was levied upon and sold to plaintiff, the consideration at the sheriff's sale being five dollars. The record also shows that prior to the deed to Spencer, Gibson's homestead had never been ad-measured or set off to him out of the tract first described hereinabove. It also stands admitted that the tract remaining and at the time of the trial held and claimed by Gibson as his homestead was a little in excess of eighteen square rods. In describing the transaction when this deed was made, Mr. Gibson, as a witness, said:

"Q. You say that you owed Mr. Spencer at that time?
A. Yes, sir.

"Q. And you made him this conveyance to pay his debt?
A. I did.

"Q. State whether or not you figured up the size of the homestead which you would be allowed at that time and undertook to convey him the excess? A. I did not, but another man did.

"Q. That was your purpose? A. Yes, sir.

"Q. And what you undertook to retain there, what you did retain there, you now hold as your homestead? You undertook to release that? A. I did.

"Q. Now, Mr. Gibson, what is the value of that land which you retained there? A. The land I retained?

"Q. Yes, with your house and improvements on it? A. I suppose it is worth twenty-four or five hundred dollars.

"Q. Do you recall what you scheduled it at when you filed an application to be adjudged a bankrupt? A. I think it was three thousand dollars.

²⁴⁷ "Q. At that time you had already sold off this to Mr. Spencer? A. No, I think not. I don't recollect.

"Q. You remember you made your deed to Mr. Spencer in the same month the judgment was rendered against you down there? A. I guess I did.

"Q. You did not apply for a discharge in bankruptcy until some year or two afterward? A. I don't recollect what I scheduled it at, but I never valued the place as a whole at three thousand dollars and I will take to-day two thousand five hundred dollars for what I have got there.

"Q. Now, at the time you made this deed to Mr. Spencer, you expected Mr. White to undertake to levy upon this excess, and have it set off? A. I suppose so.

"Q. And it was for the purpose of giving it to Mr. Spencer instead of him? A. For the purpose of paying a just debt instead of what I considered an unjust debt.

"Q. It was for the purpose of giving it to Mr. Spencer instead of letting Mr. White get it? A. The man I justly owed.

"Mr. Spencer: We object to that.

"The Court: I don't see the relevancy of it.

"Q. You say it was for the purpose of paying a just debt instead of an unjust one? A. One I recognized as my debt.

"Q. Instead of one you thought was unjust? A. Yes, sir, instead of one I thought then, and think now, and always will, was unjust.

"Q. The judgment Mr. White had? A. Yes, sir.

"Direct examination—by Mr. Spencer.

"Q. Was there anything done by you, or for you, toward setting out your homestead prior to the making of the deed by you and your wife to me of your homestead?

"Objected to by plaintiff.

248 "Objection overruled.

"Q. Was there anything done by you, or anyone for you, toward setting out a homestead there prior to the making of the deed to Richard L. Spencer? A. No, sir.

"Q. What was done and said at the time of making the deed with reference to it?

"Objection.

"The Court: State what was done.

"Plaintiff objects.

"The Court: He is not undertaking to prove the contents of the deed, he is undertaking to find out when the homestead was set out.

"The Witness: It was set out immediately preceding the deed.

"The Court: Was it set out preceding the deed?

"The Witness: I said immediately—I mean before the making of the deed Mr. Spencer come to me and told me that I owed him justly, and that he would take the excess of my homestead for the fee, and he figured it out.

"The Court: What did you do about setting off your homestead before this deed was made?

"The Witness: Didn't do anything, only just at the time it was made, I made the deed immediately.

"The Court: Then what did you do?

"The Witness: Made the deed.

“Q. Were there any measurements staked off or division made of the property prior to the making of the deed? A. No, sir.

“Q. Was there anything done at the time of making the deed except at the time of making the deed a measurement was made there of what you would grant me, and that there was a homestead and a little in excess left there to you? A. Yes, sir.

“Q. Was that all that was done? A. Yes, sir.

“Q. Up to the moment of making the deed was ²⁴⁹ that all made under one inclosure, and held and claimed by you as a homestead? A. Yes, sir.

“Cross-examination—by Mr. Eastin.

“Q. I don’t quite understand you—you said that just before the deed was made, this ground that was to be conveyed to Mr. Spencer was inclosed? A. He came to me with the proposition; I told him to measure off and leave me the homestead and I would deed him the balance. I done so.

“Mr. Spencer: Was the making of the deed and the doing of that one transaction?

“The Witness: Yes, sir.

“Q. But you had to get what was the homestead out before the deed was made? A. Yes, sir.

“Mr. Spencer: Was it all one transaction?

“The Witness: Yes, sir.

“The Court: You say he figured it out?

“The Witness: Yes, sir.

“The Court: Were there any stakes driven or anything there before the deed was made?

“The Witness: No, sir, never was a stake driven.

“Q. What did you do to mark out your homestead before this deed was made? A. Didn’t do anything; when he came he couldn’t get the excess on one side of the house or the other side; that is the reason the ten feet was taken off the east side of the property and the balance off the rear.

“Mr. Spencer: You wanted to retain your homestead?

“The Witness: Yes, sir. Didn’t want somebody else jammed up against me.

“Mr. Spencer: Was the making of this deed and the cutting off of the excess all one transaction?

“The Witness: Yes, sir.

“Mr. Eastin: You didn’t need any stakes?

“The Witness: No, sir, didn’t need any stakes.

"Mr. Eastin: When you fixed this deed or when ²⁵⁰ you determined what should go in the deed you had a clear idea how much you conveyed off on each side?

"The Witness: Yes, sir.

"Mr. Eastin: You had to have your idea before you made your deed.

"The Witness: I did have it.

"Mr. Eastin: And you didn't claim this that was conveyed away—didn't expect to claim it as your homestead?

"The Witness: No, sir.

"The Court: Did you claim it up to the time the deed was made?

"The Witness: Yes, sir.

"Mr. Spencer: You claimed that up to the time of making the deed as part of your homestead?

"The Witness: Yes, sir.

"Mr. Eastin: You know Mr. White had a judgment against you at that time?

"The Witness: Yes, sir.

"Mr. Eastin: And that he had the power to set this excess off?

"The Witness: That is a question. He didn't do it.

"Mr. Eastin: You knew he had the power to do it?

"Mr. Spencer: We object to that.

"The Court: He stated before that he made this conveyance and did it for the purpose of preventing Mr. White from getting any judgment lien on this property."

The suit in hand is one in ejectment for the land conveyed by Gibson to Spencer.

The answer pleads all the facts hereinabove set out and closes with this prayer: "Wherefore, defendant having fully answered asks to be discharged with his costs, and prays the court that said judgment and the sheriff's deed thereunder be declared a cloud upon defendant's title, and that the same be declared no lien or encumbrance against the title of defendant, ²⁵¹ and that the title of defendant as to said judgment and sale thereunder be declared to be in defendant, and for such other and further relief as may be proper and just in the premises."

By its judgment the court, nisi, found the issues for the defendant and against the plaintiff, and further decreed that the title to said property was in defendant, and that plaintiff's sheriff's deed was a cloud upon such title, and that the same be declared null and void and to be no lien or encumbrance upon defendant's title. Costs were also adjudged

against plaintiff. Timely motion for new trial proving of no avail, plaintiff brings the case here.

We have quoted liberally from the testimony and purposely so on account of the conceived importance of the case.

Boiled down, the evidence of Gibson, the judgment debtor, is to the effect that he used and claimed the whole tract as a homestead up to the time of making the deed to defendant; that he and defendant agreed that there was a surplus in quantity, and for that reason the whole tract could not be held as a homestead; that he preferred to pay defendant, whose debt he recognized as an honest obligation, rather than the judgment debt, which he did not so recognize; that they estimated the amount of the surplus and he immediately made the deed thereto; that thereafter he held and claimed the remainder as his homestead; that whilst such remainder might be a few feet in excess of the quantity allowed in cities having a population of forty thousand inhabitants, it was less in value than three thousand dollars, the prescribed limit in value. Under this testimony and the other facts heretofore narrated, we conceive the real questions raised to be these: (1) Was this transcript judgment a lien upon the amount of this tract of land which was in excess of the homestead? (2) Under the facts was there or could there be an ²⁵² abandonment of this part in such a way as would make plaintiff's judgment effective?

But, after all, an answer to the first question practically settles the controversy, for if there was no judgment lien, a deed for a valuable consideration, made prior to an execution levy, as in this case, would be good. We mention the question of abandonment because it is urged in the briefs. To our mind the case turns upon the sole question as to whether this judgment was a lien against the surplus in quantity. If it was a lien, then the sale under execution relates back to the date of the judgment lien and cuts out the deed of defendant. If it was not a lien of some kind, the land was clear, and a bona fide deed to all or any portion thereof is good, if made before actual levy, as in this case. This question we propose to discuss, but with some diffidence, in the light of the broad language of some of our previous decisions. As against a homestead proper, under the rule in this state, there is no such thing as a dormant lien. By homestead proper, we mean that tract of land, which being within the statutory limitations, both as to quantity and value, is held, occupied and claimed as a homestead. As to such a tract of land, no judgment lien attaches. To be ex-

plicit and to make an application in the case at bar, if Gibson had owned a tract of land eighteen square rods in dimensions or less, and in value three thousand dollars or less, then in no event could a judgment lien attach. This for the reason that the real purpose of the law is to secure so much property as absolutely exempt from attachment and execution and leave it in a shape so that it may be sold and the proceeds thereof invested in another homestead. Such is the spirit of our homestead act, as by this court construed. But should this broad rule apply in a case where there is a judgment and at the date of the judgment the judgment debtor has a tract of land in excess of a homestead, either in value or quantity? Confining it to the case at bar, ²⁵³ should the doctrine apply where the judgment debtor owns property in excess of the quantity allowed by statute? In such case is there no lien which could and does attach to the surplus, until after execution and levy? This is the vital question in the case at bar.

Following the broad language of the case of *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448, no judgment lien attaches to any part of a tract, owned, occupied and claimed as a homestead, until after execution, levy and admeasurement of the homestead, at which time the surplus may be sold—not by virtue of a judgment lien, but by virtue of the levy and subsequent proceedings thereunder. Is this doctrine correct? If so, we may have a judgment debtor who owns one thousand acres of land in one body, under one inclosure and used and occupied as a homestead. Such tract would, of course, exceed the statutory limitation as to quantity. Yet if no lien attached to the tract prior to levy and notice, he could sell off tract after tract until he reduced his possessions to one hundred and sixty acres in quantity, or if shrewd enough, until he reduced it to fifteen hundred dollars in valuation, and thus defeat a judgment which, under the general statute, is a valid lien upon all property, except his limited homestead, for a period of three years. Under the general statute the creditor is not compelled to push his lien under three years, the life of the lien, and if properly renewed, until the life of the renewal or renewals.

The case of *Macke v. Byrd* is substantially this: Under two executions in 1876 there was set off to Ranney in the manner prescribed by law one hundred and five acres of land as his homestead. In August, 1885, Ranney conveyed by deed to Mrs. Byrd. Prior thereto—that is to say, in 1883—Macke obtained judgment against Ranney for seven hundred

and thirty-seven dollars and eighty cents. The sale price between Ranney and Mrs. Byrd was eleven hundred dollars in excess of the homestead limit. It also appears that in July, 1885, Ranney had a contract with Mrs. Byrd's husband to sell the land to him for two thousand six hundred dollars. Whereupon Macke sued out his ²⁵⁴ execution and garnisheed Byrd. Ranney refused to make Byrd the deed, and Mrs. Byrd purchased later. Byrd was discharged as garnishee. He and his wife moved into the property and in 1886 Macke sued out scire facias to revive his judgment, making Mr. and Mrs. Byrd parties; they, however, were discharged by the court. Then in 1888 Macke brought suit against Mr. and Mrs. Byrd to cause the homestead to be reassigned and that part in excess of fifteen hundred dollars to be subjected to the payment of the plaintiff's judgment demand. The court, nisi, found for Macke, appointed appraisers to reassign the homestead, and the Byrds brought the case here. In the discussion of that case the learned judge writing the opinion propounds this question: "But does the lien touch or hold the surplus of size or value of the homestead?"

The opinion then proceeds to answer the query thus put, portions of which answer are in this language:

"This right of selection (as well as other provisions of the homestead law, mentioned later) cannot be reconciled with the idea that, as against the debtor, the judgment lien reaches the excess of quantity or value of the homestead beyond the statutory maximum, before an ascertainment, and setting out, of the part to which the exemption shall apply. . . . The rights of selection and exchange of homesteads, as given to judgment debtors by sections 5436 and 5442 (Revised Statutes 1889), could not be fully enjoyed if it were held that the lien of a judgment reached, and secured to the creditor, an uncertain part of the homestead property, without an ascertainment of the surplus to which the lien could attach, as provided by law.

"The Missouri homestead may be moved about, under the protection of section 5442. It cannot be fastened to one spot by a judgment lien, which would be the consequence of permitting it to be sold on execution subject to the homestead right.

²⁵⁵ "In contemplation of section 5436 the surplus, above the statutory measure, is not available on execution until ascertained and determined by location of the true homestead itself, in the manner prescribed.

“The homestead in dispute in the present case was fixed and defined by the action of appraisers, the sheriff and the court, under the Houck executions in 1876, and the debtor had the right to all the privileges of a homestead owner as to that property so set off (including the right to sell it), until some creditor should, by proper steps, attack the former allotment of the homestead as to quantity or value. This might be done at any time by proceeding under sections 5436 or 5444; but until that course was taken by some one, the debtor was entitled to the full enjoyment of all his rights in and to the homestead property, including the power of disposal, of which he took advantage in this case.

“The fact that Ranney realized by his sale more than the statutory amount to which the homestead is limited is of no concern, as against the purchaser of it from him, in such action as this by the judgment creditor.

“If, as we hold, the lien of judgment did not attach to the surplus in value, until ascertained by an admeasurement of the proper homestead, then the lien of judgment was no impediment to a sale of the homestead by the debtor as the statute permits.”

The purport of this broad language in the Macke-Byrd case (131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448), is, in our judgment, to the effect that if a tract of land is held, used and claimed as a homestead, then, although there may be a surplus either in quantity or value, no judgment lien attaches until levy is made and an admeasurement of the homestead is had under the execution and levy, and this, too, in the face of the fact that judgment liens attach for three years as against all property save the homestead, which homestead, by law, has fixed limitations both as to ²⁵⁶ quantity and value. This is the construction which Valliant, J., placed on the Macke-Byrd case, in *Smith v. Thompson*, 169 Mo. 553, 69 S. W. 1040, whereat he said: “We have construed our statute to mean that the judgment lien does not attach to such land either as against the homesteader or his vendee, so as to render the land in the hands of the vendee liable for the excess in value above the amount allowed as exempt, in a case where the homesteader had sold the land for more than the exempt value (*Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448). In that case it was pointed out that our statute attached the lien of a judgment only to ‘lands, tenements and hereditaments liable to be sold upon execution’ (Rev. Stats. 1899, sec. 3750), which was not the condition of lands occupied as a homestead. And it was fur-

ther shown that if more land in quantity or value was so held, the excess could only be reached under execution by following the procedure marked out in the statute for setting out the homestead."

In our opinion, taking the broad language of the Macke-Byrd case, it in effect holds that there is no lien against the surplus, whether such surplus in the homestead tract is the result of either quantity or value, until such time as there has been an appraisement and admeasurement of the homestead. If it so holds, in our humble judgment it is wrong. We have read the full text of the Vermont case cited therein, and we do not feel that it furnishes a basis for the broad conclusions reached. These conclusions say that the surplus, whether occasioned by the excess of quantity or excess of value, is not impressed with the judgment lien. In this the opinion goes beyond the facts of the case in hand. The real issue in the Macke-Byrd case was whether or not, where there had been a previous ascertainment of a homestead in the manner prescribed by statute, and there was an increase in value after such ascertainment, and whilst still held by the original homesteader, could such surplus occasioned by the ²⁵⁷ increase in value be the subject of a judgment lien of a judgment procured after the first ascertainment of the homestead. Had the Macke v. Byrd opinion strictly conformed to this issue, it would have been correct. It is correct in the conclusions reached upon the real facts therein at issue. We can see that where a homestead has been once ascertained, there might be a presumption of its continuance until such time as there might be a different ascertainment under the statute, and in our judgment the Macke-Byrd case should have been confined to this one issue, and when so confined it is correct.

We have in this state the following statute, section 3751, Revised Statutes of 1899: "Judgments and decrees obtained in any court of record in this state shall, upon the filing of a transcript thereof in the office of the clerk of the circuit court or of any other county, be a lien upon the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed."

Now, opposed to the broad provisions of this statute, we have the homestead act. This first-named statute makes such judgment a lien upon all real estate owned by the judgment debtor. But with it we must read the homestead act. This act, so far as applicable, reads: "The homestead of every

housekeeper or head of a family, consisting of a dwelling-house and appurtenances, and the land used in connection therewith, not exceeding the amount and value herein limited, which is or shall be used by such housekeeper or head of a family as such homestead, shall, together with the rents, issues and products thereof, be exempt from attachment and execution, except as herein provided; such homestead in the country shall not include more ²⁵⁸ than one hundred and sixty acres of land, or exceed the total value of fifteen hundred dollars; and in cities having a population of forty thousand or more, such homestead shall not include more than eighteen square rods of ground, or exceed the total value of three thousand dollars": Rev. Stats. 1899, sec. 3616.

Following this is section 3617, which reads: "Whenever an execution shall be levied upon the real estate of such housekeeper or head of a family, of which such homestead may be a part, or upon such part of any homestead as may be excess of the limitation of the value thereof created in section 3616, such housekeeper or head of a family shall have the right to designate and choose the part thereof to which the exemption created in section 3616 shall apply, not exceeding the limited value; and upon such designation and choice, or in case of a refusal to designate or choose, the sheriff levying the execution shall appoint three disinterested appraisers, who shall, first being sworn to a faithful discharge of their duties, fix the location and boundaries of such homestead, and the sheriff shall then proceed with the levy of such execution upon the residue of such real estate, as in other cases; and such proceedings in respect to the homestead shall be stated in return upon such execution."

When these several statutes are read together, we are of opinion that a reasonable construction thereof will give the creditor a judgment lien against all surplus of quantity, and this is the only question before us. Under the first section quoted a lien is created as against all real estate, which lien under another section has a life of three years. The homestead act says, however, that no levy can be made upon the homestead. The word "homestead," as here used, means a tract of land falling within the statutory limitations as to quantity, and we might add, value, although not herein involved. We have properly construed the homestead act to mean that no lien attaches to a homestead proper, ²⁵⁹ that is, to the tract owned, occupied and claimed as a homestead, when it falls within the statutory limitations as to quantity and value. But, in our judgment it will not do to say that

if the judgment debtor owns one thousand acres of land, no lien is created by the rendition of the judgment as to all the excess over and above the hundred and sixty which might be selected for the homestead. To so construe the statute is to give no lien from judgments secured until levy is made and the homestead selected, appraised and admeasured, and would be but to encourage fraudulent conveyances between the time of the judgment and the actual setting aside of the homestead. Or, as in this case, there would be a race between the judgment creditor and the nonjudgment creditors as to which could first secure title, and this, too, in face of the statute making the judgment a lien upon all real estate for three years. As we read these several statutes, a judgment is a lien for three years against all real estate held by the judgment creditor save and except his homestead, and his homestead means a tract of land coming within the statutory limitations as to value and quantity. Pending this lien, one who buys by private sale from the owner the homestead tract, greater in either value or quantity than the limits fixed by the statute, takes the surplus subject to the lien. Of course, there could not be a sale of the surplus, and thereby an enforcement of the judgment lien, until the homestead had been selected and admeasured. In other words, in our judgment, wherever there is a surplus in the homestead tract, either in value or quantity, there is a judgment lien as to such surplus, leaving it to a future selection and admeasurement to determine the exact dimensions of the said surplus.

In the case at bar, which is one in ejectment for the surplus tract, which was sold under execution without the statutory admeasurement of the homestead, the question arises as to whether or not such action should ²⁶⁰ prevail. Under the statute, when the officer comes with his execution, the judgment creditor has the right to select the portion of the tract which he may desire for his homestead. In this case it appears that he and the defendant discussed the fact that he had more land than he could hold under the statute; that he then selected the eighteen square rods, or thereabout, which he could hold, and deeded away the surplus. In a case of this kind, where the matter of surplus is dependent solely upon quantity rather than value, we are of opinion that the judgment creditor, as well as the purchaser from him, are bound by this selection thus made, as fully as if it had been made under an execution. The debtor was at the trial claiming the remainder as a homestead, and admits that he

was deeding the surplus to defendant with knowledge of all the facts. By deeding the surplus, if execution had been issued and the statutory proceeding followed, the judgment creditor could not have done other than claim the property selected and held by him, because of his conveyance.

Considering this case from its four corners, the judgment of the circuit court is wrong, and the same should be reversed and remanded, with directions to find for the plaintiff and enter judgment in accordance with such finding after having ascertained the reasonable value of the rents and profits. This being our judgment, such will be the order.

But, as these views are in conflict with our construction of the broad and unnecessary holding in the Macke-Byrd case, and as that is a case in which the whole court participated, we think this cause should be certified to the court in bank for its final determination, to the end that the broad language used may again pass under review.

All concur.

We Have Elsewhere Taken Occasion to Express Our Conviction that when any part of a homestead is subject to proceedings under execution because of excess either in quantity or value, then that the judgment under which the execution issues must, if by statute a general lien on the real property of the judgment debtor, be regarded as attaching to this excess. We also showed that this view was not sustained in several of the states: Freeman on Executions, sec. 249d, p. 1377; note to Vanstory v. Thornton, 34 Am. St. Rep. 505. We welcome the judgment in the principal case, not only because it coincides with the views thus expressed, but further, because it substantially overrules one of the decisions to the contrary and thus increases the majority in favor of our conclusion thus announced.

The Lien of a Judgment on the Excess of a Homestead over and above the statutory limit is discussed in the note to Vanstory v. Thornton, 35 Am. St. Rep. 505. The general rule is that a homestead within the statutory allowance is exempt from the lien of any judgment against the owner, and he may convey it free from any such encumbrance: Ketchin v. McCarley, 26 S. C. 1, 4 Am. St. Rep. 674; Freiberg v. Walzem, 85 Tex. 264, 34 Am. St. Rep. 808; Hoy v. Anderson, 39 Neb. 386, 42 Am. St. Rep. 591; Macke v. Byrd, 131 Mo. 682, 52 Am. St. Rep. 649; Roberts v. Robinson, 49 Neb. 717, 59 Am. St. Rep. 567; Traders' Nat. Bank v. Schorr, 20 Wash. 1, 72 Am. St. Rep. 17; Upton v. Coxen, 60 Kan. 1, 72 Am. St. Rep. 341. The question as to what property and estates are subject to judgment liens is discussed generally in the note to Flint v. Chaloupka, 117 Am. St. Rep. 778.

BENTON v. CITY OF ST. LOUIS.

[217 Mo. 687, 118 S. W. 418.]

DEDICATION and Rights of Dower.—Where lands are conveyed as public streets, the wife of the person making the dedication is thereby divested of her right of dower. It is not material whether such dedication is effected by deed or prescription or acts in pais. (p. 568.)

MUNICIPAL CORPORATIONS—Streets, Liability for Injuries Due to Defects in.—If certain lands constitute a public street, it is not material that the people of the neighborhood or the abuttees built the sidewalk, or from time to time repaired it without any ordinance, or that the local drainage was by the neighbors conducted into a sink-hole, and the manhole was constructed at private expense. None of these acts, nor all combined, relieve the municipality from liability for defects in the street or sidewalk, or from a dangerous condition arising from the combination of these defects and the unguarded sink-hole adjacent to the sidewalk. (pp. 568, 569.)

MUNICIPAL CORPORATION—Streets, Duty and Liability Respecting.—A city stands charged with the primary and bounden duty of keeping its streets free from nuisances, defects, and obstructions caused by itself or by third persons, if it has actual or constructive notice in time to abate the nuisance, remove the obstruction, or repair the defect. (p. 569.)

MUNICIPAL CORPORATIONS—Streets, Liability for.—The absence of sewers or water mains or a curb line established, or paving or guttering, has nothing to do with the city's liability for injury resulting from defects in the street, if, notwithstanding, the existence of a public highway is determined. (p. 569.)

MUNICIPAL CORPORATIONS.—A street may exist, so as to render the municipality liable for defects therein, though not condemned for public use by legal proceedings nor established by prescription. (p. 569.)

MUNICIPAL CORPORATIONS—Public Streets, Dedication of, Evidence of.—The intent to dedicate is essential to the establishment of a public street, but the intent and the dedication itself are inferable from permanent fences long maintained on either side, so as to be practically in line with or in continuation of an existing street, the abandonment of the strip between these fences by the abutting property owners for many years, and their failure to impress upon it the usual earmarks of private ownership, such as possession and cultivation. This remains true though the strip between the fences is made up of various small strips, which at an early date bore different designations on maps and plats and were turned out to the public at different dates. (p. 570.)

MUNICIPAL CORPORATIONS—Streets, Dedication and Acceptance Essential to.—Mere dedication is not enough to constitute a public street. There must also be an acceptance by the public. (p. 570.)

MUNICIPAL CORPORATIONS—Streets, Acceptance of Dedication of.—The acceptance of the dedication of a street may be either express or implied. (p. 571.)

MUNICIPAL CORPORATIONS—Streets, Acceptance of, When may be Implied.—The acceptance of a public street may be implied from general and long-continued use by the public as of right. (p. 572.)

MUNICIPAL CORPORATIONS—Public Streets, Acceptance of, When Inferable.—The long public user as of right, the location and maintenance of street lamps and the poles of public corporations, the barricading of the whole of the strip of land when out of repair, and the employment of the usual city signs on the barricade, the maintenance of street signs on the corner, warrant the jury in inferring the acceptance of the strip of land as a public street. (pp. 572, 573.)

MUNICIPAL CORPORATIONS—Public Streets—City, When Bound by the Maintenance of Street Lamps or Poles.—If street lamps and the poles of public service corporations have been erected and for a long time maintained in such a condition as to indicate a dedicated street, the municipality must be held to have acquiesced in the public use of the strip which was apparently designated as a street, whether such lamps and poles were put there in accordance with the red tape and minutiae of detail of city charter regulations or not. (p. 573.)

MUNICIPAL CORPORATIONS—Public Streets—Evidence—Subsequent Repairs.—If there is an issue of street or no street at the time of an accident, subsequent repairs made by the city are competent evidence as tending to show that the city recognized the locus as a public street. The remoteness of the repairs may affect the force but not the competency of the evidence. (p. 575.)

Carter, Collins & Jones, for the appellants.

Charles W. Bates and Charles P. Williams, for the respondent.

⁶⁹¹ LAMM, P. J. Plaintiffs, father and mother of George Benton, an infant between six and seven years, sue for the wrongful death of George, drowned May 4, 1905, at a place in defendant city known as "Bruno avenue," laying their damages at five thousand dollars. At the close of their evidence, defendant asks an instruction in the nature of a demurrer. The trial judge signifies his ⁶⁹² intention to give it. Thereupon plaintiffs request permission to take a nonsuit with leave. Permission going, they take a nonsuit. In due time they move to set it aside, and (their motion denied) they appeal.

The petition charges that Bruno avenue is a public street of defendant; that a duty lay upon defendant to keep it in safe condition; that at a certain point in said avenue there was for a long time a "sink-hole, surrounded with a large excavation, ditch or hole," about five feet deep and twelve feet in diameter and coming up flush with the edge of the north sidewalk on said avenue; that there was no rail on the sidewalk at the point and the boards of the walk were loose and insecure; that such dangerous and defective conditions were well known to defendant, or could have become known to it by the exercise of ordinary care in time to have made

repairs before the death of George, but that it failed and neglected to put the street and sidewalk in safe condition, and that such negligence caused George's death. That in walking upon the sidewalk in said street at said point in the afternoon of May 4, 1905, he stepped or fell from the sidewalk into said excavation and was drowned—the excavation being then filled with water up even with the surface of the sidewalk and water in said street.

The answer was a general denial.

There is (among minor questions raised) a main proposition in the case in a sharp issue on the question of fact of a street or no street at the locus.

Facts vital to the disposition of material questions made on appeal will appear in connection with their determination.

1. If the sidewalk was on a public street there can be no doubt but the charge of negligence was well made out and that such negligence was the proximate cause of the death of George. It was an ⁶⁹³ old, narrow, wooden sidewalk, the worse for wear and decay, built of boards nailed crosswise on stringers and, at the point in hand, rested elevated on wooden posts several feet high. The boards were loose, the sidewalk tipped south toward a hole running under it and thence out in the street. This hole was a large and deep affair. The combination of hole, tipped sidewalk and loose boards shown by the evidence presents an inflamed case of a negligently maintained and dangerous pitfall to adult or child. Not only so, but for a long time, in not unusual rains, the hole filled with water gathered by surface gutters and drainage, and this water arose even with the walk. There had been a heavy but not unusual rainfall on May 4th. The water gathered in the hole caused the sidewalk to float—that is, it (as a whole) seemed not fastened and anchored down securely. George was of such tender age that contributory negligence could not be imputed to him as a matter of law. In fact, there is no plea of contributory negligence and none that his parents were guilty of negligence in allowing him to be on the street at the time. It seems they had but moved into the neighborhood and knew nothing of the bad sidewalk or of the hole or of storm water usually accumulating there, nor did the child. A little bit before he was drowned, George had been seen busying himself placing planks, some distance away up street, for footmen to cross Bruno avenue dryshod. He had on rubber boots and a striped cap. He was next seen making his way on the sidewalk toward this hole—this, a very

few minutes before the alarm was given. No human eye saw him drown. But a neighbor woman saw him going toward the spot immediately before. She had but turned to her household duties and hearing a cry (a death cry, obviously), hurried out doors. On investigation, his cap was seen floating on the hole of water and his body was presently fished out by hooking a pole into one of his rubber boots. Some ⁶⁹⁴ witnesses describe the sidewalk as "wobbly" and "rickety" right close where his body lay. In this condition of proof the jury could reasonably infer that the defects in the sidewalk hard by the treacherous pool caused him to slip or step off and drown. There was proof, too, that these defects were of long standing, so that the city could not claim it had neither actual nor constructive notice in time to remedy them. Hence the demurrer cannot be upheld on the theory that plaintiff's made no case on the facts, if it be once further determined that the issue of fact of street or no street at the locus should have been put to the jury.

2. Plaintiff's theory of the case is that the sidewalk is on a public street; contra, defendant insists it was on private ground, and hence the city owed no duty to keep it safe. Such controversy (assuming facts already stated) seeks additional facts, viz.:

Bruno avenue runs east and west in the west part of the city. McCausland avenue, a public street, crosses it (with a slight jog) east of the locus. Blendon place, another street, comes into it from the north a little ways west of the locus. With a jog, Blendon place then runs on south. At an early date, not disclosed, the land in that region seems to have been platted into blocks of irregular dimensions, and ways were left open between them. At a time, not disclosed by the evidence, but many years ago, a street was dedicated by deed and called Bruno avenue. The whole region was then an outlying country district apparently. Bruno avenue, as dedicated by deed, was thirty feet wide. Ten feet off the south side of this deeded street were, many years ago, inclosed by the abutting proprietors by a permanent fence, as a part of their grounds and this fence has ever since been maintained to the exclusion of the public. A city plat or survey shows that a ⁶⁹⁵ strip of ground twenty feet wide lying north of and adjacent to the thirty-foot street, so dedicated, is marked as a "private road." When this plat was made is dark, but the paper private road antedates the oral evidence in the case which, in turn, covers a period of fifteen or twenty years next before the trial. Hard by and north of the private road

is a strip of ground ten feet wide marked on the same city map or plat with the name "George W. Campbell." In point of fact, however, these three strips so severally designated on paper as "private road," as "Bruno avenue" and as "George W. Campbell" (barring said ten feet on the south taken in to a private inclosure), make on the earth's surface a strip of ground fifty feet wide inclosed for fifteen or twenty years on the north and south by such permanent fences as commonly earmark a public road, and the whole strip is known in the neighborhood as Bruno avenue. The record is dark as to whether the said ten feet on the south were vacated by legal steps. It is dark as to whether the original Bruno avenue was ever widened by legal steps on the north by taking in the private road and the Campbell strip. The next parallel streets, north and south of Bruno, are, severally, say, six hundred feet away. The distance from McCausland avenue to Blendon place is, say, six hundred feet, but (while the abstract is not clear) it is not our understanding that Bruno avenue ends at McCausland on the east and Blendon place on the west. It crosses said streets and runs on. On the north side of Bruno at the locus are a church, some residences, and some inclosed grounds. On the south side of said six hundred foot section of Bruno is probably a residence and some lots used for gardening. On the south side of Bruno there never was a sidewalk. On the north side there has been for fifteen or twenty years a straight sidewalk, one section of it laid in cinders and another with boards and stringers. This sidewalk, as we grasp it, is on a ⁶⁹⁶ straight line with that on the north side of Bruno east of McCausland. From photographs presented here we infer that the neighborhood north of Bruno is quite thickly settled. There is no testimony showing that the sidewalk in question was built by the city or by its order. There is testimony to the contrary, to the effect that when originally put down, as said, fifteen years or more ago, it was voluntarily laid by the abutting property owners or by the neighborhood and wholly on the Campbell strip of ten feet. There is no testimony that the sidewalk itself was ever repaired by the city or by its order. To the contrary there is evidence that some repairs were voluntarily put on by neighborhood subscription and individual effort. There is no testimony that any curb line was ever established on Bruno or that the city sewer or water system is extended along the street. In the center of the fifty-foot strip is a roadway for vehicles, twenty or thirty feet wide.

This roadway the city practically admits is a public street. It is partly on the old private road and partly on Bruno avenue as originally dedicated by deed. The city has graded it, repaired it, and claims it as a street, whether by condemnation, by prescription or by dedication and acceptance is not shown, nor is it material. On Bruno avenue, a little ways from Blendon place, is a hole called a sink-hole. The neighbors once used it for drainage purposes and probably do so now. Into this sink-hole drain pipes run, crossing under the sidewalk. A manhole was there constructed long ago by private enterprise to serve some purpose of rustic and rural drainage. At spells the water, eating into the roadway from the sink-hole, enlarged the hole, and from time to time city teams and employes hauled in filling and repaired the roadway at the hole and elsewhere. The record shows that weeds and some small bushes were at times allowed to grow about this hole. At times a temporary barricade of some sort protected ⁶⁹⁷ travelers in vehicles on the roadway from getting into the hole, and photographs presented to us show that the traveling public are somewhat protected and warned by a rude stone curbing running south of the hole and next to the roadway for a short distance, and further, that there is a rude gutter made of flagging leading from the hole a little ways and draining it off on the side of the street. At times covered by the oral evidence the hole was of such dimensions that the traveled way referred to bended from the center of the fifty-foot strip to the south and returned to its central course when the hole was passed. At the corners of McCausland and Bruno and Blendon place and Bruno the usual city signs are put up on posts, naming the streets crossing there, and indicating the fifty-foot strip as "Bruno avenue." These signs have been there for many years. At intervals Bruno avenue was temporarily closed by barricades for repairs, and on these was the usual sign used in the city indicating that the street was, for the nonce, put out of use because of its bad condition. On Bruno avenue close to the locus is a street lamp, maintained by the city for years, just at the south edge of the sidewalk and on the ten-foot Campbell strip. One or more lamps of a similar nature are maintained on the same strip by the city between McCausland and Blendon place. It seems from the evidence that there fell a time in the history of St. Louis (mysteriously and by way of metaphor) referred to as the "moon yet" period. Before that period, electricity was used to light the ways of that town in the suburbs. During the electricity, as over

against the "moon yet." period, the city maintained an arc light at the corner of Blendon place and Bruno, and we infer that poles sustaining the wires were on the ten-foot strip. On this same strip, under permits granted by the city, are telephone and lighting poles erected by public service corporations.

It seems that many years ago George W. Campbell ⁶⁹⁸ owned quite a tract of land in that region; that he is dead, but when he died is not shown; that he left a widow—whether she is dead or alive is not shown; and it appears that long ago he parted with all his holdings, barring, maybe, the ten-foot strip on which the sidewalk is laid. One of the minor contentions of the city is that dower in the widow of George W. Campbell would seem to be outstanding, and that this fact interferes with a prescriptive right of way in the city or public or with a right of way arising from dedication.

There was testimony tending to show that the fence long maintained along the north side of the sidewalk as a visible boundary of Bruno was in line with the north line of Bruno as continued east of McCausland. We infer that this extension was also known as Bruno avenue, and that it ran east with a uniform width of fifty feet. There was testimony that the sidewalk in question had long been used by pedestrians in that neighborhood. That many people passed to and fro over it daily for many years, and that there was nothing during all that time to indicate to anyone coming afoot on Bruno avenue from McCausland or Blendon place that the walk was not a public walk for footmen as part of the street.

The foregoing is sufficient of the record to pass upon the issue of law raised by the demurrer as to whether the sidewalk, or, what amounts to the same thing, the ten-foot Campbell strip, was part of a public street.

On that record, we observe:

(a) The suggestion that dower is outstanding in the widow of George W. Campbell in the ten-foot strip deals only with the surface of things. The case really turns on another question, viz.: Is that strip a component part of a public street? If it be, then, under the reasoning of *Venable v. Wabash W. R. R. Co.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68, and *Chouteau v. Missouri Pac. R. R. Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299, we must ⁶⁹⁹ hold that such widow has no dower in a public way: *Chrisman v. Linderman*, 202 Mo. 605, 119 Am. St. Rep. 822, 100 S. W. 1090, 10 L. R. A.,

N. S., 1205; *Baker v. Atchison etc. Ry. Co.*, 122 Mo. 396, 30 S. W. 301.

In the *Venable* case it was decided that a widow had no dower in a strip conveyed by her husband during coverture to a railroad company for a right of way.

In *Chouteau v. Missouri Pac. R. R. Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299, it was held, in effect, that a widow was not endowable in land dedicated to public use as a railroad right of way. The argument runs on the theory that the land was subject to the sovereign right of eminent domain; that a widow was not endowed of land condemned for public use under statutes regulating the exercise of eminent domain; therefore, if the land was subjected to public use by a conveyance, instead of by condemnation under the exercise of the right of eminent domain, the same result follows.

The proposition that a widow is not endowed in land impressed with an easement for public use accords with the general law.

In 14 Cyc. 930, the doctrine is announced as follows: "Where land is dedicated by the owner to a public use, as for a street, highway or market-place, such dedication divests the wife's right of dower. And where a quasi-public corporation, such as a railroad company, having authority to acquire lands for a public use and hold the same in fee, takes lands by grant from the owner for a right of way or other public purpose, the wife's right of dower is effectually barred."

As to dower, we can conceive of no difference in principle whether the public use arises by prescription, by dedication through a deed or acts in pais coupled with acceptance, or by condemnation. In each instance the husband during his lifetime held the fee, and, the ⁷⁰⁰ fee in each instance passing to the public for its use, the inchoate right of dower is extinguished.

We pass from the question of dower outstanding in *Campbell's* widow, deeming it of no significance on the merits.

(b) If Bruno avenue from side to side and end to end is a public street, then the mere fact that the people of the neighborhood, or the abutters, or both together, built the sidewalk originally along its north side, and from time to time repaired it without ordinance of the city or order from its officers, and the further fact that the local drainage was conducted by pipes into the sink-hole by the neighbors, and that a manhole was constructed there at private expense,

each, or all combined, cannot relieve defendant city from liability for defects in its street or a sidewalk laid thereon, or from a dangerous condition arising from a combination of said defects and the unguarded sink-hole adjacent to the sidewalk: *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528.

This, because: A city owns and controls its streets as a trustee for the public. It therefore stands charged by the law with the primary and bounden duty of keeping them free from nuisances, defects and obstructions caused by itself or by third parties if it (in the latter instance) had actual or constructive notice thereof in time to abate the nuisance, remove the obstruction or repair the defect. It cannot shirk that duty, or shift it over to, or halve it with, others. So much is clear law in Missouri: *Welsh v. St. Louis*, 73 Mo. 71; *Oliver v. City of Kansas*, 69 Mo. 79; *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108, 1 S. W. 240; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Beaudean v. Cape Girardeau*, 71 Mo. 392, and cases cited; *Streeter v. Breckenridge*, 23 Mo. App. 244; *Hill v. Sedalia*, 64 Mo. App. 494.

701 (c) The case is put to us by respondent's learned counsel somewhat as if the absence of sewer or water mains, or a curb line established, or paving, guttering, etc., had something to do with the city's liability. Such indicia of a highly finished street in a great city may conclusively show acceptance of a dedication of the ground for street purposes, but they have not a whit to do with liability for defects, if once the fact of the existence of a public highway is determined. Otherwise we would have to write the law this way for the little and that way for the big, one way for villages with no paved streets, no water or sewer mains and no curb line established, and another way for cities where such things exist. A city like the humble village or country town may leave its streets as dirt roads, and yet be liable for defects negligently allowed to exist in them: *Warren v. Independence*, 153 Mo. 593, 55 S. W. 227; *Dinsmore v. St. Louis*, 192 Mo. 255, 91 S. W. 95; *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256; *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637.

(d) With the foregoing subsidiary questions put at rest, we face the main proposition of the case, viz.: Was Bruno avenue, at the locus, a public street fifty feet wide? In considering that question it may be assumed that the street was not condemned for public use by legal proceedings. So, while a question of the existence of a street by prescription is in the case, yet it would be unprofitable to consider it, be-

cause the question of dedication seems uppermost and controlling.

Speaking to that question in the light of the facts, there ought to be no doubt that the animus dedicandi existed; that is, that the abutters intended to dedicate the street for public use from side to side fifty feet wide. This conclusion, we think, reasonably follows from facts established by proof. For example, permanent fences, long maintained on either side, earmark a public street. Again, the fact that these fences ⁷⁰² are practically in line with the north and south fences of the continuation of Bruno avenue adds strength to that idea.

In the next place, the practical abandonment of the whole fifty-foot strip for many years by the abutting property owners and their failure to impress upon the strip the usual earmarks of private use and ownership, like possession, alienation, cultivation, etc., lend force to the conclusion by leading up to it. Especially so when such abandonment seems related and responsive to the public need of a street at that point because of the distance away of parallel streets and the number of people to be accommodated by a thoroughfare there.

That Bruno avenue as now existing is in aggregation of various strips of land, which smaller strips at an early time bore different designations on maps and plats and possibly were turned out to the public on different dates, somewhat complicate the matter, but can have no adverse bearing on the issue of the dedication of the whole strip; for if each component part was dedicated, then the blanket of dedication covers the whole.

But mere dedication is not enough to constitute the street a public street in the eye of the law. There must be an acceptance of the dedication by the public before the dedicated grant becomes a street such as raises the municipal duty to keep it clear of defects, nuisances and obstructions caused by the acts of third parties or by the city itself.

It seems clear law that where a street is a mere paper one, as distinguished from a street in fact, then the common sense of it is that a municipality is not charged with the duty of clearing it of obstructions and dangerous defects resulting from the laws of nature or the acts of man. Here we need not bother with the refinements of the law in that behalf, because this case is not such a case.

⁷⁰³ So there is conflict of doctrine as to whether a city must put its traveled streets from side to side and from end

to end in condition for reasonable safety for travel by night as well as by day. It is maintained on one hand and denied on the other that a city can leave portions of its de facto streets in a "state of nature," without liability for damage from defects. We need not enter into that inviting field of speculation and canvass the authorities pro and con on the proposition, because this case is not such case. The student in jurisprudence may find phases of that question considered in *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168; in *Tritz v. Kansas City*, 84 Mo. 632; in *Goins v. Moberly*, 127 Mo. 116, 29 S. W. 185; in *Walker v. City of Kansas*, 99 Mo. 647, 12 S. W. 894; in *Roe v. City of Kansas*, 100 Mo. 190, 13 S. W. 404, where the doctrine of the *Tritz* case (84 Mo. 632) is repudiated; in *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717; in *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637; in *Johnson v. St. Joseph*, 96 Mo. App. 663, 71 S. W. 106; in *Brown v. Glasgow*, 57 Mo. 156, and in many other cases.

Attending, now, to the fact of acceptance of the dedication, we think it clear that a case was made for the jury. An acceptance of a dedicated street may be either express or implied. It may be conceded to respondent that no express acceptance is shown, but we think an implied one was made out.

Judge Elliott, in his excellent work on *Roads and Streets*, second edition, says: "An implied acceptance arises in cases where the public authorities have done acts recognizing the existence of the highway, and treating it as one of the public ways of the locality. Where control of a way is assumed by the authorities representing the public corporation, an acceptance will be implied. . . . One of the principal indications of acceptance is that of improving or repairing the road or street. In one case it was held that digging a public well in the way was evidence of acceptance, and we have no doubt of the soundness of this decision: ⁷⁰⁴ for no matter what the particular act is, if it be one which could only be rightfully done upon a highway, it should be regarded as evidence of acceptance": Elliott on *Roads and Streets*, 2d ed., secs. 152, 153.

Continuing, that author says (Elliott on *Roads and Streets*, 2d ed., sec. 154): "There has been much diversity of opinion as to whether user by the public will amount to an implied acceptance and cast the burden of maintenance upon the local government. Professor Greenleaf says: 'It does not follow, however, that because there is a dedication of a public way by the owner of the soil, and the public use it, the

town, or county, or parish, is bound to repair. To bind the corporate body to this extent, it is said that there must be some evidence of acquiescence or adoption by the corporation itself, such as having actually repaired it, or erected lights or guide-posts thereon, or having assigned it to the surveyor of highways for his supervision or the like. This statement, it is noticeable, is a very careful and guarded one, and is indicative of the doubt in the mind of the writer. In another treatise (Angell on Highways, sec. 159) appears language more clearly exhibiting the uncertain state of the law. This uncertainty is removed by the later authorities, and it may now be considered as the prevailing opinion that an acceptance may be implied from a general and long-continued use by the public as of right. The later decisions upon this subject will, when analyzed, be found to be well bedded in principle. The 'town, county, or parish,' using Professor Greenleaf's terms, is represented by the town, county or parish officers, but the officers are not the corporation. The municipal corporation consists of the inhabitants and not the officers; the officers are, in truth, nothing more than the agents of the corporation. The inhabitants, therefore, stand to the officers as principals, and if the principals have, by their conduct, accepted the dedication, it is of no great ⁷⁰⁵ importance that the agents have taken no action in the matter. The inhabitants of a locality having by long-continued use treated the way as a public one, they make it such without the intervention of those who derive their authority from them. Creating towns, cities, and other public corporations, is 'but the investing the people of the locality with the government thereof,' and they may themselves exercise the powers of government of highways quite as effectually by continued use as by any other method. Of course, user cannot constitute a way a public one in cases where the incorporating act requires an acceptance by some officer or body expressly designated."

We have liberally borrowed from Judge Elliott's text because he well formulates the general law under this head, and the doctrine announced agrees with the general trend of the decisions of this court and other appellate tribunals in this state. It is needless to lengthen this opinion by excerpts from opinions in those cases. Citing a few of them will do, viz.: *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637; *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717; *Hunter v. Weston*, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633; *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W.

630; *Beaudeau v. Cape Girardeau*, 71 Mo. 392; *Rose v. St. Charles*, 49 Mo. 509; *Becker v. St. Charles*, 37 Mo. 13; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735; *Golden v. Clinton*, 54 Mo. App. 100; *Garnett v. Slater*, 56 Mo. App. 207; *Hill v. Sedalia*, 64 Mo. App. 494; *Johnson v. St. Joseph*, 96 Mo. App. 663, 71 S. W. 106.

In determining the fact of acceptance of a dedication for street purposes it must be borne steadily in mind that the roadway proper primarily is for wheeled vehicles and horse-men, whereas the sidewalk is that portion of the street intended for the use of footmen and which they are invited to use under the due guards of the law. In this case the long public user as of public right, the location and maintenance of street ⁷⁰⁶ lamps on the Campbell strip and the poles of public service corporations, the barricading of the whole street when out of repair and the employment of the usual city signs on such barricade, the maintenance of street signs at the corner of the street and other acts in pais, show such condition of things as would permit the jury to draw the conclusion of acceptance. The fact that there was no sidewalk or other provision for footmen except the sidewalk in question occupying the usual place of a sidewalk, and the further fact that there was nothing to indicate to a passer-by that the sidewalk was not for public use or on public ground, coupled with other facts shown, tend to estop the city from denying its acceptance of the Campbell strip as part of the street. Such facts amount to an invitation held out to the public to use the sidewalk as of public right.

Some confusion exists in the record as to whether the proper officers in charge of the proper departments of city government permitted the use of the Campbell strip for street lamps and the poles for public service corporations. If these poles and lamps had been erected but a short time, it might be proper to go into these questions on this appeal. But they existed there for a long time, and whether put there in strict accordance with the red tape and minutiae of detail of city charter regulations, or not, the city must be held to have acquiesced in such public use of the strip.

We are cited by learned counsel for respondent to the *Ruppenthal* case (190 Mo. 213, 88 S. W. 612), as direct authority in favor of sustaining the demurrer. Because of the strong reliance put on that case, we have re-examined it with anxious care. The *Ruppenthal* case is somewhat grounded on the *Ely* case (181 Mo. 723, 81 S. W. 168), but the law in the *Ely* case must be read in the light of the facts of that

case, and those facts do not accord with the facts in the Ruppenthal case.

⁷⁰⁷ In the Ely case there was a roadway graded down on the western side of an eighty-foot street. There was an ordinance requiring the street to be partially graded. When this was done, it was cut down so that the eastern side of the street was elevated several feet above the graded wagon road and "left as nature had made it." There never was any sidewalk on the street and nothing to designate a way for footmen except a foot-worn path made by pedestrians on this elevated portion of the street on the eastern side. Weeds grew on both sides of this path and storm water washed a gully across it. Into that gully Ely fell on a dark night. The question in the case was whether it was the city's duty to make a sidewalk or, failing to make one, was it responsible for the condition of the path. The conclusion reached was adverse to the plaintiff: See in this connection *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256, written by the same learned brother.

In the Ruppenthal case the facts were these: There was a granitoid sidewalk laid by abutting property owners on a public street. This sidewalk had been there for a long time (eight years the syllabus says), and it was not constructed by order of the city. At the end of the granitoid walk there was a drain-pipe put in by some abutting property owner long before, which pipe did not extend for the width of the sidewalk by eighteen inches at either end. Commencing from that pipe, and continuing in line with the granitoid, there was what is denominated a dirt pathway as wide as the pipe was long, i. e., three feet narrower than the granitoid walk. This pathway was used by pedestrians who came on the street and traveled the granitoid walk to its end. The storm water, rushing through this pipe, cut away the dirt at the end of this walk next to the granitoid and made a dangerous hole there. Plaintiff, in the night-time, passed along this granitoid walk. He had lived in the neighborhood ⁷⁰⁸ for seven years but knew nothing of this hole, and, reaching the end of the walk, fell into the hole and was hurt. The street dealt with in the Ruppenthal case was eighty feet in width—the macadamized roadway fifty. Outside of the macadamized part, the street had not been graded and the city seems to have elected to pay no attention to it. Weeds grew on the unimproved sides and the roadway was higher than those sides. Along those unimproved sides were natural water drains. Based on the theory that the city had not taken possession of the fifteen-foot strip on each side of the

macadamized roadway for the purposes of a street, and had done nothing to improve it, but had left it in "a state of nature," we held, first, that the city was not liable as a matter of law for the dangerous hole made by the flowing of water through the drain-pipe where the dirt pathway connected with the granitoid, and, second, that plaintiff was guilty of such contributory negligence as defeated recovery.

I agreed to that opinion when handed down, but am now satisfied it is out of line with general principles of law declared over and over again by this court. My conclusion by way of amends is that my agreeing to that case can be best told in the dispatch sent his government by Sir Charles Napier (was it not?) when in India. Having been forbidden to take Sind, he took it and announced his action in one word: "Peccavi." I am sorry I agreed to it. There was no "state of nature" in the Ruppenthal case (190 Mo. 213. 88 S. W. 612). There was a public street and the city had allowed the works of man to change the works of nature by marring the street and making it dangerous where foot travel was invited. The existence of that granitoid walk on a public street was an unmistakable invitation to foot-travelers to use it. The existence of that pitfall at the end of that granitoid walk in the line of travel, ostensibly provided for footmen, was a defect in a public street and the city, barring Ruppenthal's contributory ⁷⁰⁹ negligence, was liable in damages for injuries received at that pitfall.

We will not follow the Ruppenthal case but will overrule it except its holding on the question of contributory negligence.

We conclude it was error to give the instruction in the nature of a demurrer.

3. As the case must go back for another trial, it is well to pass on a ruling on evidence. There being an issue of street or no street, subsequent repairs made by the city are competent as tending to show that the city recognized the locus as a public street: *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481, and cases cited; *Bailey v. Kansas City*, 189 Mo. 503, 87 S. W. 1182; *City of Jeffersonville v. McHenry*, 22 Ind. App. 10, 53 N. E. 183; *Elliott on Roads and Streets*, 2d ed., sec. 865.

Having put in some evidence of prior repairs, plaintiff tendered evidence of subsequent repairs made in the August or September after George was drowned in May. The court excluded the evidence and committed error in doing so.

The only justification offered for this ruling is that the repairs were too remote, but the remoteness merely affects

the force of the evidence, not its competency. It was not so remote that it could be said, as a matter of law, to have no bearing at all.

Other rulings on the exclusion of testimony are either sufficiently covered by the opinion on the main propositions, or will not likely arise on a rehearing, and may therefore be put aside.

The judgment is reversed and the cause is remanded to be proceeded with in accordance with this opinion.

All concur.

WHAT CONSTITUTES DEDICATION TO AND ACCEPTANCE OF A PUBLIC STREET.*

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I. Scope and Explanations.

In the note appended to *State v. Trask*, 27 Am. Dec. 559, will be found a very interesting discussion of the definition and history of dedication to public use. It is there shown that it is only in modern times that the subject has assumed much importance. But notwithstanding that the subject is one of very recent growth, the cases bearing upon it are almost without number, for the reason, no doubt, that by a dedication valuable rights in land pass from the owner without compensation, and, as was said by the supreme court of California: "It is no trivial thing to take away another's land, and for this reason the courts will not lightly declare a dedication to public use": *City and County of San Francisco v. Grote*, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127, 41 L. R. A. 335.

*REFERENCES TO MONOGRAPHIC NOTES.

Dedication to public use: *State v. Trask*, 27 Am. Dec. 559; *Abbott v. Inhabitants of Cottage City*, 58 Am. Rep. 146.

Highways by user: *Whitesides v. Green*, 52 Am. St. Rep. 744.

Any attempt to enter into a general discussion of the subject of dedication and acceptance of public highways would require a note of unreasonable length, and our inquiry must be confined to some particular branch or branches of the questions involved.

The cases bearing upon the subject generally are divided into two classes—the one dealing with the nature and requisites of express dedication and formal acceptance; the other with the nature and requisites of implied dedication and implied acceptance. Upon the latter questions the cases are also of two classes—one where the question of implied dedication arises from the sale of land with reference to maps or plats; the other when it arises, as in the principal case, from an abandonment to, or acquiescence in, public use. It is to this latter branch of the subject of dedication that our inquiry in this note will be directed.

Likewise, with reference to acceptance our discussion will be confined principally to such official acts of the public authorities (other than formal acceptance), and such acts of the unorganized public itself which by implication establish acceptance where the dedication arose from facts other than a sale of land with reference to maps or plats. Some of the illustrations we may give illustrating the rules governing implied acceptance may be when the dedication was implied from the filing of plats, etc., but if so, it will be only when the general principles announced are by analogy at least applicable to the questions to be particularly discussed.

Indeed, the cases bearing upon the law governing implied dedication and implied acceptance, without reference to maps or plats, are so numerous as to defy any attempt at a careful review of them all within the limits of a single note, but, fortunately, our topic has heretofore been somewhat treated in the note appended to *Whitesides v. Green*, 57 Am. St. Rep. 744, and in the one appended to *State v. Trask*, 27 Am. Dec. 559, and to *Abbott v. Inhabitants of Cottage City*, 58 Am. Rep. 146; so we need only be now concerned with the cases which had not been decided or had not been properly classified at the time those notes were written. Also in the note appended to *Osage City v. Larkin*, 10 Am. St. Rep. 189, the question of implied dedication arising from the sale of land with reference to maps or plats, and what constitutes implied acceptance thereof, will be found treated, but there have been so many cases upon this question alone that, in order to bring that note up to date, it will be necessary for us to devote another note at some future time to that particular branch of the subject of dedication and acceptance.

It may be well to remark further, with reference to one branch of our topic, that, as our present discussion is directed entirely to the rules governing dedication, it is important to bear in mind at the outset the distinction, which has been sometimes overlooked by the pleader, between implied dedication of land to public use and the right of use which the public may acquire by prescription. In both cases, of course, the owner is estopped from asserting private

ownership and control, but the principles of law which govern each are essentially different, and pleading and proof which might support a finding for the one would not support a finding for the other: *International & G. N. R. Co. v. Cuneo* (Tex. Civ. App.), 108 S. W. 714.

Dedication is established by proof of an act of dedication, and of the animus dedicandi, without reference to the period of use; the intention of the owner to dedicate, the animus dedicandi, being the fundamental principle, the very life of dedication, without reference to the period of use, while in prescription long user is the essential ingredient: *Davis v. Town of Bonaparte*, 137 Iowa, 193, 114 N. W. 896. This distinction was also clearly announced recently by the court of civil appeals of Texas: "An implied dedication is one arising by operation of law from the acts of the owner, and is founded on the doctrine of equitable estoppel. It is essential in such case that the owner intended to set the land apart to the use and benefit of the public. This need not be evidenced by deed. 'It is enough that there has been some clear, unequivocal act or declaration of the proprietor evidencing an intention to set it apart for a public use,' and that there has been an acceptance on the part of the public. The length of time the road has been used is of no consequence, unless it becomes important, in connection with other circumstances, to show an intention on the part of the owner of the land to dedicate it to public use. Unlike an implied dedication, which, as we have seen, operates by way of estoppel in pais rather than by grant, a right of prescription rests upon the presumption that the owner of the land has granted the easement and that the grant has been lost. To sustain this claim it is not necessary to show intent on the part of the owner to set apart the road to the use of the public, and the element of acceptance is not involved; whereas the length of time the road has been used by the public is the foundation upon which the claim rests, and the use upon which the right is predicated must have continued under an adverse 'claim of right' for the full prescription period": *Evans v. Scott*, 37 Tex. Civ. App. 297, 83 S. W. 874.

It is also well to observe that in those cases where no express dedication appears the question whether there was an intent to dedicate, and therefore whether dedication can be implied, becomes a mingled one of law and fact. If the facts are undisputed and admit of but one legal interpretation, the question is purely one of law: *Town of Marion v. Skillman*, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55. But in the great majority of cases the facts are conflicting, and the intent must be drawn from the acts and conduct of the owner in connection with the circumstances surrounding the case; hence no past rule can be given for determining where dedication should be implied.

Consequently, while there are certain well-defined rules of law governing the question of implied dedication, which will be duly given, our prime object in this note is to show what probative

facts the courts have deemed sufficient to constitute implied dedication under the general principles of law governing the subject. We have deemed it best, therefore, to give numerous illustrations under each of the subdivisions, into which our discussion is arranged, showing how the courts have applied the general rules to the facts and circumstances of each particular case. And inasmuch as dedication is not a creation of the civil law, it is either statutory or according to the common law. "The difference between a statutory and common-law dedication is, that the one vests the legal title to the ground set apart for public purposes in the municipal corporation, in trust for the public, while the other leaves the legal title in the original owner, charged, however, with the same rights and interests in the public which it would have if the fee was in the corporation": *Chicago R. & P. R. Co. v. City of Joliet*, 79 Ill. 25. As a statutory dedication, therefore, operates by grant, it does not fall within the scope of our present discussion; but as a common-law dedication operates (as we shall more fully see hereafter) by estoppel in pais, the question of what constitutes implied dedication must necessarily be determined by the rules which govern dedications at common law, and to these rules we first direct attention.

II. Dedication at Common Law—General Principles Controlling.

The general principles controlling dedication to public use at common law have been recently summarized by the supreme court of Illinois thus: "In order to constitute a dedication at common law, it is essential (1) that there be an intention on the part of the proprietor of the land to dedicate the same to public use; (2) that there be an acceptance thereof by the public; and (3) that the proof of these facts be clear, satisfactory and unequivocal. The vital and controlling principle is the *animus donandi*, and, whenever this is plainly and unequivocally manifested on the part of the owner of the soil, either by formal declaration or by acts from which it may fairly be presumed, such as should equitably estop him from denying such an intention, the dedication, so far as the owner is concerned, is complete. Without such manifestation of intention by either of said modes, it cannot be said that a valid dedication is possible.

"To make a sufficient dedication the proprietor of the soil must devote the portion thereof intended for public use to such use, and, on the part of the public, it must be accepted and appropriated to that use. The acts on the part of the donor, and of the public, of an intention to dedicate, accept and appropriate the lands to public use, where the dedication is relied upon to support some right, must be equally clear and unambiguous. A dedication is not an act of omission to assert a right, but is the affirmative act of the donor resulting from an active, and not a passive, condition of the owner's mind on the subject. A mere nonassertion of right does not establish a dedication unless the circumstances establish a purpose or in-

tention to donate the use to the public": *Stacy v. Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546, 79 N. E. 133, 8 L. R. A., N. S., 966.

Perhaps an even clearer insight into the rules governing dedication at common law, so far as they relate to the particular questions involved in our present topic, is afforded by the supreme court of Indiana, which, speaking to the question of when dedication could be implied, said: "All that is necessary to constitute such dedication is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment. There must be, in such cases, an intent on the part of the owner to dedicate, and the intent to dedicate must clearly appear. Such intent may be inferred from circumstances. The assent of the owner to the use need not be expressly declared, nor be manifested in any particular manner, but may be implied from the conduct of the owner of the land. An implied dedication arises by operation of law from the acts of the owner. It is considered as in the nature of an estoppel in pais, and once made, it is irrevocable": *Town of Marion v. Skillman*, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55.

The general principles laid down by the two foregoing cases have been uniformly upheld, and it is therefore fully established that dedication is not within the statute of frauds, and is not required to be made by a deed or other writing, but may be effectually or validly done by verbal declarations, or inferred from acquiescence by the owner in the use of his property, or in any other conceivable way from which his intention to dedicate can be made manifest.

"In determining a question of dedication vel non of real estate to public use, the intent of the owner is, of course, a vital factor. The existence vel non of the requisite intent is not to be ascertained, however, from the purpose 'hidden in the mind of the land owner,' but is read by the courts from acts of the owner": *East Birmingham Realty Co. v. Birmingham Machine & Foundry Co.* (Ala.), 49 South. 488. "The intention to dedicate need not be shown by an express declaration to that effect. Such intention may be inferred from an acquiescence by the owner of the use of his property by the public": *Healey v. City of Atlanta*, 125 Ga. 736, 54 S. E. 749.

"If a land owner, by open and visible acts, unequivocally indicates to the public and to citizens that he intended to and did throw open a street to the public, and the citizens and public have acted upon the faith that there was a dedication, the law will treat the acts of the owner as constituting an irrevocable dedication. In such cases there need be no grant. . . . The principle upon which implied dedication rests is that which underlies the doctrine of estoppel in pais": *Faust v. City of Huntington*, 91 Ind. 493.

"The use of land for a highway for such a length of time that public accommodations and private rights might be materially affected by an interruption of the enjoyment would be evidence that

the land owner intended to dedicate to the public": *Cromer v. State*, 21 Ind. App. 502, 52 N. E. 239. "If, however, there is not an express dedication, but the owner suffers the public to use the passway, knowing it is claiming it as a matter of right, the law presumes a dedication to the public, and presumes the dedicator's intention to be in accord with the public's use. This does not depend upon whether there has in fact been an actual dedication to the public, but it is founded upon the principles of estoppel in pais. . . . The law operates upon his conscience and makes effectual that which he has suffered for so long to appear to be so, by raising the conclusive presumption that he has actually done what he allowed the public to believe he had done—dedicated the passway to the use of the public": *Riley v. Buchanan*, 116 Ky. 625, 25 Ky. Law Rep. 863, 76 S. W. 527, 63 L. R. A. 642.

"Land may be dedicated to public use without writing and may be manifested by acts and declarations": *State v. Transue*, 131 Mo. App. 323, 111 S. W. 523; and again: "A dedication may arise out of the conduct of the owner and the acts of those who rely thereon": *Tracy v. Bittle*, 213 Mo. 302, 112 S. W. 45.

"An implied dedication is founded on the doctrine of equitable estoppel; and when land has been thus set apart as a highway for the use of the public, for their convenience and accommodation, and enjoyed as such, and private and individual rights acquired in relation to it, 'the law,' as said by the supreme court of the United States, 'considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication: *City of Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452. And such an appropriation of land is not within the statute of frauds, and may be established by parol evidence showing the acts and conduct of the owner of the land. In fact, an implied dedication of land for public use as a highway may be shown in any conceivable way by which the intent of the owner can be made apparent.' The intent which the law means is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to public use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent. . . . The right of the public does not rest upon grant by deed, nor under a twenty-year possession, but upon the use of the land, with the

assent of the owner, for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment": *Schettler v. Lynch*, 23 Utah, 305, 64 Pac. 955.

Speaking of dedication, the supreme court of Virginia said: "It may be express or implied. . . . Dedication is not required to be made by a deed or other writing, but may be effectually and validly done by verbal declarations. The intent is its vital principle, and the dedication may be made in every conceivable way that such intention may be manifested": *Buntin v. City of Danville*, 93 Va. 200, 24 S. E. 830.

But though dedication will be implied when the intention of the owner to make the dedication has been unequivocally manifested, the user of the public to constitute a dedication must exclude the owner's private rights; otherwise the use by the public will be regarded as permissive only: *Wilson v. Lakeview Land Co.*, 143 Ala. 291, 39 South. 303; and mere permissive use of land as a street does not of itself constitute dedication: *German Bank v. Brose*, 32 Ind. App. 77, 69 N. E. 300. And to same effect is *Cochran v. Purser* (Ala.), 49 South. 353, and *Hartley v. Vermillion* (Cal.), 70 Pac. 273, where the court said: "Dedication is a pure question of fact. The intention of the owner to dedicate is a vital element in every case, and that intention is also a pure question of fact. A mere permissive user by the owner of land for a highway never can amount to a dedication. That is a user by license, and nothing more, and of itself never would ripen into a dedication, no matter how long continued."

The foregoing excerpts taken from the opinions of the courts in widely different sections of the country suffice to show the controlling principles upon which the doctrine of implied dedication rests.

Let us now see how these principles have been applied.

III. Illustrations Showing When Dedication will or will not be Implied.

a. Abandonment to or Acquiescence in Public Use.

1. **In General.**—In *City and County of San Francisco v. Grote*, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127, 41 L. R. A. 335, the city sought to recover in ejectment a strip of land which it claimed had been impliedly dedicated by defendant as a public street. The evidence showed that the strip of land in dispute had been used for eight years by the public generally for travel, and upon this showing the trial court awarded judgment for plaintiff. This was reversed, however, on appeal, for the reason that no manifest intention on the part of defendant to dedicate appeared.

Likewise in *Hartley v. Vermillion* (Cal.), 70 Pac. 273, the uncontradicted evidence was to the effect that the public had used the highway in dispute for fifteen years or more to the knowledge and with the consent of the owner. A conclusion of law drawn by the

lower court that this long user constituted a dedication by implication was not upheld on appeal, for the reason that such use was not necessarily inconsistent with a total absence of intention to dedicate, and might indicate merely a license. This judgment in department, however, was afterward reversed and the judgment of the trial court affirmed by the supreme court sitting in bank (141 Cal. 339, 74 Pac. 987), the court saying: "When, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same, with full knowledge of the land owners interested, without asking or receiving any permission and without objection from anyone, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication." This language was also quoted with approval and a similar decision rendered on practically the same state of facts, by the supreme court of California in the very recent case of *Liverone v. Weakley* (decided March 25, 1909), and reported in 101 Pac. 304. In both of these cases, however, the court seems to have used the words "prescription" and "implied dedication" as synonymous when applied to an easement claimed by user, but it is doubtful if the court so intended; for that an essential difference does exist in the rules of law governing each, based upon the soundest legal principles, has already been shown. It is probable, therefore, that the court merely intended to hold that probative facts which are sufficient to establish prescription are also sufficient to establish an implied dedication, without holding that dedication might not also be implied from facts which would not establish any prescriptive right.

In *Loomis v. Connecticut Ry. & Lighting Co.*, and *Connecticut Ry. & Lighting Co. v. Morganstern*, 78 Conn. 156, 61 Atl. 539, the owners of a triangular piece of ground in the city of Derby, upon which stood a hotel and a building occupied by stores, had opened a passageway over said triangle leading to hotel and stores. This passageway had been used by the public as a public highway for more than twenty years. It also appeared that in 1895, the owners had stated to the street commissioner that the strip in dispute "is open to the public and always will be open." This was said to induce the city to macadamize the passageway. The lower court also found that the strip in dispute had been kept in repair by the city, and from the facts stated concluded that the passageway had been dedicated to public use. On appeal from this decision it was earnestly contended that the public had used the way only under a license from the owners, and that the facts did not prove a dedication of the land to a public use, because the owners had a right to throw open the land for their own use and convenience in the conduct of their business carried on at the hotel and in the stores, and for the use and convenience of their patrons and customers in such business, and because the land so thrown open was in fact so used by the owners, although the public were also allowed to pass over it.

This contention was not sustained, for the reason that the question whether the use of the way by the public had been under a license or as of right was a question of fact, depending on the actual or manifested intention of the owners, and the evidence might properly have been considered by the trial court as inconsistent with the claim that the owners of the land did not intend to throw it open for the use of the public, but only for their own use and that of their customers. The supreme court did say, however, that "The fact that a way which is used by the public is also used as an approach to the place of business of the owner of the land over which it passes, although usually a very important circumstance in determining whether the use by the public is under an implied license, or under a dedication and acceptance of the way as a highway, is not necessarily decisive of that question." And it also said: "The opening of a passageway over one's own land, as a convenient means of access for himself and his customers to his store or hotel, does not amount to a dedication to a public use of the land so thrown open, although such passway may also be used by the public generally. Such use by the public can only properly be held to be under an implied license."

It would seem from these remarks that this was considered a very close case, and that the fact upon which the ruling of the lower court was sustained, was the statement made by the owners to the street commissioner, which has been already set out.

The case of *Healey v. City of Atlanta*, 125 Ga. 736, 54 S. E. 749, was of a quasi-criminal nature. The defendant had been convicted of creating a nuisance by building a fence across a public street in the city, and the validity of the judgment depended entirely upon the question whether the obstructed way was or was not a public street. The title to the disputed land was in the defendant, but it was claimed on the part of the city that he had by implication dedicated it as a public street. The evidence relied on in support of this claim was use of the alleged street by a portion of the public for a period of time less than twenty years. There was no evidence that the alleged public way had ever been worked by the city as a public street, or had ever been curbed or paved. There was evidence, however, that some of the houses along the way had been numbered. The court, after saying that dedication was not complete without an intent to dedicate on the part of the owner and an acceptance on the part of the public, and also that both the intention to dedicate and to accept need not be express, but could be implied, held that the evidence in this case was not sufficient to show either an intention to dedicate or an acceptance on the part of the public, and the judgment of the lower court was therefore reversed.

In *Poole v. City of Lake Forest*, 238 Ill. 305, 87 N. E. 320, the question was whether a strip of land along the shore of Lake Michigan was a public street of the city. One of the reasons urged by the city why dedication of the strip should be implied was that such

strip had never been listed for taxation, and that no taxes had ever been paid thereon, and that this fact proved that it was public property, but the court said: "The law does not demand the forfeiture of title simply because the owner of property does not cause it to be listed for taxation. The utmost that can be claimed by appellant from this circumstance is that the failure of the public authorities and the owner to have the premises listed and taxed is an evidentiary fact tending to prove that the premises were regarded as public property. This fact, while entitled to consideration and due weight, is not conclusive upon the owner."

An excellent illustration of when dedication vel non will be implied from acts of acquiescence by the owner, in the public use, for only a few years, and where no right by prescription was claimed, is afforded by the case of *Campbell v. O'Brien*, 75 Ind. 222. This case presents some peculiar features and is worthy of being noted at some length. The plaintiff brought the action against the township trustees of the city of Valparaiso to recover damages for entering his close and cutting down certain fence posts thereon. The facts were substantially as follows: A railroad company engaged in grading its road in the city of Valparaiso sought permission to cross Third street in said city at a level below the then grade of the street. The city agreed that the railroad company might sink the grade at said street, provided it furnished the ground for a change of the street at a point slightly farther north, where the street could cross the railroad at the surface grade. Plaintiff owned the land required to accomplish this object. The railroad company by its agents agreed with plaintiff to purchase the necessary strip of ground to make the change, and the price was agreed upon, but not paid. Soon thereafter the railroad company removed plaintiff's fence, obstructed the travel at the Third street crossing, and turned over to the city the plaintiff's land so agreed to be purchased. The line of the new street was surveyed by the engineer of the railroad company, plaintiff being present and assisting in the survey. The change in the course of the street necessitated the construction of a new bridge to conform to it over the line of another railroad. Plaintiff never received payment for his land as agreed by the railroad company, but it did not appear that this fact was known to the city authorities until several months after the street was changed and the new bridge erected and the old street so destroyed by the railroad as to render it impracticable to resume its use as a highway. Plaintiff then gave notice to the town trustee of his intention to inclose his land over which the public passed, and thereafter planted a fence post across the same, which was removed by defendant, and this was the trespass complained of. Judgment went for defendant in the lower court, which was affirmed on appeal by the majority. It was urged in behalf of appellant that the public had no right to assume a dedication of premises in controversy, because it was known to the proper public officers that he did not intend to make a dedica-

tion, but that he agreed to sell it to the railroad company, and that, as vendor, he had a right to resume possession in case the purchase money was not paid. Said the court: "When the plaintiff agreed to sell the strip of ground in controversy to the railroad company, he knew that the purpose and object of the purchase was to appropriate it as a highway, and he knew of the immediate obstruction of the old road, the change of the course of travel occasioned thereby, and of the subsequent erection of the new bridge, as a consequence of such change. The only question in the case is, Did the acts and acquiescence of the plaintiff amount to a dedication of the locus in quo to the public, for use as a highway? That there was such dedication we entertain no doubt. True, the owner did not directly dedicate, but he stood by and permitted the railroad company to do so, and this was equivalent to a dedication by himself. He expected to be paid by the railroad company for the land, but the failure of the latter to compensate him could not change the rights of the public, which had been previously granted with his knowledge and consent, and which could not be resumed by him without serious public inconvenience and loss."

Though in the language quoted the majority express "no doubt" but that there was a dedication, Justice Woods filed a very able dissenting opinion, which seems in close accord with the general rules of law governing implied dedication, and is worthy of note. He first emphasizes the fact that the plaintiff did not intend to dedicate, nor give the railroad company an agency to do so for him. That plaintiff's failure to object to the removal of his fences and the use of the land by the public was because he expected his oral contract of sale to the railroad company to be consummated, and further, that the oral contract of sale between plaintiff and the railroad company was never so far executed as to take it out of the statute of frauds, and therefore the railroad company never acquired the power in its own right to make a dedication. "Campbell [plaintiff] and the public both acted on the faith they had in the conduct of the railroad company. The railroad company did not keep faith with either; but does it follow that Campbell alone should suffer? On the contrary, having retained his title, he was in the stronger position, and his right should prevail."

In *Town of Marion v. Skillman*, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55, plaintiff owned land within the corporate limits of the city, upon which was situated a valuable hotel building. No part of this land had ever been platted as an addition to the town, nor had any part of it ever been condemned or formally dedicated as a street or part of the town; though it lay between two other tracts which had been formally platted into lots, streets and alleys. An extension of one of the streets in these two platted additions would pass over and cross plaintiff's land. Plaintiff had permitted the public to use his land as an extension of said street for more than twenty years prior to the commencement of this suit, and said user

by the public began before the hotel building was erected. The hotel building when erected extended over a part of the strip necessary for an extension of the street an even width. The evidence did not disclose when the hotel building was erected, other than that it was after the public began using the strip as an extension of the street. It was held that as to that portion of the strip not covered by the hotel there was a dedication thereof to the public, but as it was not shown that the hotel building was not erected within a very short time after the public user began, it could not be presumed that the public had acquired any interest in that part of the land covered by the hotel building.

In *Sioux City v. Chicago & N. W. Ry. Co.*, 129 Iowa, 694, 113 Am. St. Rep. 501, 106 N. W. 183, it was held that the occasional use of a river front by the public for the landing of boats with the consent of a railroad, which uses land along the river front for depot purposes, there being no intent on the part of the railroad to dedicate any portion of the land to a public use inconsistent with the railroad company's own use thereof, does not divest the railroad company of its title to the land, although it was conveyed to it solely for depot grounds or railroad purposes.

In *Davis v. Town of Bonaparte*, 137 Iowa, 196, 114 N. W. 896, plaintiff sought to recover damages from the city for injuries resulting from his falling into a cellar through an open doorway while passing along what he claimed was a public street. The cellar was underneath a hotel building, but extended some ten feet beyond the side wall of the building and into the alleged street. The hotel building had been constructed for fifty years and the cellar then extended out into the alleged street just as it did at the time of the accident. The strip in dispute extended from a public street to the river. No express dedication appeared. The evidence showed that prior to 1861 there was a ferry at the foot of the alleged street, but it was abandoned in that year, and in 1872 a bridge was constructed across the river at another point. After the ferry was abandoned the strip claimed by plaintiff to be a street was used by persons who wished to go to the river for sand, to swell wagon wheels, or to drag material from the river. Near the back of the hotel building, the owner had constructed a coal-house, which extended farther out into the so-called street than did the cellarway. Cinders were thrown along the side of the building from the front past the cellarway to the coal-shed, and there were also some flat stones upon which people might step. Wood was corded on the other side of the so-called street out upon a line with the coal-shed. Originally there was also a barn on the same side of the street as the hotel and belonging to it, and the hotel people went along the open space to get to the barn. The owners of the property on both sides of the alleged way built barns or outhouses at the rear of their lots close to the river, and one of these barns extended out into the so-called street some twenty feet. People desiring to use any of these im-

provements drove over this open space. In 1884 a road supervisor put in a culvert or sewer running lengthwise of the strip in dispute to carry the water from the intersecting street down to the river. This sewer passed just beyond the outer edge of the cellar-way, and from the time of the construction thereof there was no wagon track between the hotel building and the sewer. Occasional use, however, was made of the sewer by foot-passengers who went to the river bank to play cards and for other private purposes. The only sidewalk was that made by the cinders and the rocks heretofore mentioned, and all travel by wagon went down the middle of the strip in dispute. No work was ever done on the open space by the town or anyone else except as above indicated. This evidence was held not sufficient to show an implied dedication, though the court was of opinion that the evidence was perhaps sufficient to show an acceptance of that part of the strip actually used, had there been a dedication. In *Magruder v. Potter*, 25 Ky. Law Rep. 1336, 77 S. W. 919, it was held that a dedication by the owner and acceptance by the proper authorities will be presumed where a passway has been used by the public continuously for more than fifteen years.

In *Neal v. Hopkins*, 87 Md. 19, 39 Atl. 322, the owner of a lot, desiring to have a public street widened, moved his fence back, established a gutter and sidewalk on his land in front of his lot. This he did with the expectation that the town authorities would acquire land from other lot owners and widen the street. The city refused to buy the necessary land from other owners along the street, and later defendant moved his fence back to its original position. It was held that though defendant moved his fence and established the sidewalk with intent to widen the street still there having been at that time no dedication of the street at that point, but only up to one side of the lot and there being a fence across the street on the other side of the lot, such intent must be referred to a widening he intended to make in the future, when he should dedicate the street. It was further held in this case, however, that while the moving back of a fence from a highway is not of itself a dedication, it is evidence tending, in connection with other facts, to prove it.

In *Canton Co. of Baltimore v. Mayor etc.*, 104 Md. 582, 65 Atl. 324, the question of implied dedication was raised by an application to enjoin the city from removing a fence which the complainant in assertion of its ownership of the land in dispute had erected thereon to prevent the public use. The complainant (a corporation) alleged in substance that it was the owner of a tract of land in the city of Baltimore, lying between a public street known as "Alice Anna street" on the north and the Patapsco river on the south, and of all water rights and privileges appurtenant thereto; that for the more convenient use of said land it had laid out and opened over said property a way of even width running from the south side of Alice Anna street and at right angles thereto, through

and over said land to the river, said way forming a continuation through complainant's land of a highway known as Chester street, which ran into and intersected Alice Anna street on the north; that said way was laid out wholly through the land of complainant, "and solely for its own convenience," and used, "and was graded, paved and curbed" by it, and has always been "repaired and maintained at its own cost and expense." The city answered the bill by averring that the strip in dispute had been used by the public as a highway for more than twenty years, and this allegation was supported by the evidence. To show that this use was merely permissive, however, there was evidence in behalf of complainant that since the way in dispute was opened it had been at one time practically obstructed by tenants of complainant, but it appeared that this was more than twenty years before the filing of this suit. It did appear, however, that one of the tenants of complainant had erected a ferry-house in the bed of the way, and there was also testimony that complainant had collected wharfage for the use of a wharf or landing at the foot of the street in dispute, but this was not very clear, and it was shown that when the demand for wharfage was refused complainant did not press its claim therefor.

The allegation in the bill that complainant had graded, paved and repaired the way in question was sustained by the evidence, but it also appeared that it had also appropriated money to repair other public streets in that locality. It was held that the way in dispute had been established as a public street by user. In arriving at its decision the court said: "Just when the street in controversy came into existence as a continuation of Chester street across and to the south of Alice Anna street does not appear. But, whenever it did, it took the exact width of this previously dedicated street, and from the time of its formation seems to have been known as 'Chester street'—no distinction having been made, as respects the name, between that and the already existing Chester street to the north of Alice Anna street. . . . The evidence shows that this continuation of the previously existing street was of much convenience and utility to the public in getting to and from the harbor of Baltimore for various purposes of business. . . . The public, therefore, would naturally be inclined to avail of opportunity afforded to adopt the street in question as a highway for public use; and the same reason would induce the appellee to accept it as such. The considerations mentioned may be lacking in any considerable probative force toward establishing prescriptive title, but they, at least, may tend to give color to the character of use to which the street was subjected by members of the public. Their tendency may well have been to induce a general understanding that the street was designed for public use, and this may be supposed to give character to the claim with which its use was availed of, with the effect to require a more distinct and palpable denial of the public right than would be requisite in other circumstances, to guard against the consequence

of the user." Though the issues tendered by the pleadings in this case were those of dedication, the decision would seem to be founded on the theory that the public right had been acquired by prescription, for the court, in its discussion of the evidence in behalf of complainant tending to show that the use was by license, quoted as applicable to this case the rule laid down in *Cox v. Forrest*, 60 Md. 74: "The use of a way over the lands of another whenever one sees fit, and without asking leave, is an adverse use, and the burden is upon the owner of the land to show that the use of the way was by license or contract inconsistent with a claim of right."

There seems to have heretofore existed some doubt in the minds of the courts of Missouri as to what acts of abandonment to, and acquiescence in, public use by the owner were sufficient to establish an implied dedication; but an excellent illustration of the view entertained by the supreme court of that state in its latest decision on the subject is presented in the principal case—*Benton v. City of St. Louis*, 217 Mo. 687, ante, p. 561, 118 S. W. 418.

In *Cassidy v. Sullivan*, 75 Neb. 847, 106 N. W. 1027, the strip in dispute had been used, more or less, for twenty years by the public as a roadway, but it had never been opened as a public road by the county authorities. The way in dispute followed a section line, and the owners of the land on either side of the line had placed fences and planted trees on their respective sides of the line, leaving a space sixty-six feet wide for public travel. It appeared that about a year before the trial, one of the owners had placed a fence across the alleged road but had removed it when directed to do so by the county attorney. There was also evidence to the effect that some years before a fence had been maintained across the space in dispute, and travel over it had been interrupted for a considerable period. The evidence, however, on this point was conflicting, and the supreme court refused to reverse a judgment of implied dedication, saying: "Taken in its entirety, the evidence satisfies us that the owner of the land more than fifteen years ago dedicated that portion now claimed as a public road to the public, and the public at once accepted the grant, and, practically speaking, have been in the uninterrupted enjoyment thereof ever since. It is true, there is no evidence that the public authorities ever authorized any work on the road, or did any act indicating an acceptance of the grant. But a dedication, in order to become binding upon the dedicator or his privies in estate, need not be accepted by the public authorities, but may be accepted by the general public. The general public accepts, as in this instance, by entering upon the land and enjoying the privilege offered—in other words, by user."

Likewise in *Eldridge v. Collins*, 75 Neb. 65, 105 N. W. 1085, the owners of land on either side of a road, alleged to be a public highway from long user by the public, contended that such use was by license, because the owners had for a period of three or four years maintained wire gates across the alleged road to connect fences on

either side. But it was held that this action of the owners did not amount to an assertion of any right inconsistent with the easement of the public, "because the public used the road notwithstanding such obstructions, and submitted to the inconvenience, not in recognition of any right inconsistent with the free use of the road as a highway, but as an act of grace, and out of regard for the necessities of the land owners during that period."

But in *Morris & E. R. Co. v. Jersey City*, 63 N. J. Eq. 45, 51 Atl. 387, it was held that, where a city extended a sewer through land subsequently claimed as a street, and made an assessment for such extension on the basis of building lots laid out on the land on each side of the strip through which the sewer ran, payment of the assessment by the owner of the land was not evidence that he knew or approved of the basis of the assessment, so as to constitute such payment an act of dedication of the land traversed by the sewer. The strip in controversy in this case was in direct line with the extension of a public street in Jersey City, known as Thirteenth street, and was supposed by many to be Thirteenth street, and was so called. It had been constructed by the owners of a dock in a tide-water river between the cities of Hoboken and Jersey City, connecting their dock with their warehouse, and also with the water terminus of a public street in Jersey City. But this street or causeway did not extend across the river so as to connect with any street in Hoboken, and no ferry had ever been established from the end of the causeway to the city of Hoboken, nor was the alleged way ever worked by the city as a street or opened to the general public, though a portion of the public used it as a street. It was further held that the above facts were not sufficient to constitute dedication so as to give the city the right to treat the causeway as an extension of Thirteenth street (affirmed 71 Atl. 1135, three of the judges dissenting).

Where a city lays out a street on the land of a private owner, there is no implication of a covenant against the owner to give the land to the public without compensation: *Fitzell v. City of Philadelphia*, 211 Pa. 1, 60 Atl. 323.

But a petition by abutting property owners for the establishment of a highway within the city, and agreeing to donate sufficient land for this purpose, is sufficient to establish complete dedication when the petition was acceded to by the council and an ordinance passed fixing the course of the desired street: *Grace v. Walker*, 95 Tex. 39, 64 S. W. 930 (affirmed on rehearing, 95 Tex. 39, 65 S. W. 482).

The principle that dedication may be implied for long user by the public of the land claimed to have been dedicated has appeared from the illustration already given, and was also recognized in *Hill v. Hoffman* (Tenn. Ch. App.), 58 S. W. 929, *Harris v. Commonwealth*, 20 Gratt. (Va.) 833, and in *Buntin v. City of Granville*, 93 Va. 200, 24 S. E. 830.

It is also apparent from the cases heretofore cited that when the intent is once established, no length of user is essential to an irrevoc-

cable dedication. The difficulty arising in those cases where long user alone is relied upon to show the requisite intent to make the dedication complete is, whether the user has been such as is inconsistent with the claim of the owner that it has been only permissive—i. e., a license; and this, as we have seen, is a question of fact, to be ascertained from the circumstances of each case. Thus in *Harris v. Commonwealth*, 20 Gratt. 833, the supreme court of Virginia, after stating that long-continued use by the public, with the consent of the owner, would justify the presumption of dedication to the public, provided the use has continued so long that private rights and public convenience might be materially affected by an interruption of the enjoyment, further said: "Where no public or private interests have been acquired upon the faith of the supposed dedication, the mere user by the public, of the supposed street or alley, although long continued, should be regarded as a mere license, revocable at the pleasure of the owner; unless, indeed, there be evidence of an express dedication; or unless, in connection with such long-continued user, the way has been, by the proper town authority, recognized as a street, so as to give notice that a claim to it as an easement has been asserted."

The application of this principle was here made in a criminal prosecution against the defendant for obstructing an alleged public street in the city of Norfolk. The evidence was conflicting as to how long prior to 1862 the land in controversy was unoccupied and uninclosed. Evidence in behalf of the state showed that it was vacant land in 1824 and was then used by the public as a public way; and that in 1849 the city had designated it as a public street by causing a name to it to be placed on the houses adjoining said passageway on either side thereof, and that it had ever since been considered by the public as one of the public streets of the city. Evidence for the defendant showed that the space was inclosed in 1830, and had been continuously under inclosure from 1840 to 1862, and he had always paid taxes on said strip. That in the latter year defendant left the city. It did not appear when he returned, but the obstructions complained of were made in 1870. It was held that the absence of the defendant in 1862, the existence of war, and the unsettled condition of the country since then up to the date of the trial were circumstances "sufficient of themselves to explain the reason of the failure to inclose the lot since that year, without resorting to the violent and unjustifiable presumption that the defendant thereby intended to dedicate it to the city of Norfolk." A judgment of conviction was accordingly reversed.

The case of *International & G. N. R. Co. v. Cuneo* (Tex. Civ. App.), 10 S. W. 714, is another illustration of the principle that mere user by the public for a long time does not, under all circumstances, amount to dedication. In this case the railway company obtained from the city of Austin the right to use Third street for its tracks, and in 1876 purchased lot 12 in block 29. Block 29 was

bounded on the north by Fourth street, on the south by Third street, on the east by Congress avenue and on the west by Colorado street. The block was divided north and south by an alley, which for years had been used for public travel. Lot 12 purchased by the railroad company was situated on the southwest corner of the block, and fronted on Colorado street, and extended east parallel with Third street to the alley. On the north, and immediately joining lot 12 and fronting on Colorado street, the railroad, plaintiff, owned another lot which also fronted on Colorado street, and extended east to the alley. On the east part of this lot when plaintiff purchased it there were buildings with openings on lot No. 12, and in 1884 plaintiff erected a store building on the front part of his lot. There were gates which afforded an entrance from plaintiff's lot to lot No. 12, and plaintiff had for years loaded and unloaded goods from and into his premises from lot 12. During the time which it was contended should be considered sufficient to establish dedication, the railway company had in use on Third street between Congress avenue and Colorado street about four tracks, one of which, located on the south side of lot 12, extended across the south end of the alley. In 1888 the railway company built a depot on its lot 12 and placed posts with chains extending from each, along the north side of Third street, and thereby closed up the south entrance to the alley in block 29 from Third street. The evidence was uncertain as to how long the alley was thus closed by the action of the railroad company, but by reason of the closing, use and travel was diverted from the alley across lot 12 to Colorado street, which was continuous up to the commencement of this suit. The spur track of the railroad company along the south side of lot 12 and across the alley was used by it during this time upon which to place and store its cars, and at some times the south end of the alley was blocked by cars stored on this track, for the purpose of being loaded and unloaded. Lot 12 was vacant and uninclosed and the railroad company had used it in driving its teams upon so as to reach the cars on the spur track. The railroad company had paid taxes on lot 12, but knew of the existence of the public use over it. It was contended that by fencing the end of the public alley dividing block 29, and blocking the same up by cars, coupled with the long-continued and uninterrupted use by the public of a way over lot 12 with knowledge of the railroad company, was sufficient to constitute dedication; but this contention was not sustained. Said the court: "The evidence is not sufficient to establish an intent to dedicate—that primary and absolutely essential element that must exist in order to create the donation. It is true that affirmative and direct evidence of this fact is not necessary—it may be shown by the conduct and acts and the circumstances from which it is claimed the donation springs. The intent to dedicate need not exist immediately at the time that the public asserts a use; and long-continued use, in connection with other facts, may in cases be considered sufficient to

establish the intent to donate, although there has been no express declaration to that effect by the donor. But the mere use by the public of uninclosed lands, or an uninclosed lot in a city, without objection by the owner, is not of itself sufficient evidence of an intention to donate; and, in order to give effect to long and continued use as some evidence to establish a donation, there must, in addition, be shown some act and conduct of the owner which unequivocally and with some degree of certainty tends to indicate that such was his intention. Lot No. 12 was vacant and uninclosed when the appellant purchased it, and continued in that condition during the time involved in this controversy and during the time it was in use by the public; and when we eliminate the mere use by the public, with the fact of knowledge upon the part of the railway company, there is left in the evidence very little that can be given any probative force intending to show a purpose, any time during that period, on the part of the railway company to donate any part of lot 12 to the use of the public." As to the other facts which it was claimed should be considered sufficient to establish implied dedication, the court was of opinion that they were not inconsistent with the railway company's claim of ownership. The plaintiff in this case relied upon the two issues of dedication and prescription, and the supreme court being of opinion that the finding was a general one in favor of plaintiff, reversed the judgment, but on a rehearing they decided the finding was not a general one, but was intended to be for the plaintiff on both issues; and as it was of the opinion that the issue of prescription had been shown by the evidence, its former ruling was reversed and the judgment of the lower court enjoining the railway company from closing the passageway in dispute was affirmed, but the court expressly said that it adhered to the views expressed in its first opinion on the subject of dedication.

In *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 44 S. E. 155, it was held that, where a railroad company occupies a street, which is a public highway in an unincorporated village, and acquires a lot with an intent to open through it a way in place of the street so occupied by it, but does nothing more than to tear down the fence and allow its use by the public, it does not amount to an irrevocable dedication, as the company might change its intent to dedicate, and such use might be attributed to a mere license, rather than an intent to dedicate.

In *Spencer v. Town of Arlington*, 49 Wash. 121, 94 Pac. 904, plaintiff sought to recover damages from the town for injuries he sustained by falling into an unguarded hole which he claimed was in a public street, but which was denied by the defendant town. The evidence showed that officers of the town had hauled, placed, and leveled dirt at and about the place in dispute for use for highway purposes, and had placed oil upon the same for said purpose, knowing that it had been and was then being used, and would thereafter be used, as a public highway. It was thereafter so used for

twelve or fifteen years. It also appeared that a cross-walk was built across the alleged street near the hole, which had been constructed under the immediate direction of the street commissioner of the town and paid for by the town.

This was held to be sufficient evidence to sustain a verdict that the disputed territory was a public street, but a judgment in favor of the plaintiff was reversed because of prejudicial remarks by the trial judge.

2. Knowledge and Consent of Owner and Nature of Use in General.—In *Niles v. City of Los Angeles*, 125 Cal. 512, 58 Pac. 190, one of two owners of adjacent land sought to restrain the city from working a strip of land as a public street. The lower court found that the plaintiff and the owner of the adjacent land had agreed with each other to fence off a portion of their respective properties for a passageway, and did fence off a strip of thirty feet in width from the land of each, so as to constitute a continuation of a regularly opened street; that for about twelve years prior to the commencement of this action the strip in controversy had been open to public travel and had been continuously used as a public way without protest from the plaintiff, and had been known as and called by the name of the street of which it was a direct continuation. That subsequent to the building of the fences the owners had caused a survey of their respective properties to be made and a map thereof recorded, in which their properties were shown to be subdivided into lots and blocks up to the line of said fences. It was held that the probative facts found were not sufficient to support a conclusion that the strip had been dedicated or abandoned to public use. "It was not found," said the supreme court, "that the public, during the times that it has traveled over the said land, claimed any right to so travel over it, or that appellants even knew of such travel. There is no finding that the public authorities of the city ever claimed the said land as a public street, or that they ever expended any money in improving or grading the same." Referring to the finding as to the map, the court said that was of little consequence, as it was not claimed that the strip was shown on the map as a street, or that the map even included it.

In *Mitchell v. City of Denver*, 33 Colo. 37, 78 Pac. 686, the controversy was over a strip of land which the owners had expressly reserved for their private use, when they platted a larger tract of which such strip formed a part. Some six or seven years prior to this action the city, or some of its constituent municipal corporations, graded the strip, put up sign-posts at the intersection of the adjoining streets, and placed thereon the names of such streets. These facts were held not sufficient to show acquiescence by the owners of the strip to establish a common-law dedication thereof.

It was further held that the fact that subsequent owners of blocks in the tract of which the strip formed a part treated the strip as public property, which was not known to or acquiesced in by the owners of the strip, did not vest any rights in the public therein.

In *State v. Reybold*, 5 Harr. (Del.) 484, it was held that public use of a navigable river front for a landing, the same being private property for twenty years, is not evidence of a dedication to public use unless the same be connected with a public road or street extending to the river.

But when a railroad purchased a strip of land twenty-five feet in width, adjoining which the city subsequently laid out another tract of the same width, and the track of the railroad company was removed from where it was originally located, and replaced at the request of the city, and the two strips were used and occupied as a street, a finding that such strip was one of the public streets of the city was authorized, having been dedicated by the railroad; and it was immaterial that the railroad understood when the street was first opened that it was to be used merely as a public drive, since it afterward consented by its acts to the public use: *Atlanta Ry. & Power Co. v. Atlanta Rapid Transit Co.*, 113 Ga. 481, 39 S. E. 12.

And when an owner, who made a common-law dedication of land for a public square, afterward planted trees thereon, and to some extent used it as a pasture, it was not an open, notorious, and exclusive resumption of possession adverse to the public, when he also maintained turnstiles, so as to leave the square open to free use: *Marsh v. Village of Fairbury*, 163 Ill. 401, 45 N. E. 236.

But a land owner cannot be charged with acquiescence in the appropriation of a strip of land for highway purposes, in the absence of notice, actual or constructive, that the public is using the same under claim of right: *Town of Bethel v. Pruett*, 215 Ill. 162, 74 N. E. 111.

In *Pittsburgh C. C. & St. L. Ry. Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. 741, plaintiff sought to enjoin the city from paving a strip which it claimed was its private property. It appeared that the strip had been used by the public continuously for thirty years, and that it had during that time been worked and improved by the public authorities of the town in the same manner as other public streets therein. Residences had been erected with reference to it, and a livery barn had for years been maintained near it, with its only entrance from this way, all without objection from the plaintiff. It was held that these facts raised a presumption of dedication to the public use. It was urged by the plaintiff in this case that the facts tended to establish prescription, not dedication, and that a highway cannot be established by prescription in an incorporated town or city.

In answer to this the court said that while, strictly speaking, the doctrine of prescription did not apply to the acquirement of highways because it had as its foundation the presumption of a grant from the adverse user, and that the application of the doctrine to streets and highways, independently of statute, was doubtful because those whose use was set up as constituting the right could not occupy the position as grantee, still it was held that user, in the

case of a street or highway, which, as between individuals, would constitute an easement by prescription, is evidence of a dedication. This holding explains the apparent failure we have noticed in some of the cases reviewed to draw the distinction between dedication and prescription where only the issue of dedication was made and was upheld in the absence of positive proof of intent to dedicate on the part of the owner; and shows that these cases were based on the theory that evidence sufficient to show prescriptive right was also sufficient to establish dedication by consent. It was also still further held in this case that the plaintiff's participation in the use of the highway in a manner not inconsistent with the public use would not defeat a presumption of dedication, nor was this presumption overcome by the fact that during a part of the user by the public the plaintiff was out of possession, and the property was held by a tenant under a long lease from it.

In *Dodge v. Hart*, 113 Iowa, 685, 83 N. W. 1063, the public for thirty years had, with defendant's knowledge, openly and continuously used a strip back of his building as an alley, and defendant on notice from the city cleaned the alleyway, and allowed the city to pay for paving the street opposite its intersection; and it was held that he was estopped from claiming that he had no intention of dedicating the strip as a public alley. In answer to defendant's contention that under section 3004, Code of 1897, providing that no easement can be created by adverse user without express notice of the adverse claim, distinct and independent of such use, no dedication could be found, the court further held that said statute relates only to titles by prescription and not to those by dedication.

In *Larkin v. Ryan*, 25 Ky. Law Rep. 613, 76 S. W. 168, there was a spring of water located in a small town which was never known to go dry. For seventy-five years the inhabitants of the town had used this spring and a passageway leading to it. Several times during this period a gate had been placed across the passageway for the convenience of the owners of the land adjoining it, but with the understanding that at all times persons were to be allowed to pass through it without let or hindrance, and in dry seasons the gate was always thrown open for the benefit of the public. It also appeared that the walls of the spring had been kept in repair and the spring had been cleaned by the public during all of this time. It was held that these facts were sufficient to show a dedication of the passageway to public use.

In *Terrell v. Hart*, 28 Ky. Law Rep. 901, 90 S. W. 953, defendant was the owner of an unimproved lot in the city of Paducah, and together with the owners of adjacent land signed and sent to the mayor and council of the city a communication requesting that a street be graded and graveled through the petitioner's lands. The council acceded to the petition, passed an ordinance for grading and graveeling the street, and had the work done under contract with plaintiff in conformity with the ordinance. This action arose over

defendant's refusal to pay his pro rata portion of the assessment for the cost of constructing the street, his ground of refusal being that "the street as graded and graveled is not, and never has been, a public street or highway or road, or dedicated as such, and is not owned, or never has been owned, or in the control, as a public street, of the city of Paducah, but that the alleged street was "through and over a mere open common, and the defendant city of Paducah had no jurisdiction over same, or to contract for the grading or graveled of same, or make the cost of grading and graveled, or any part of the same, a charge against this defendant or his land." It appeared that defendant appeared before the council at or about the time of the final passage of the ordinance for the construction of the alleged street, and went into the city clerk's office, but not in the presence of the council, and erased his name from the petition asking that the street be opened. The nature of his objections to the council at the time he appeared before them did not appear, but about that time he sent a communication to the council urging that action on the petition be postponed on account of financial depression, but it was not shown that he then withdrew or attempted to withdraw his offer of dedication of the strip of ground in controversy to public use. It was held that the strip had been dedicated, and a judgment in favor of the defendant was reversed.

So, also, in *Jackson v. McHargue* (Ky.), 106 S. W. 871, it was held that, where the owner of a strip of land contracted for the laying of a sidewalk over the same, under a city ordinance requiring the laying of a sidewalk, it amounted to a dedication of the strip.

Likewise in *Lonaconing, M. & F. Ry. Co. v. Consolidated Coal Co.*, 95 Md. 630, 53 Atl. 420, the owner of land, through which a highway ran on a curve, laid out a cut-off, in 1892, to serve as a substitute for the curved portion, and then closed up the curve and included it in land which he leased to a third party. In the lease the highway was referred to as a landmark. Afterward the public constantly used the cut-off with the knowledge of the owner and without his objection. It was held that the cut-off was dedicated to public use.

But in *Baker v. Squier*, 77 Mo. App. 329, it was held that the fact that when a county building was constructed, the four feet of the lot nearest the street were not built on, but were paved as other parts of the sidewalk, was not of itself evidentiary of a common-law dedication, and this decision was affirmed by the supreme court in 143 Mo. 92, 44 S. W. 792.

In *Postal v. Martin*, 4 Neb. (Unof.) 534, 95 N. W. 8, in 1872 the county commissioners had laid out and caused to be surveyed a road through certain uncultivated and uninclosed land. This action of the commissioners was had without notice to the owner, either actual or constructive, and was irregular and void, but ever since that time the strip as surveyed and staked had been traveled

by the public, and the public had constructed a culvert across one ravine along said survey, which had been carried away by the water some eight years afterward, and this culvert had not been rebuilt. Another ravine across said survey was filled with logs and dirt by the public, but this also was carried away by the water some three years thereafter and was never repaired; but thereafter the public travel diverged a short distance from the line of survey near the points where it was crossed by the ravines. Plaintiff purchased the land over which the alleged highway crossed in 1885 and the next year inclosed the strip in controversy with a fence, and brought this action to enjoin the court authorities from removing the fences. A judgment of the lower court that the strip had never been dedicated to public use and granting the injunction was affirmed.

In *Sherman Lime Co. v. Village of Glen Falls*, 42 Misc. Rep. 440, 87 N. Y. Supp. 95, it was held by the supreme court of New York that where the owners of land containing a ledge in which there was a natural fissure running underground to a river for ten years allowed the village to construct an outlet for a sewer system over their lands to the fissure, and erect a brick building to make the proper connections, they had dedicated to that extent their lands to the public use; but this decision was reversed by the appellate decision (101 App. Div. 269, 91 N. Y. Supp. 994), upon the ground that in the absence of any evidence to show an agreement between the parties as to the terms upon which the sink-hole was to be taken, the user by the village could properly be ascribed to a license.

In *Town of Johnson City v. Wolfe*, 103 Tenn. 277, 52 S. W. 991, the city was sued for damages for removing a fence and destroying shrubbery which plaintiff claimed was on her lot but which the city claimed had been by implication dedicated to the public as a street. Plaintiff (a married woman) owned the lot of which the strip in controversy formed a part. The lot faced on one of the public streets of the city. Several years before the injury complained of many lot owners on the street made an effort to have the street widened by a donation of a strip on each side; and all the owners on the side of the street on which plaintiff's lot lay agreed to this except plaintiff. The refusal of plaintiff defeated the plan. About eight years before this action was begun plaintiff's husband moved back the fence which stood along the front of plaintiff's lot. At that time the fence was only an ordinary wooden fence, but he afterward erected an iron fence of a valuable and permanent character. When this was done other lot owners on the street aligned on the iron fence thus erected by plaintiff's husband, and the municipal authorities, assuming that it was the intention of the owners to dedicate this strip to the public, graded it up to the line of the fence and made gutters and treated it as a part of the street, and for eight years the public, without interruption, had used the strip as a part of the street, when plaintiff moved the fence on her lot back to its original location. Plaintiff contended that the fence was moved back

from its original location by her husband without her consent. The evidence showed, however, that she knew the public had used the strip in controversy for eight years without objection on her part, and that she knew of the work that had been done on the strip by the city authorities. It was held that dedication was implied, and a judgment in favor of plaintiff was reversed. The court, after announcing the rule that an intention to dedicate would be implied from the visible manifest acts and conduct of the owner and not from any secret intent, referring to the fact the owner in this case was a married woman, said: "While it is true that in the case of a married woman a stronger case must be made out than if she was discovered, to induce the court to apply the rule of implied dedication to her, yet where a case is made in favor of the public, the doctrine of estoppel in pais may be invoked against her. In such a case she is held bound because it would be a fraud upon the rights of others to permit her to gainsay what she had done, and deprive others of rights they have acquired upon the faith of what her acts and declarations implied."

Also, that the mere placing of obstructions across a way used by the public will not, under all circumstances, disprove an intention to dedicate, is shown by the case of *Burkitt v. Battle* (Tenn. Ch. App.), 59 S. W. 429. Here, the road in controversy had been used by the public as a matter of right for seventy-five years, without objection, after the original owner had established a mill, shop, and cotton-gin on his land for the public. Other public institutions were located along the road, fences were built up to it, and it was frequently worked by those who used it, though it was never laid out as a public road or recognized by the public authorities. The travel over it was unimpeded except by three gates, one of which was maintained by defendant. The gates had been erected by the adjoining owners, who claimed under the original owner, after the road had been used by the public for more than thirty years, and no other obstructions were placed across it, until defendant built the fence complained of. There was nothing to show that the gates were placed across the road as a denial of the rights of the public, or as indicating a permissive use. It was held sufficient evidence of dedication.

Likewise in *Heard v. Connor* (Tex. Civ. App.), 84 S. W. 605, it was held that, when the people of a town recognized a street as such, and it was so designated on a plat of the town in general use, and the timber on the street had been cut out and used for school purposes, there was sufficient evidence to justify a finding that it had been dedicated as a public street, though defendant and those under whom he claimed had long had a portion of it inclosed.

In *Schettler v. Lynch*, 23 Utah, 305, 64 Pac. 955, the question was whether a twelve-foot strip which defendant claimed as part of his lot was a portion of a public street in Salt Lake City which ran along that side of defendant's premises. It appeared that about eighteen years ago the then owner of the lot, including the strip in

controversy, built a board fence leaving that strip in the street, and that an adjoining lot owner on the same side of the street aligned his fence with the one so built by defendant's predecessor in title. Portions of these fences were still standing. The former owner of defendant's lot had also placed or allowed to be placed on his house a sign bearing the name of the street. The street, independent of the strip in controversy, had been used for a long number of years, but owing to an irrigation ditch on the outer edge of the strip, the strip itself had not been used much, except as a means of turning teams in the street and for hitching horses. About twenty houses had been built along this portion of the street. The court was of opinion that as the former owner lived in the vicinity he must be presumed to have known that the people were acquiring rights with reference to the street of which the land in dispute formed a part, and it was therefore held that the strip had been dedicated to the public as a part of the street.

In *Thurston County v. Walker*, 27 Wash. 500, 67 Pac. 1099, it was said that a dedication is complete if the owner's acts "are such as would fairly and reasonably lead an ordinarily prudent man to infer intent to dedicate, and they are so received and acted upon by the public." Hence it was held that a dedication of a public road is shown where defendant marked out a line for a road across his premises, stating, if the road officer wanted to open it, he could, and subsequently put it in shape in connection with such officer, and it was thereafter kept in shape at public expense till defendant put fences across it, which he removed, substituting gates in their place, under agreement with the county commissioners that in consideration of the abandonment of a certain other route for a road he granted the right of way for the road in question, claimed to have been dedicated to the county, and he would immediately substitute gates for the fences, and remove the gates at a certain time.

In *Williams v. City of Hudson*, 130 Wis. 297, 110 N. W. 239, the defendant city in grading one of its streets raised the grade on that part of the street on which plaintiff's lot abutted from one to seven feet above the level of her lot. No retaining wall was built by the city to prevent the earth of the raised street from falling into plaintiff's lot, but plaintiff consented when the work was being done that the city place sufficient earth on the margin of her lot to form a support for the earth of the street so raised or graded. Four years thereafter plaintiff demanded that the city remove the earth so deposited on her lot for a collateral support of the street so graded, and, upon the city's refusal, brought this action to recover damages for injury to her use of the property consequent from leaving the filling on her lot. Judgment in favor of the city was affirmed, for the reason that the act of the plaintiff in consenting to the filling on her lot, and the city's acceptance of the privilege, constituted a gift of the use of her lot to the public. The court said: "It is in nature and effect a dedication of her property for a proper public purpose, namely, the maintenance of the street."

3. Time Requisite.—It has been said that, in every case of an implied dedication it must appear that the property has been in the exclusive control of the public for a period long enough to raise the presumption of a gift: *Georgia R. R. & Banking Co. v. City of Atlanta*, 118 Ga. 486, 45 S. E. 256; *Healey v. City of Atlanta*, 125 Ga. 736, 54 S. E. 749. And this is doubtless the general rule, but we have already seen that intent is the vital principle of dedication, and that when this intent is once shown by acts in pais, lapse of time is not important. Just what length of time, therefore, the property must have been in the exclusive use of the public, in order to raise the presumption of a gift, depends, as we have seen, upon the acts and conduct of the owner and the circumstances of each particular case. It has been held, however, that, where user alone, disconnected with any act of the owner showing an intent to dedicate, is relied on to establish dedication of a way to the public, it must continue the length of time necessary to create title by prescription: *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004; and to same effect is *Montana Ore-Purchasing Co. v. Butte & B. Consol. Min. Co.*, 25 Mont. 427, 65 Pac. 420.

And it is very generally held that dedication of a public highway will be presumed from the continued public user for the period of time required to create a prescription, where the circumstances attending the use are not inconsistent therewith: *Hartley v. Vermillion*, 141 Cal. 339, 74 Pac. 987; *District of Columbia v. Robinson*, 14 App. D. C. 512, affirmed 180 U. S. 92, 21 Sup. Ct. Rep. 283, 45 L. ed. 440; *Pittsburgh, C. C. & St. L. Ry. Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. 741; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. 207.

4. Use of Vacant or Uninclosed Land.—When the doctrine of implied dedication is sought to be applied with reference to the public use of a way over vacant and unimproved lands, the courts generally require greater proof of intention on the part of the owner to dedicate than when the controversy is over a way through or adjacent to premises that are improved or occupied. The reason why stronger proof of intention is required in such cases is doubtless because where an owner is not putting his land to any present use, and for that reason has no occasion to inclose it, the public use should be regarded more as a mere license from the owner, than as an intent on his part to donate the land as a public highway.

Some of the cases reviewed under the preceding subdivisions illustrate how the general rules have been applied with reference to controversies over ways through vacant, unoccupied lands, but the following additional cases will throw further light on the rulings of the courts where the particular question was involved. Thus in *Tutwiler v. Kendall*, 113 Ala. 664, 21 South. 332, it was held that the fact that the public had traveled a passageway over and through vacant and unimproved land for a period of fifteen years with the owner's knowledge, and without objection, was not sufficient to constitute a dedication. "The fact that people generally travel a route through an 'old

field,' and over land that has been 'turned out' for the time, without dissent on the part of the owner, is not sufficient to show or authorize an inference that he has devoted that route to public uses. It is a mere permissive use, which is ordinarily of little detriment to the land, and to prevent which, frequently, the owner would be put to the expense of maintaining an inclosure around land which he has not present use for."

In *Tucker v. Conrad*, 103 Ind. 349, 2 N. E. 803, the way in controversy had been opened by the public in 1846. It extended from one public street to another in the town of Warsaw, and ran diagonally across an uninclosed and unimproved lot owned by the plaintiff. From the time the way was opened until the year 1866 it had been used by the public as a public highway, but in that year it was obstructed by a fence. Money and labor had been expended by the public on the strip in controversy from year to year, and from 1866 to 1882 it had been occupied and constantly used and traveled by the public as a public highway. Plaintiff had been owner of the land of which the strip in controversy was a part for the past fifteen years, and had knowledge during that time of the public use of the way, and made no objection thereto until 1882, when he built a fence across it, and brought this action to recover damages for its removal. The defense was that the strip in dispute had been dedicated to the public by implication, but plaintiff obtained judgment and this was affirmed on appeal, when the court said: "Can it be correctly said that the owner of an uninclosed and unimproved lot, in town or city, who knows of, and passively acquiesces in, the use by the public of such lot, or part thereof, for street or highway purposes, until such times as he may be able and willing to inclose and improve the same, thereby dedicates such lot, or part thereof, to the use of the public for such purposes? We are of opinion that each of these questions must be answered in the negative." While there may be no question of the soundness of the answer given by the court to its question, on a comparison of the facts and circumstances of this case with those in other cases where the subject of implied dedication was raised, and where a different conclusion was reached, we should say that this decision is a very close one.

In *Gordan v. City of Taunton*, 126 Mass. 349, it was held that the fact that land adjoining a common in a city was left open and uninclosed, and was used by the public for twenty years, is sufficient to create an easement in it, either for the public or for the city; and in *Kirkman v. City of Nashville* (Tenn. Ch. App.), 55 S. W. 1072, in 1848-49, the owners of a lot built a pavement along its border abutting on a public street, occupying nine and one-half feet of the lot between store buildings and the street. The intention of the owners in constructing the pavement did not appear. It continued to be assessed as part of the lot and the owner paid the taxes on it. No consent of the owner was asked or given, but the public had used it without let or hindrance ever since its construction, as a part

of the street on which it abutted the same as it used the pavements in any of the other streets in the city. In 1869 the city, by ordinance, adopted the grade of the street, including the pavement. It was held that these facts were sufficient to constitute a common-law dedication of the pavement to the public as a part of the street to be used in whatever way the public deemed appropriate.

5. **Public Use of Private Ways and Improvements.**—In *Town of Manitou v. International Trust Co.*, 30 Colo. 467, 70 Pac. 757, the town sought to quiet title to a certain park within the town limits which it claimed had been dedicated to the public under a common-law dedication. The park contained several mineral springs, and the public had free and unrestricted use of the springs and of the premises since 1876, and the town had made expenditures in the improvement of the springs. But it appeared that the town had never during this time claimed to own the park, but had constantly dealt with others as the owners thereof, who had paid the taxes thereon, and spent much money in improving the springs and beautifying the park. It was held that no dedication was shown, the court saying that the expenditures made by the town in the improvement of the springs was because the public were permitted to use them, and not because they were the property of the town.

The case of *Loomis v. Connecticut Ry. & Lighting Co.*, 78 Conn. 156, 61 Atl. 539, also illustrates the application of the rules governing implied dedication with reference to the public use of private ways, where it was held that where the owners of a triangular piece of ground in a city opened the same to the public as an approach to the place of business of such owners, and thereafter stated to the street commissioner of the city that the space was open to the public, and would always be open, and that the city should be willing for the rights and privileges so given, to macadamize the whole strip, such facts were sufficient to sustain a finding that the strip was dedicated to the city for street purposes. As this case also illustrated the question embraced in a previous subdivision of our topic, a somewhat lengthy review of the facts and of the court's opinion has already been given.

But where a strip of land had not been worked by the city, but was used by a railroad company as an approach to a place at which its cars were loaded, and there were no sidewalks or curbing, and the strip was kept in repair at the expense of the company, which simply permitted the use of the land by pedestrians and vehicles, the evidence was insufficient to show a dedication as a street: *Georgia R. R. & Bkg. Co. v. City of Atlanta*, 118 Ga. 486, 45 S. E. 256; and it was further held in this case that the fact that the public uses an approach to stations or depots is not inconsistent with the retention of private ownership by the company owning the depot; and to same effect is *Columbia & P. S. R. Co. v. City of Seattle*, 33 Wash. 513, 74 Pac. 670.

In *Alden Coal Co. v. Challis*, 200 Ill. 222, 65 N. E. 665, the plaintiff company laid out a townsite on its lands, erected houses, a church, schoolhouse, hotel, livery-stable, barber-shop, restaurant and a general store. It leased the houses to its employes and also leased building sites on which houses belonging to private owners were erected. No plat of the town was made, and the title to the property remained in plaintiff. The townsite was connected with a public highway adjoining plaintiff's land by a street which was opened and improved by plaintiff, and which was used by the public, who visited the townsite without objection by plaintiff. This action was brought to restrain the defendant (a butcher in a neighboring town) from bringing or selling and peddling his meats within the town to the inhabitants thereof. It was held that the inhabitants of the town having acquired their property interests with reference to its streets, established homes, and built up a trade within the town, the company was estopped to deny the townsite's dedication to public use, not only as against the inhabitants, but the public at large, and a judgment denying the injunction was affirmed.

Where, however, one adapts a portion of his land for use as a way of travel for his own convenience and accommodation, he will not be deemed to have dedicated it to the public simply because the public also used the way with the land owner's permission: *Pennsylvania Co. v. Plotz*, 125 Ind. 26, 24 N. E. 343.

But where a way has been used as a highway for a considerable period with the consent of the land owner, and it is beneficial to the public, and other land has been purchased and improvements made thereon by persons believing it to be a highway, under circumstances known to the owner of the way, and material injury would ensue if the land owner was permitted to close the way, an intent to dedicate and accept will be implied: *McCloskey v. McDaniel*, 37 Ind. App. 59, 74 N. E. 1023.

Where, however, a road leading from a river to a highway was used by those owning adjoining lands to haul wood and stone, but such limited use was not under a claim of right, and the road did not lead to anywhere in particular, there being no bridge at the place where it approached the river, and the wood was never used by the public to any extent, part of it being rough and unsafe for general use, no dedication and acceptance of the road to public use will be presumed: *Fairchild v. Stewart*, 117 Iowa, 734, 89 N. W. 1075.

So, also, in *Quick v. Cotman*, 124 Iowa, 102, 99 N. W. 301, to the north of W.'s land was a highway, and south of it was land owned by C. W.'s land was uninclosed and C. made a lane along the east side of his land and along this and over W.'s land, by which he reached the highway. Afterward W.'s land was inclosed, but the lane was continued over W.'s land to the highway by an oral agreement between C. and W., each fencing one side of it. Thereafter coal mines were opened on their lands and gates were put in the

lane fence to reach them. Houses were also built near the mines, and a person owning land south of C.'s built a house thereon, and by C.'s permission passed over C.'s land and into the lane, using it as an exit to the highway. Coal was hauled from the mines through the lane, and persons desiring to reach C.'s house used it. Cattle occasionally passed down it to the river bottom. No work was ever done on it by the public except on the portion of it on C.'s land, and part of this was at his request. W. always objected to any exercise of authority by the public over that part of the lane over his premises. C. at one time purchased a strip of land to have an outlet to the highway but never opened it, as he had the use of the lane. It was held that there was no dedication of the land to public use.

Likewise, in *Kansas City, C. & S. Ry. Co. v. Woolard*, 60 Mo. App. 631, two adjoining land owners left a lane between their lands open for their own convenience, and it had been traveled by persons who desired to pass that way for a great many years, but it had never been worked by the road overseers, and was not in their list of roads. The freeholders of the township had presented a petition to the county court for the opening of the road, which was granted and the road afterward established, but which proceeding was not effective as against the plaintiff railroad, the right of way of which crossed the lane, because no notice had been given to it. It was held that the road was not a public one, and hence an injunction restraining the road overseer from tearing down the fences inclosing the right of way should have been made perpetual.

In *McNeil v. City of Boston*, 178 Mass. 326, 59 N. E. 810, a wife sought to recover damages from the city for the death of her husband, caused by the defective condition of a stairway leading into a public building. It was held that such a stairway cannot become a highway or tramway by dedication, since its permission is merely permissive by the public authorities, and may be stopped at any time.

Likewise, the fact that a city maintained a street lamp at an alley leading to a private court, and collected garbage and ashes from the houses fronting on the court, was held not such public use of the court as to create a dedication thereof: *Robertson v. Meyer*, 59 N. J. Eq. 366, 45 Atl. 893.

And where municipal authorities regulated to some extent the repair of certain docks, but private persons owning them continuously used them for private purposes in such a manner as to almost wholly interrupt any public right of way, the acquiescence by the owners in the municipal regulations did not constitute a dedication: *City of Buffalo v. Delaware, L. & W. R. Co.*, 68 App. Div. 488, 74 N. Y. Supp. 343, affirmed 178 N. Y. 561, 70 N. E. 1097.

In *Culmer v. Salt Lake City and Utah Stove & Hardware Co.* v. Salt Lake City, 27 Utah, 252, 75 Pac. 620, an alley opened as a private way, being closed by owners of part of the property, was reopened in part by a compromise between the different owners, in which the public took no part. Conveyances of abutting property were made

"subject to a right of way" and "subject to a right of way for use of all the owners" of certain of the land, running "with the land forever in favor of the heirs." The alley was overarched by the owners, basements excavated beneath, and all costs of repairs were borne by the owners. The use of the alley was practically confined to the owners of a portion of the block, and the use was regulated by the owners, as to weight of wagons and loads passing over it, and the owners had sometimes closed the alley for periods of two months. It was held that no evidence of dedication was shown; and it was further held that the alley in dispute did not become a public highway under section 2066, volume 1, Compiled Laws of 1888, which provides that "all roads, streets, alleys and bridges, laid out or erected by others than the public, and dedicated or abandoned to the use of the public, are highways."

In *Town of Clarendon v. Rutland R. Co.*, 75 Vt. 6, 52 Atl. 1057, plaintiff sought in assumpsit to recover from the railroad company the amount expended by it in building a bridge upon an alleged highway that extended across the defendant's railroad in said town. The question at issue was whether the way in dispute was a public highway at the time the railroad was constructed across it. At that time the way led from a certain farm to a main highway of the town. The buildings on the farm had been there for more than one hundred years, and the only way to reach them from the main highway was over the strip in controversy, which was fenced and kept open for public travel, and used by the public as occasion demanded before the railroad was built. It was held that these facts were sufficient to justify the jury in finding dedication by the owner of the land, and a judgment for plaintiff was affirmed.

6. Use and Maintenance of Railroad Crossings.—In *Evansville & T. H. R. Co. v. State*, 149 Ind. 276, 49 N. E. 2, a street in the town of Fort Branch ran in opposite directions from respondent's railway right of way. Approaches were built to such right of way by authority of the public, and the railroad company graded and planked its track at such crossing. The crossing was kept in repair and used by the public as a highway for six or seven years with the consent of the railroad company, when the same was torn up by the company. This proceeding was instituted to compel the railway company by mandamus to replace the crossing.

It was held that the public had acquired such rights in the crossing as could not be divested by the company's tearing up the planking and preventing such use of that portion of its right of way, since the facts recited constituted a dedication thereof to the public; and hence a judgment ordering a peremptory writ of mandate was affirmed.

And in the later case of *Michigan Cent. R. Co. v. Hammond, W. & E. C. Electric Ry. Co.*, 42 Ind. App. 66, 83 N. E. 650, it was held that dedication of a strip across a railway right of way as part of a street is shown where the street was platted and dedicated to the public up to, and both sides of, the right of way in 1887, and the rail-

way company thereafter opened the street through the right of way, connecting and in line with the street as platted on both sides thereof, where the company built its fences and cattle-guards conforming to the lines of the platted strip, put in a plank crossing over its track, and built sidewalks connecting with the sidewalks on both sides of the right of way, when the use of the way thus provided was accepted by the public and city authorities, and when the strip has been treated in every respect by the company, the public, and the city authorities as though it had been regularly laid out.

So, too, a railroad company which acquired by conveyance, as its right of way and depot grounds, a portion of a tract of land which had previously been platted into town lots, was not justified in excluding the public from the use of such streets across its land as had been so used, with its knowledge and acquiescence, for more than fifteen years, and on which it had provided a crossing: *Minneapolis & St. L. R. Co. v. Town of Britt*, 105 Iowa, 198, 74 N. W. 933.

And though a street which crosses a railroad had not been dedicated to the public when the railroad acquired its right of way, yet as the company then knew that it was used as a public road, and permitted it to be used as a public way for forty years after that time, it cannot close the street on the ground that the right to cross the railroad has never been acquired by condemnation: *Louisville & N. R. Co. v. Sonne*, 21 Ky. Law Rep. 848, 53 S. W. 274.

But where a railroad company filed a map of a townsite owned by it, expressly rebutting any presumption that it intended to dedicate a street crossing over its right of way which it continued to use for a switch-yard, its subsequent acts in keeping a crossing in repair for its own use were not sufficient to amount to a dedication of it to public use: *Village of Benson v. St. Paul, M. & M. Ry. Co.*, 73 Minn. 481, 76 N. W. 261.

The case of *Larson v. Chicago, M. & St. Paul Ry. Co.*, 19 S. D. 234, 103 N. W. 35, illustrates very clearly that, with reference to railroad crossings, determination of the question of intent to dedicate under the rule that it will be presumed when the public convenience and accommodation might be affected by an interruption of its use of the crossing depends very little upon the length of time of such public user. In this case the townsite was not established until after the railroad had built its tracks. The town was incorporated in 1892, with its principal street extending across the railroad track. Under the direction of the company's division superintendent a crossing was constructed at the crossing of this street over the tracks, and a sign of warning was there erected. This crossing was constantly used by the public from the time of its construction in 1892 to 1895, inclusive, when it was completely obstructed by a snow fence, depot and platforms erected by the railroad company. The division superintendent testified that his only object in building the crossing was to accommodate settlers coming in on trains with emigrant movables, and to enable teamsters to deliver to the business men of the town

merchandise taken from the cars and placed on the platforms a short distance from the street. It was held, however, that the crossing had been dedicated. Said the court: "While the division superintendent and road master were without authority to make a valid dedication, their conduct, acquiesced in by the managing agents of the company for so long a time, is sufficient, when considered with all the other facts and circumstances in the case, to evoke the doctrine of equitable estoppel." The long user of which the court speaks had been for something less than four years.

IV. Implied Acceptance.

a. General Principles Controlling.—As a dedication often imposes burdens upon the public as well as grants privileges, it is well, before considering the general rules which govern implied acceptance of a dedication, to bear in mind the familiar rule which is found running through all the cases and applies to dedication generally, viz., that dedication of a public street is not complete without an acceptance, since it would not do to allow one of his own volition to impose an onerous burden upon an unwilling public.

Of course, a formal order upon the records of the proper official body is the most satisfactory acceptance of an offer of dedication, but much less is necessary, and, as we shall presently see, the authorities unanimously sustain the rule laid down in the principal case (*Benton v. City of St. Louis*, 217 Mo. 687, ante, p. 561, 118 S. W. 418), that acceptance will be implied "where the public authorities have done acts in recognizing the existence of the highway, and treating it as one of the public ways of the locality"; or, as was said by the supreme court of Indiana, acceptance will be presumed from acts of the public authorities "in improving or repairing the same, or from any other act with respect to the subject matter that clearly indicates an assumption of jurisdiction or dominion over the same": *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883.

Another general rule announced by the principal case (ante, p. 572) is that the acceptance of a dedication may be implied from long-continued user by the public as of right. There has been much diversity of opinion, both among text-writers and the courts, as to the soundness of this doctrine, but the rule is sustained by the weight and prevailing current of opinion: *City of Mobile v. Fowler*, 147 Ala. 403, 41 South. 468; *Los Angeles Cemetery Assn. v. City of Los Angeles* (Cal.), 32 Pac. 240; *Pittsburgh, C. C. & St. L. Ry. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356; *Gillespie v. Duling*, 41 Ind. App. 217, 83 N. E. 728; *Carter v. Barkley*, 137 Iowa, 510, 115 N. W. 21; *Raymond v. City of Wichita*, 70 Kan. 523, 79 Pac. 323; *Riley v. Buchanan*, 25 Ky. Law Rep. 863, 76 S. W. 527, 63 L. R. A. 642; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270; *State v. Muir* (Mo. App.), 117 S. W. 620; *Cassidy v. Sullivan*, 75 Neb. 847, 106 N. W. 1027; *Schettler v. Lynch*, 23 Utah, 305, 64 Pac. 955; *Spencer v. Town of Arlington*, 49 Wash. Am. St. Rep., Vol. 129—39

121, 94 Pac. 904. The theory upon which this rule is sustained is that a highway is for the use of the public, and as the officers of a municipality are merely the agents of the inhabitants who compose the municipal corporation, when the public has by long-continued use treated the way as public one, this makes it such without the intervention of those who derive their authority from them.

But this rule, though supported by the decided weight of the later cases, is not of universal application, and is restricted by some of the courts to those highways which are of common convenience and necessity, and which are therefore a benefit to the public and not a burden: *Phillips v. City of Stamford*, 81 Conn. 408, 71 Atl. 361. Others again, while not denying that acceptance of an implied dedication may be inferred from user by the public, insist that such an acceptance only creates an irrevocable dedication as between the owner or his alienees and the public, but is not such an acceptance as will charge the municipality with the maintenance of the highway, in the absence of some recognition thereof by the public authorities showing an acceptance: *Pennick v. Morgan County*, 131 Ga. 385, 62 S. E. 300; *Palmer v. East River Gas Co.*, 115 App. Div. 677, 101 N. Y. Supp. 347; *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 44 S. E. 155; *Town of Harper's Ferry v. Kaplon & Bro.*, 58 W. Va. 482, 52 S. E. 492.

The difference between these cases and those which broadly support the general rule is, that in the latter it is held that from long-continued use by the public, formal acceptance by the proper legal authority will be conclusively presumed to have taken place: *Riley v. Buchanan*, 116 Ky. 627, 76 S. W. 527, 63 L. R. A. 642.

But the supreme court of Ohio goes even further than the cases cited which oppose the general rule, and attacks the principle upon which its support is based, namely, that the corporate officials are merely the agents of the inhabitants, and that the principal may do what he might have done through the intervention of an agent, saying: "Local subdivisions, such as counties and towns, are themselves merely agencies of the state, possessing only delegated powers, and the prescribed mode or manner of exercising them is the measure of the power. They can act only by their officers, and the duty to care for the roads and streets and the liability for damages for neglecting to perform the duty cannot be imposed upon them by proof of user by the public, but only by an acceptance by the authorities whose duty it would be to care for the road or the street if it should be established": *Cincinnati & M. V. R. Co. v. Village of Roseville*, 76 Ohio St. 108, 81 N. E. 178.

Another general rule to be observed in determining whether an offer of dedication has been accepted is that only such acts as tend to show an acceptance for the purpose for which the dedication is offered to be made can be considered: *Myers v. City of Oceanside*, 7 Cal. App. 87, 93 Pac. 686. And proof of acceptance must be clear, unequivocal and satisfactory: *City of Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212, 52 N. E. 383; *People v. Johnson*, 237 Ill.

237, 86 N. E. 676. But the acceptance need not follow the offer of dedication at once, but must be within a reasonable time and before a withdrawal of the offer: *People v. Johnson*, 237 Ill. 237, 86 N. E. 676.

Speaking to the question of public acceptance of a dedication, it was recently said by the supreme court of Connecticut in *Phillips v. Stamford*, 81 Conn. 408, 71 Atl. 361, that the question "is one of mixed law and fact. It is one of law in so far as it involves questions as to the nature of this acceptance, the source from which it must come, and the acts and things which may be indicative of it. It is one of fact in so far as it involves inquiries as to whether or not the requisite acts and things have been done so that legal requirements have been met." As the acts necessary to show an implied acceptance of a street are not much more definitely defined than are the acts from which a dedication will be presumed, a clear understanding of the subject of implied acceptance can best be obtained from the following illustrations showing how the courts have applied the general rules to the facts and circumstances surrounding each particular case.

V. Illustrations Showing Application of General Principles.

a. Official Acts or Proceedings.

1. **Acts Constituting Implied Acceptance in General.**—In *Penick v. Morgan County*, 131 Ga. 385, 62 S. E. 300, plaintiff was injured by the falling of a bridge over which he was driving on an alleged public road, and brought this action against the county to recover damages. It appeared that many years ago the county commissioners had been petitioned to open up the road in controversy; that they had appointed a committee to investigate its practicability, and the report being favorable, the commissioners had opened the road and built the bridge. These proceedings were irregular and void, but ever since that time the road had been traveled by the public, and the question at issue was whether the road had by implication been dedicated and accepted. After the accident to plaintiff the bridge had been rebuilt by the county authorities and been worked by them since that time. It was held that the order of the county authorities in adopting the favorable report of the committee appointed by them to investigate the practicability of the road, and the building of the bridge and the use of it by the public for twenty years, was sufficient proof to submit to the jury the question whether or not there had been an acceptance of a dedication if one was found.

Likewise, where a city takes possession of the pipes, hydrants, etc., in the streets of an annexed subdivision, and connects them with its general water system, so as to form a part thereof, and supplies water by means of such pipes, it accepts the common-law dedication of such streets as public streets: *Smith v. City of Chicago*, 107 Ill. App. 270; affirmed 204 Ill. 356, 68 N. E. 395.

But the mere extension of a town so as to embrace ground dedicated as a street is not an implied acceptance of the dedication:

Cochran v. Town of Shepherdsville, 19 Ky. Law Rep. 1192, 43 S. W. 250; and to same effect is *City of Baltimore v. Brownell*, 86 Md. 153, 37 Atl. 648.

In *City of Keokuk v. Cosgrove*, 116 Iowa, 189, 89 N. W. 983, the issue was whether an alley, by reason of a common-law dedication, had been accepted by the city. It appeared that work had been done on the alley by the street supervisor; that the public used it more or less as necessity or convenience required; that it had the same use as other public alleys in the neighborhood; that the city platted the strip as an alley; and that no taxes had been assessed against it for several years. It was held that these facts were sufficient to constitute an acceptance by the city. Said the court: "Acceptance may be inferred from public use, as well as from other acts indicative of an intent on the part of the city to treat the strip as an alley; and it need only be such as the public wants and necessities demand."

In *City of Louisville v. Snow's Admr.*, 107 Ky. 536, 21 Ky. Law Rep. 1268, 54 S. W. 860, the appellee had obtained a judgment for damages against the city of Louisville for the death of his minor son, caused by the fall of an embankment on the edge of an alleged public street in the city. The principal ground relied on by the city for reversal was that the city had never accepted the common-law dedication of the alleged street at the point where the accident occurred, or thrown it open to public travel. It appeared that in a suit between the city and the former owners in 1879 for a division of the tract of land which included the place when the accident occurred, partly within and adjoining the city, a division thereof was made by commissioners under a judgment of the court, who subdivided the tract into lots, and the extension of a public strip was made through the property, and a copy of the plat was duly recorded. The spot where the accident occurred was then just inside the limits of the city. Some two months before the accident the limits of the city were extended so as to take in several blocks of the street as extended. It also appeared that about two years previous to the accident the property owners who owned lots abutting on the street as extended had it graded at their own expense, and that they made the cut which caused the embankment to be left; that subsequently this embankment was undermined by various parties who removed the fine sand which constituted the bottom layer of the embankment; that after the grading of the street it was traveled by a large number of people living and having business in that vicinity; that with the knowledge and consent of the city authorities, the contractors who were preparing the grade on another street in the immediate vicinity used earth taken from this portion of the alleged street, and that the effect of this removal was also to perfect the grade of the alleged street.

Subsequent to the extension of the city limits, the extension of the street beyond the point where the accident occurred was included in

and made a part of the policeman's beat in that vicinity, and he was instructed to patrol that street, and the policeman had noticed the dangerous condition of the embankment, and had on divers occasions driven children away from it, but he had never called the attention of the city authorities to the danger. These facts were held sufficient to show acceptance of the alleged portion of the street by the city, and the judgment for damages was affirmed; the court saying that acceptance of a street may be implied "where the municipality takes control of it, includes it within the beat of its police officers, and permits the public to make use of it as a public street of the city."

In *Board of Supervisors of Cass Co. v. Banks*, 44 Mich. 467. 7 N. W. 49, it was held that the institution of a suit by the public authorities for the possession of land which had been offered as a public square in a village was not an acceptance of the dedication; but this decision is opposed by some later cases, and seems to have been based largely upon the ground that the suit was not brought within a reasonable time after the offer of dedication was made, and in the meantime the authorities had not shown any distinct intention to accept the land for the uses for which the offer was made. The suit here was not brought until forty-eight years after the offer.

The supreme court of New Jersey has repeatedly held that the bringing of an action by a city to obtain possession of land dedicated to public use is sufficient acceptance: *City of Atlantic City v. Graff*, 64 N. J. L. 527, 45 Atl. 916; *Inhabitants of Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353, 47 Atl. 566; *Atlantic City v. Snee*, 68 N. J. L. 39, 52 Atl. 372.

In *Longworth v. Sedevic*, 165 Mo. 221, 65 S. W. 260, it was held that where a way has been open to the public use, and has been actually and continuously used by the public as a street for eighteen years, without objection by anyone, and with knowledge of all persons, and has been during that time treated by the town trustees as a public street, it is accepted by the town authorities.

And that acceptance by a city of a dedicated street will be implied by the city's taking control of it and permitting the public to use it as a street is clearly upheld in *City of Paducah v. Johnson*, 29 Ky. Law Rep. 532, 93 S. W. 1035.

Likewise, action of the common council of a city in recognizing a certain street as a public highway, after an offer of dedication by the owner of the fee, and before any attempt had been made to rescind the same, constituted the street a public highway: *Uhlefelder v. Mt. Vernon*, 76 App. Div. 349, 78 N. Y. Supp. 500.

In *Cincinnati & S. Ry. Co. v. Village of Carthage*, 36 Ohio St. 631. the village council and the railway company had agreed, under the statute, as to the terms under which the railway company might use the streets of the village for its road, whereby the company bound itself to grade and gravel the streets so used, in a manner "to the acceptance of the village council." This action was brought by the

village against the company to recover damages for its alleged failure to grade and gravel the streets according to the agreement. There had been no formal dedication or acceptance of the streets of the village, but it was held that a charge, in effect, that if the jury found the streets had been dedicated, then the contract between the village and the railway company constituted an acceptance of such streets on the part of the village, was not error.

2. **Ordinances and Resolutions in General.**—A further illustration of the general rule that acceptance of a dedicated strip of land for a public street will be implied from any acts of the public authorities which clearly indicate an intention to recognize the strip in question as a public highway is shown by those cases which hold that this intention may often be inferred from the passage of ordinances or resolutions by the city authorities, other than those of formal acceptance. Thus, when an ordinance providing for the construction of a street expressly recognizes the existence of another street in designating the territory to be assessed, there is in effect an acceptance of a dedication of such other street: *Scheafer v. Selvage*, 19 Ky. Law Rep. 797, 41 S. W. 569.

And where there was both a majority and minority report of a committee appointed by the city council to inquire by what authority a railroad company had taken possession of an alleged street, and the majority report expressed the opinion that the street had been dedicated to the public, and the minority report expressed no opinion as to the dedication, but recommended that no action be taken by the council, and the minority report was adopted by the council, such action was evidence that the council had not only accepted the land as a street, but had deliberately decided not to assert a claim to it: *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173.

But a resolution of the common council authorizing the construction of a railroad through land dedicated to the city as a street is effective as an acceptance by the city of the offer to dedicate: *Michigan Cent. R. Co. v. City of Bay City*, 129 Mich. 264, 88 N. W. 638.

Likewise, an acceptance of a dedicated street is inferred from the passage of an ordinance by the municipality granting permission to a street railway company to lay its tracks therein, and conditioning its permission upon the grading and paving of the streets in a specified way: *People's Traction Co. v. Atlantic City*, 71 N. J. L. 134, 57 Atl. 972.

But as an ordinance or resolution of a common council is a legislative and not a ministerial act, when such ordinance or resolution is relied on to constitute an acceptance, it must be evidenced with legal formality; hence an ordinance passed by the common council of a borough, authorizing a railroad company to construct its road along a certain avenue, being *ultra vires*, is not acceptance by the borough of the avenue as a street: *Thompson v. Ocean City R. Co.* (N. J. Ch.), 37 Atl. 729. And when under a city charter requiring all resolutions of the council to be adopted by a vote of the major-

ity thereof, a resolution accepting the dedication of a street, which receives the affirmative votes of less than a majority, does not constitute a valid acceptance thereof: *Gregory v. City of Ann Harbor*, 127 Mich. 454, 86 N. W. 1013.

In the recent case of *Atkinson v. City of Nevada*, 133 Mo. App. 1, 112 S. W. 1022, it was held that the passage of an ordinance establishing the grade of an alleged street, or even one providing for its improvement so as to render it fit for use, does not amount to an acceptance, so as to render the city liable for its maintenance or repair. But this case is opposed to the great weight of authority, and in fact, from the language of the supreme court of Missouri, as used in the still more recent principal case (*ante*, p. 561), this decision would seem to have been repudiated. True, there is no reference made in the principal case to the effect of an ordinance on the question of acceptance, but it is distinctly said that an acceptance may be implied "when the public authorities have done acts recognizing the existence of the highway, and treating it as one of the public ways of the locality."

Also in *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616, 57 N. E. 735, it was held that an ordinance directing a dedicated street to be graded, paved, or put in proper condition for use by the public would have the effect of an acceptance. And to same effect is *Steinacker v. Gast*, 28 Ky. Law Rep. 573, 89 S. W. 481.

Likewise, where the public had uninterruptedly used a portion of a tract of land in a city for a pleasure ground, and another portion thereof as a passageway to reach stairs which had been constructed by the city leading from one part of the town to another, and the municipality had exercised authority over the property by passing ordinances concerning it and granting a right of way to a railroad through the same, an acceptance of a dedication of such land to the public was shown, though there had been no formal acceptance: *Oregon City v. Oregon & C. R. Co.*, 44 Or. 165, 74 Pac. 924.

And resolutions of a city council, permitting long and uninterrupted use of a culvert for the flow of water through it from the city sewers, adopt such culvert as a part of the city's sewerage system, making the city liable to one whose property is damaged by the negligence of the city in permitting such culvert to collapse: *City of Richmond v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877.

3. **Improvements and Repairs.**—In determining where, under the rule, official acts of the officers of a municipal corporation show such recognition of a dedicated street as a public highway, so as to constitute an acceptance thereof by the municipality the authorities are practically uniform in holding that improvements and repairs made by the city in such street constitute an acceptance of the offer of dedication. Thus in *Fairburg Union Agricultural Board v. Holly*, 169 Ill. 9, 48 N. E. 149, an alley dedicated to the public had been used for several years without any obstruction. The town had laid tile to drain a low place in the alley, the expense being divided between the

town and the highway commissioners. Stones and cinders had been put on a portion of the alley to improve the travel, and a culvert was put in, at public expense. It was held that these acts constituted an acceptance by the public.

So, too, the putting in of a culvert by the highway commissioners under a strip dedicated for a road, the leveling of it off, their subsequent acceptance of a deed from another extending the road, and the fact of travel over the road, is evidence of acceptance: *Woodburn v. Town of Sterling*, 184 Ill. 208, 56 N. E. 378.

Likewise, an attempt by the city to open a dedicated street which has been obstructed by a land owner is an acceptance of the dedication: *Russell v. City of Lincoln*, 200 Ill. 511, 65 N. E. 1088.

And the acts of a municipality in extending its corporate limits to embrace a duly platted and designated addition to the town, and in causing a sidewalk to be improved for the whole length of a street in such addition, and in keeping certain streets in repair for a number of years, and in directing the opening and improving of three streets, sufficiently showed an acceptance of the dedication of the addition.

But the fact that a city has built a retaining wall partially across a strip of ground does not show an acceptance of the alleged dedication of the ground as a street: *Exterkamp v. Covington Harbor Co.*, 104 Ky. 796, 47 S. W. 1086. Nor is the act of a city in laying out the extension of a street under legislative authority an acceptance of a way previously dedicated, where the alleged way by dedication is not identical with that actually laid out: *Chapin v. Maine Cent. R. Co.*, 97 Me. 151, 53 Atl. 1105.

It was also held, in *Arnold v. City of Orange* (N. J. Ch.), 66 Atl. 1052, that the maintenance by the village of a street light erected within the limits of its streets by a private corporation, was not sufficient to show an acceptance by the village of the dedication of the street. It further appeared in this case, however, that the village, in the exercise of its municipal powers, constructed a sewer through the alleged street, and this was held to be a "most complete and sufficient acceptance of the dedication."

In *Finucan v. Ramsden*, 95 App. Div. 626, 88 N. Y. Supp. 430, plaintiff recovered a judgment for damages against the highway commissioners for cutting down certain trees alleged to be on his land. It appeared that the land on which the trees stood had been surveyed some nineteen years ago by the highway commissioners as a highway, with plaintiff's consent, and the commissioners had made an order opening the same, and duly filed a map in conformity with the survey. It was held that these acts constituted a dedication of the land and an acceptance thereof; hence the judgment in favor of plaintiff was reversed.

Likewise, in *City of Dallas v. Gibbs*, 27 Tex. Civ. App. 275, 65 S. W. 81, where a large portion of a street was opened pursuant to a city ordinance ordering such opening, and a map was executed by the city laying out as a street land dedicated for that purpose, it

was held that acceptance of the dedication by the city was fully established.

4. Acceptance of Part of Property Dedicated.—The right of a city to accept part of a dedicated street without accepting the whole is universally recognized, but where acceptance is to be implied from acts of the public authorities in recognizing it as a public highway, and such acts consist in an exercise of control over only a portion of the street dedicated, the question whether there is a constructive acceptance of the other portion over which there was no exercise of corporate authority is one of considerable difficulty. There are some cases which hold that in the absence of proof showing that there was an intention on the part of the city authorities to limit the acceptance only to the portion of the street over which control was exercised, acceptance of the whole street as dedicated will be presumed: *City of Sullivan v. Tickenor*, 179 Ill. 97, 53 N. E. 561; *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378; *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230; *Chafee v. City of Aiken*, 57 S. C. 507, 35 S. E. 800; *City of Ashland v. Chicago & N. W. Ry. Co.*, 105 Wis. 398, 80 N. W. 1101; *London & San Francisco Bank v. City of Oakland*, 90 Fed. 691, 33 C. C. A. 237. Thus, in *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378, the former owner of land which included the strip in dispute had attempted in 1866 to make a statutory dedication of a street of a certain width, but the proceeding being irregular, it was in effect only an offer of dedication, or if a dedication, it could be so considered only as one at common law. The street was opened, but the north side of it reached only to a fence on the owner's land, leaving a twenty-two foot strip of the intended street within the owner's inclosure, and this was cultivated by him. The street as opened was used by the public and kept in repair by the village authorities for some thirty-five years, and acceptance as to the width it was opened was not denied. The former owner did not claim ownership of the strip in controversy, but claimed he left the fence until a new one should be built in the future; though he had stated that he dedicated the land under a misunderstanding as to the width of the street and would keep the fence where it was, as at some time he might get a right to the strip by limitation. Plaintiff acquired title to the land in 1901 and brought this action in trespass against the city to recover damages by reason of its removing the fence on the north side of the opened street and grading the twenty-two foot strip as part of the street. A judgment obtained by plaintiff in the lower court was reversed on appeal, where it was held that the city's acceptance of the portion of the street as opened constituted an acceptance of the street for its full width as dedicated.

Likewise, in *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883, it was held that the failure of a municipal corporation to open and improve part of a new street does not operate as a rejection of the part not opened or improved.

But there are other cases which hold that while acceptance of a dedication of a street by a municipality may be shown by proof that it assumed control over the street, it will not be implied as to a portion of the street laid out by the owner of the land, but over which the municipal authorities did not undertake to exercise any control: *Hall v. City of Meriden*, 48 Conn. 416; *Kelsoe v. Town of Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138, 48 S. E. 366; *Bell v. City of Burlington*, 68 Iowa, 296, 27 N. W. 245; *Wayne County v. Miller*, 31 Mich. 447. The case of *Hall v. City of Meriden*, 48 Conn. 416, seems to have received very careful consideration, and the reasons given by the court for its conclusions are worthy of being quoted, "The acceptance of a street by the public is always one of fact, the law merely contributing its definition of the term. While the acceptance covers what is incidental to the street, there is yet properly no legally constructive acceptance, unless in a peculiar case which we will hereinafter consider. Thus the actual use of a street laid out eighty feet wide would be an acceptance of the street as of that width, while the same amount of use of a street laid out only forty feet wide would be an acceptance of it as only of that width. In each of these cases the public by its use has accepted the street, but has accepted it as it was dedicated or as the use found it. But this is not so much by operation of law as by operation of the actual use as a fact. There is no room for such an operation of the use upon a portion of an opened street that extends entirely beyond all actual use on the part of the public. It will be seen at once, upon a consideration of the matter, that any such rule would be one very difficult of practical application. Thus, a street is laid out by private land owners in the suburbs of a growing city extending a mile out into the country. We will suppose it to be cleared of trees and fences, and perhaps marked by visible monuments, so as to have been opened for a street, as in the present case, but also, as here, not worked. Now, the occupancy of the street by houses, and the use of it by the public in connection with the houses, would begin at the end next the city and extend very gradually outward, making perhaps a very clear acceptance of the street for a quarter of a mile, while no use whatever is made of the street beyond. Can it be that this use so clearly limited and defined in extent can constitute a use, and by such constructive use an acceptance of the part of the new street that is most remote from the city? If it could operate to make an acceptance of that remote part of the street, why not of a still remoter part, perhaps a mile farther out, if the street had been laid out for two miles instead of one? And if it could not operate to accept a part of the street so remote, as we think it very clear that it could not, where shall the line be drawn? . . . There is only one rule to apply in such a case, and that is the rule of actual use. When the actual use stops, there the acceptance stops, with only the qualification before suggested, that such use will take in whatever may be regarded

as properly incident to it." The peculiar case to which the court referred is that of *Town of Derby v. Allen*, 40 Conn. 410, where the use of a portion of a street in the town was held under the doctrine of constructive acceptance, an acceptance of the whole, but this decision was based upon the fact that the street had been dedicated to the town as a whole, and was held by the town as trustee for the public, for the latter's acceptance as a whole, and also upon the further ground that the entire street in question was a part of a network of streets, and was connected by the portion not used with a cross-street to which it furnished access, and the nonuse was wholly owing to a steep grade at that point which made it necessary that this part should be graded before it could be used.

5. **Time of Acceptance.**—It is a general rule that an acceptance must be made within a reasonable time. This doctrine is recognized by all the cases, but is pointedly announced in *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; *Wolfskill v. Los Angeles Co.*, 86 Cal. 405, 24 Pac. 1094; *Kelsoe v. Town of Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138, 48 S. E. 366; *Field v. Manchester*, 32 Mich. 279; *Briel v. City of Natchez*, 48 Miss. 423.

But we have already seen from the case of *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378, that where acceptance of a portion of a street had been made by recognition of the public authorities in assuming control over such portion, that the "reasonable time" rule was so extended that acceptance of the street to its full width was presumed after a lapse of thirty-five years, notwithstanding the unused portion had been in the possession of, and cultivated by, the owner of the land during that time. Also in *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230, where the same question was involved, the court said: "The public authorities must be allowed a reasonable time for opening and improving public streets, as their resources and the public necessities may allow and require. . . . Mere nonuser of a street or alley, no matter how long continued, does not deprive the city or village, as the representative of the public, of the right to take possession thereof and improve the same." And in *Chafee v. City of Aiken*, 57 S. C. 507, 35 S. E. 800, upon the question whether an acceptance had been made in a reasonable time, the lower court charged: "The public authorities—county commissioners, town council, as the case may be—will be held to have refused, if within a reasonable time after the dedication by the owner nothing has been done by the public authorities. How much time is a reasonable time is for the jury to determine in a given case. The jury is to consider all of the circumstances surrounding the case—evidence of the size of the town, population, the direction in which the town may be extending, and other circumstances which may or may not account for the interval of time elapsing between a dedication and acceptance." It was insisted that the charge should have limited the time of acceptance to the statutory period of twenty years, and that no acceptance could there-

after be made when intervening rights had accrued. But the supreme court said the charge was sound in principle and if the charge had fixed twenty years as a reasonable time, the jury would have been deprived of the right to determine a question which was peculiarly within their province.

It is clear, therefore, that the general rule which requires that an acceptance must be made within a reasonable time is based on the doctrine of abandonment and not on the principle of prescription, for the statute of limitations does not run against a municipal corporation with respect to land held by the municipality for public use: *Kelsoe v. Town of Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138, 48 S. E. 366; *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378. And the student of jurisprudence will find a very interesting discussion of the maxim "*Nullum tempus occurrit regi*" in the note appended to *Bannock County v. Bell*, 101 Am. St. Rep. 144, and of its application to municipal corporations on page 157 et seq. of that note.

No fixed period of time as necessary to constitute an abandonment by nonuser is established by the cases, but in *Kelsoe v. Town of Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138, 48 S. E. 366, it was said that in none does it appear to have been established "where the period of nonuser was less than the period necessary to establish adverse possession, except where a new highway has been opened and established in place of the one abandoned"; and it was also said in this case that "the current of authority seems to be that mere nonuser for twenty years affords a presumption, though not a conclusive one, of extinguishment, even in a case where no other circumstance indicating an intention to abandon appears; and if there has been in the meantime some act done by the owner of the land charged with the easement, inconsistent with or adverse to the right, a much stronger presumption of extinguishment will arise."

But some of the cases we have cited, notably those of *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378, *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230, and *Chafee v. City of Aiken*, 57 S. C. 507, 35 S. E. 800, do not agree that even such lapse of time as would constitute adverse possession is sufficient to negative an acceptance. And the position taken by these cases is also sustained by the comparatively recent case of *City of Meridian v. Poole*, 88 Miss. 108, 40 South. 548, where it was held that acceptance of land dedicated to a city for street purposes was not negated by the facts that the city did not presently open the street, but the land remained as part of an old field for twenty years, and was outside of the city limits when dedicated, the court saying that acceptance "may be postponed until the advancing population and private improvements make it necessary. . . . Because the neighborhood is not rapidly settled up, and years may elapse before the city undertakes to work and grade the streets, or before

the necessity arises, the city should not, by such nonuser, be held to have relinquished the easement and abandoned its acceptance of the dedication." Other late cases bearing upon abandonment as affecting the question whether the dedication of a street has been impliedly accepted by the municipal authorities in due time, will be found collected in the cross-reference note to *Kelsoe v. Town of Oglethorpe*, 102 Am. St. Rep. 144, and on pages 492-495 of the monographic note appended to *Schneider v. Hutchinson*, 76 Am. St. Rep. 479.

b. Acceptance from User.—In discussing when a dedication of land would be implied from an abandonment to or acquiescence in its public use by the owner, we gave many illustrations showing that as against the dedicator and his alienees a complete dedication may arise from user alone. And as we have seen that a complete dedication of a public street cannot exist without the same has been accepted by the public, it follows that those cases where mere user was held sufficient to constitute an irrevocable dedication as against the owner necessarily held that such user also constituted an acceptance on the part of the public. We also learned from these cases that the length of time of such user does not depend upon the principles of law governing prescription, but is controlled entirely by the circumstances of each case, the main question being whether the public convenience and accommodation would be materially affected by a denial or interruption of the enjoyment.

We might give a large number of illustrations showing that as against the dedicator or his alienees acceptance will be implied from user by the public, and that the length of time of such user depends upon the peculiar circumstances of each case, the test being, as in dedication, whether the public convenience and accommodation would be materially interfered with by a denial of the enjoyment. But since, for the reason given, the rules of implied acceptance from user, as against the dedicator, and that of implied dedication from user, are the same, it is hardly necessary to extend this already lengthy note by giving separate illustrations of implied acceptance from user, when those already given of implied dedication from user will answer the purpose. Of course, however, acceptance from user is not limited to those cases where the dedication was created by user, but it will be found that in nearly all of such cases, though the general doctrine of implied acceptance from user alone was recognized, the user relied on was coupled with some act of recognition by the public authorities, in making repairs or improvements, or otherwise assuming control over the dedicated way.

That acceptance of a dedicated street may be implied from mere user alone by the unorganized public, and that it will be presumed from very slight circumstances when the highway in question is one of public convenience and necessity is very clearly illustrated by the recent case of *Phillips v. City of Stamford*, 1 Conn. 408, 71 Atl. 361. The controversy in this case was over a strip of land which

had been dedicated by a former owner, lying in a remote part of the city, in a vicinity which was being settled by shore residences, to none of which did the strip serve as a natural or necessary access. It did, however, extend from an existing highway to the beach, and was intended to furnish access to the beach. It had never been worked as a highway, though the grass on it had been cut occasionally. From fifty to eighty persons a year passed over it, mostly in the summer time. In holding that acceptance from user would be implied the court said: "We have said that where the proffered way is shown to be one of common convenience and necessity, and therefore beneficial to the public, acceptance will be presumed, that for the purpose of showing that it is beneficial a variety of acts and conduct on the part of the municipality, or of individual members of the public, indicating a recognition of its usefulness and tending to show an approval of the gift by the members of the community immediately cognizant of it, are of importance, and that of all the things thus important as evidence of the beneficial character of the dedication, the actual use of the way as a highway by those who have occasion to use it holds the highest place: *Guthrie v. New Haven*, 31 Conn. 308, 321; *Green v. Canaan*, 29 Conn. 157, 165. . . . Certain it is that when the public, by the acts and conduct of those of its members who are most likely to be cognizant of a proffered gift of a way for the public use, has shown its recognition of its usefulness and beneficial character and its approval of the gift by any one or more of a variety of recognized acts and conduct, the conditions of an acceptance are fully satisfied"; and, "If the dedication appears to be one of common convenience and necessity, and therefore beneficial to the public, the conditions arising from the acts and conduct of the public will the more readily be regarded as satisfied." Speaking to the fact that the way had not been worked, the court said this was not a matter of vital moment. "That a traveled way has or has not been wrought by the local municipality, that repairs have or have not been made at the public charge, or otherwise for the accommodation of travel, are facts which naturally possess significance, and oftentimes great significance, as evidence tending to show acceptance by the public of a dedicated way, but the only importance to be attached to such facts is that which bears upon their evidential value for the purpose indicated." Referring to the fact that the way had been used largely by persons on foot only, and confined chiefly to the summer season, the court continued: "Neither of these facts is of controlling significance. The attitude of the public toward the proffered gift for its benefit could be as effectively disclosed by foot travel, if that was, as here, the kind which would naturally be chiefly accommodated, as by any other; and a user limited to the summer season, if that was the user to be anticipated, and for the accommodation of which the way was under the circumstances suited, would be as significant as any could reasonably be expected to be."

As to the fact that the user had not been an extensive one, or one participated in by a large number of the general public, the court further said: "It is not essential to the creation of a highway by dedication and acceptance that large numbers of the public participate in the user, or that the user be one which results in a large volume of travel. Each situation must be judged in relation to its own surroundings and conditions, and with regard to the number of persons who would have occasion to use the way." This case fairly represents the consensus of opinion on the question of when an acceptance, as against the dedicator or his alienees, may be implied from user alone, and further illustrations may be omitted.

But where an acceptance from mere user alone, that is, from the acts of the unorganized public, which can only be disclosed by acts and conduct on the part of the individual members of the public as such, is sought to be established for the purpose of holding the public authorities responsible for the repair and keeping of a dedicated street, or to sustain a criminal prosecution for the obstruction of such street, the authorities are not harmonious. The general rule, however, as we have previously stated it, namely, that acceptance of a dedication may be implied from long-continued user by the public, as of right, is supported by a majority of the later cases, without reference to the question of who may be affected by its application, though in some of these cases the length of use required seems to be such as would establish a highway by prescription. At least this would appear to be the ruling in *People v. Johnson*, 237 Ill. 237, 86 N. E. 676, where defendant was being prosecuted for obstructing an alleged public street. The street had been dedicated, but the question of the defendant's guilt hinged entirely upon whether there had been any implied acceptance of the street by the public from user, and the evidence was that it had been traveled by the public for some eight or nine years, but it was held this was not sufficient, the court saying "there was no user which could establish a street by prescription," and a judgment of conviction was accordingly reversed.

And in Illinois the rule seems further to be that, before an acceptance will be implied from user alone, so as to charge a city with the responsibility of keeping a street in repair, the user must be of such a general character as to necessarily show an intention of the authorities to accept the street. Thus, in *City of Rock Island v. Starkey*, 189 Ill. 515, 59 N. E. 971, the appellee had recovered a judgment for damages against the city for injuries sustained by falling on the defective sidewalk of an alleged public street, but which the city claimed had never been accepted; and the judgment had been affirmed by the court of appeals (91 Ill. App. 592). The street had been traveled by the public as a public highway for about thirty-nine years, and was known and called by a designated street name; but the judgment was reversed by the supreme court because the trial court charged the jury that "acceptance of the street might be shown by long-continued use." Said the court: "The instruction

declared the rule that long-continued use, regardless of its manner or extent, would establish the acceptance, and it does not require that it should be general. There might be long-continued use as a public way by a few persons, and the use not be of such general character as to necessarily show an intention of the public authorities to accept the street."

In *City of Hammond v. Maher*, 30 Ind. App. 286, 65 N. E. 1055, appellee had recovered a judgment against the city for damages for injuries received by reason of a defect in an alleged public street. The only issues involved were whether the alleged street had been dedicated and accepted. It appeared that the owners of the land graded the street, built a sidewalk, had telegraph poles strung along it, and that the public used it extensively as a street for two or three years before the injury occurred. There was no evidence that the city had ever formally accepted it, or ever caused it to be worked as a street. In affirming the judgment of the lower court the supreme court said: "Later cases are all to the effect that user by the public will amount to an implied acceptance, and cast the burden of maintaining the highway upon the local government, and that the acceptance of the dedication will be implied from the general use by the public as of right." And as sustaining its decision, the rule laid down by the supreme court in *Summers v. State*, 51 Ind. 204, was quoted: "In determining whether there had been an acceptance of the road by the public, it would be proper to inquire whether it had been worked by public authority, but the fact that it had not been adopted and worked by the supervisor would not defeat the dedication. The fact that the road had been used for a considerable length of time by the public, with the consent of the owner of the land, raises the presumption that the owner intended to dedicate it to the public; and the continued use of it by the public for a considerable length of time is sufficient evidence of acceptance on the part of the public."

It was also said by the supreme court in the *Summers* case last quoted that: "The use of a highway by the public for twenty years, with the knowledge and without objection on the part of the owner of the land, amounts to a complete bar," but "a dedication by the owner and an acceptance by the public are to be presumed from the use thereof for a much shorter period of time, the necessary time being dependent upon the peculiar facts of each case."

So, too, in the late case of *Pittsburgh, C. C. & St. L. Ry. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356, the doctrine of implied acceptance from user alone was fully upheld. There was no question involved in this case as to the effect of implied acceptance in charging a city with the responsibility of keeping its streets in repair—in fact, the city was not a party to the suit at all—but the rule of implied acceptance from user alone by the unorganized public was applied under peculiar circumstances, and several questions regarding dedication and acceptance were raised, which makes

the case one of unusual interest. The action was brought by plaintiff against the railway company to recover damages for injuries he sustained by reason of being struck by a mail pouch thrown from one of the defendant's trains, while he was walking along an alleged public street in front of defendant's depot. The depot was located half way between two public streets of the city of Greenfield, and the defendant company had constructed in front of it a substantial brick platform which was convenient for use by the public as a sidewalk, and it had been so used by the public ever since its construction, but the portion of it on which the tracks were laid had been used only by foot travelers. It appeared that the strip of land on which the platform or sidewalk rested was dedicated to the public as a highway in 1853, though the strip in dispute was designated as "Railroad street," and that about that time the railroad was built upon it and sidetracks were laid upon it leading to various mills, elevators and warehouses, and these had ever since so remained. There had been no express acceptance of the dedicated strip by the municipal authorities, nor had they ever improved the same or caused it to be worked.

The defense of the railway company was that the platform or sidewalk where the injury occurred was its private property, upon which plaintiff at the time was a trespasser. The first point relied on to sustain this contention was that the strip in question was never dedicated to the public, but was dedicated to the railway company for railroad purposes. The court disposed of this by saying that dedications could not be made to a private person or to a corporation, but only to the public. It was then insisted that there had been no acceptance of the dedication, but this contention was overruled upon the ground that the strip had been constantly used by foot-passengers practically ever since it was laid out. It was then urged that the use was only such use as is habitually made by the public of the railroad's right of way wherever the same remains open and is convenient for public travel. The court said this was probably true, and would have force if the defendant was the legal owner of the ground, for then the public use would have only been permissive, but it was not effective in this case because the public had the right of way, and the railroad company was but a permissive user, and that the user by the public in this case showed an acceptance of the dedication.

A case somewhat similar to the one just noted is that of *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270. In this case the action was brought for the negligent death of plaintiff's intestate, while walking across an alleged public road. Defendant operated a blast furnace and owned land adjoining and connected with it across which ran the road in dispute. This road had been used by the public for over twenty years without objection, but it had never been worked by the public within the limits of defendant's land, though they had worked and repaired it up to defendant's land on either side. Defendant had kept that portion of

the road which was on its land in repair, but had made no objection to its use as a public highway. One issue involved was whether defendant had been guilty of negligence, and this depended upon the question whether the road at the point where the accident occurred was a public highway or a private road of the defendant's, upon which it owed no duty to the public or to travelers. The road had never been legally laid out, and if it was a public highway, it existed as such only by user.

The trial court was of opinion that the evidence was not sufficient to show dedication and acceptance, and directed a verdict for defendant, but it was held on appeal that plaintiff was entitled under the circumstances to have this question submitted to the jury. "It was not necessary," said the supreme court, "that it should be laid out, or attempted to be paid out, by the highway authorities. It could become a public highway by user alone. . . . It was not necessary to show that there had been a formal acceptance by the highway authorities. Public user alone, where sufficiently general and long continued, will constitute an acceptance." The judgment in favor of defendant was affirmed, however, but entirely upon the ground that the death resulted from the negligence of a fellow-servant of deceased against whom no charge of incompetency was made.

The decisions of the courts of Missouri, though seeming to be agreed on the question that mere user alone is sufficient to establish acceptance for most purposes, are not uniform, even in the late cases, as to whether such user will constitute an acceptance which will hold the city responsible for its failure to keep the dedicated premises in repair. This question was squarely before the supreme court of that state in 1900, in the case of *Downend v. Kansas City*, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170, where it was held that user by the public for six years would not amount to the acceptance of a dedicated street so as to charge the city with the duty of keeping it in repair; and the court went even further and said that such user for the period required to create a prescriptive right would not be sufficient to so charge the municipality.

"The mere use of a street does not constitute the way a street or highway, so as to cast the burden of keeping it in repair on the public authorities. As between the owner of the land and the public, prescriptive use or public use for longer than ten years bars the owner's right to close it up or to deny the use as a way. But the public acquire no right by such use to demand that the city shall keep it in repair."

The reason given by the court for this opinion is, that the power to establish streets is vested in a city as a political subdivision of the state, and can only be exercised by its officers in the manner specified by its organic law; and this decision was followed by the Missouri court of appeals in *Atkinson v. City of Nevada*, 133 Mo. App. 1, 112 S. W. 1022, where, referring to the *Downend* case, this

court said that the "basic principle underlying that decision is that it requires a voluntary, not a compulsory nor perfunctory, act of the city to bind it as an acceptor of the street."

But in *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. 207, it was held that, where the intent of the owner to dedicate is shown aliunde, acceptance by the public may be established by adverse user for a period less than that prescribed in the statute of limitations. Damages were not sought in this case, however, against the city, but against a third person, and the question of whether the alleged street where the accident occurred was or was not a public street was necessary to be decided only for the purpose of determining whether the plaintiff was a trespasser at the time the injury was sustained.

And in *State v. Muir* (Mo. App.), 117 S. W. 620, it was said that continuous public use was evidence of an acceptance, if it had been so long and so extensive "that the public would be materially discommoded and private rights impaired by interrupting it." But this decision was rendered in a prosecution for obstructing an alleged public street, and no question of liability on the part of the city for failure to keep it in repair was involved.

The latest decision of the supreme court of Missouri, however, on this question appears in the principal case, *Benton v. City of St. Louis*, 217 Mo. 687, ante, p. 561, 118 S. W. 418, and the question of whether an acceptance from user could be implied, so as to charge a city with responsibility for its failure to keep a dedicated street in repair, was directly before the court. It is true that, in addition to the public user shown in this case, some acts on the part of the public officers of the city, which tended to show recognition of the street, appeared, but speaking only on the subject of the user, the court, after remarking there had been some doubt on the question whether user alone for a dedicated street would amount to such acceptance as to bind the city to keep it in repair, said: "This uncertainty is removed by the later authorities, and it may now be considered as the prevailing opinion that an acceptance may be implied from a general and long-continued use by the public as of right."

And the same rule was announced by the supreme court of Washington in *Spencer v. Town of Arlington*, 49 Wash. 121, 94 Pac. 904, where it was sought to recover damages from the town for injuries sustained by reason of a defective street, which had never been formally accepted, but which had been traveled by the public as a highway for twelve or fifteen years.

The foregoing cases sufficiently show that the general rule which we gave is fully sustained without any qualification by the weight of authority, but it is not of universal application, for in Georgia, New York, Ohio and West Virginia, and perhaps a few others, it is held that mere acceptance by user alone of a dedicated way will not charge a city or county with the burden of its repair. Thus, in the late case of *Penick v. Morgan Co.*, 131 Ga. 385, 62 S. E. 300,

plaintiff was injured by the breaking of a bridge on an alleged public road while driving over the same, and sought to recover damages from the county for the injuries sustained. It appeared that the road had been traveled by the public as a public highway for about eight years, and that the public authorities had recognized it as such by making improvements and repairs. This was held sufficient evidence to submit to the jury the question whether the road had been dedicated and accepted, but speaking to the question of acceptance from user alone the court said: "However, the dedication of land by the owner thereof for use as a public road, and use by the public of such road as a route of travel, would not of itself make the road a public road so as to charge the county with the burden of its repair and maintenance, unless the dedication was accepted by the county authorities, or there was evidence of their recognition of the road as a public road showing acceptance."

In *Palmer v. East River Gas Co.*, 115 App. Div. 677, 101 N. Y. Supp. 347, it was held that there could be an irrevocable dedication of a public street by general public user, without any official acceptance, but that official acceptance is necessary in order to impose a duty on the body politic to keep the street in repair.

The decision in this case was called forth by a suit by the plaintiff to enjoin the defendant gas company from laying its mains by permission of the city in a street which plaintiff claimed had been abandoned by the city because it had failed to work it for six years as required by statute, although it had been continuously traveled as a public street by the public. The court having decided that the user was sufficient to constitute the street an "unofficial" public highway, the injunction was denied.

The supreme court of Ohio has gone even further than any of these courts which hold that acceptance cannot be implied from mere user alone so as to charge the city with the burden of repair; for in the comparatively recent case of *Cincinnati & M. V. R. Co. v. Village of Roseville*, 76 Ohio St. 108, 81 N. E. 178, it was held that even as against the dedicator, user alone by the public would not amount to an implied acceptance. In standing thus practically alone on this question the court said: "It is said that the late cases rule that an acceptance may be implied from public user, upon the assumption that the inhabitants are the principal and the corporate officials merely its agents, and that the principal may himself do what he might have done through the intervention of an agent: *Elliott on Roads and Streets*, 2d ed., sec. 150. A somewhat similar suggestion was made in the time of King James I. The usurpation of the court of high commission being checked, much to the disappointment of the king, by prohibition from the court of common pleas, it was suggested that the king in his own person should judge whatever cases he pleased, free from all risk of prohibition or appeal. The reasoning, as given by Lord Campbell, was as follows: 'The judges are but the delegates of your majesty, and administer the law in

your name. What may be done by the agent may be done by the principal. Therefore, your majesty may take what causes he may be pleased to determine from the determination of the judges, and determine them for yourself.' But the king was advised by Coke, C. J., all the judges concurring, that the king in his own person could not adjudge any cases, either civil or criminal: Prohibitions, Del Roy, 12 Coke, 63." The court then proceeded to say that a city is only a local subdivision of the state, and possessed only of delegated powers which must be exercised by the officers of the municipality, and hence it would be bound to keep a dedicated street in repair only after its acceptance by the authorities whose duty it would be to care for it should it be established.

This, as we have seen, was the same reasoning set forth by the supreme court of Missouri in *Downend v. Kansas City*, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170, but which seems to be repudiated by the principal case (*ante*, p. 572), which is the latest decision of that court on the question.

So that, among those courts which contend that mere user alone by the public will not constitute an acceptance so as to charge the city with the burden of keeping the dedicated premises in repair, this Ohio case seems to be the only one which contends that such user is not sufficient to establish an acceptance, at least as against the dedicator and his alienees.

In addition to the cases already cited on this question may be added that of *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 44 S. E. 155, where it was held that, when a land owner dedicates a highway for public use, and it is accepted by the public by general use, it becomes a highway as between the dedicator and the public beyond his revocation, though not accepted by the public authorities, but that such acceptance by user is not sufficient to charge the city with its maintenance.

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CASES
IN THE
SUPREME COURT
OF
MONTANA.

LARSON v. PEPPARD.

[38 Mont. 128, 99 Pac. 136.]

QUIETING TITLE—Equitable Nature of Action.—An action to quiet title under section 6870 of the Revised Codes is an action in equity, wherein the maxim applies that he who seeks equity must do equity. (pp. 631, 632.)

QUIETING TITLE—Payment of Taxes as Condition Precedent.—The plaintiff in an action to quiet title to land which has been sold at a tax sale, which, because of irregularities, did not divest him of title, must reimburse the tax purchasers before he is entitled to relief. (p. 632.)

QUIETING TITLE—Interest on Delinquent Taxes.—In an action to quiet title to land which has been irregularly sold for taxes, the court should allow the holder of the tax deed only legal interest on the delinquent taxes paid by him. (pp. 635, 636.)

QUIETING TITLE—Payment of Delinquent Taxes.—In an action to quiet title to land which has been sold for taxes, the court should enter an order requiring the plaintiffs to make payment of the delinquent taxes to the holder of the tax deed within a reasonable time, say thirty days. If the payment is made within that time, then the decree quieting title should be entered; if not so made, the plaintiffs should be denied all relief. (p. 636.)

H. G. and S. H. McIntire, for the appellants.

Woody & Woody, for the respondent.

¹³⁰ **HOLLOWAY, J.** This action was commenced in the district court of Missoula county by Peter Larson against O. E. Peppard for the purpose ¹³¹ of having determined any adverse claim of the defendant to certain pieces and parcels of land situated in the city of Missoula, and claimed to be owned by, and in the possession of, plaintiff and the heirs at law of one John Woods, deceased. The plaintiff died, and the per-

sonal representatives of his estate were substituted as plaintiffs. The complaint is in the ordinary form of actions to quiet title. The prayer is that the defendant be required to set forth the nature of his claim, that it be determined to be without right, and that the defendant be enjoined from asserting any claim to the premises. In addition to other defenses, the answer sets forth that in 1893 the premises in controversy were owned by Larson and Woods, and were assessed by the assessor of Missoula county for taxation to such owners; that the taxes were not paid within the time allowed by law before they became delinquent; that the property was advertised for sale for delinquent taxes; that a sale thereof was had, and at such sale Frank D. Low became the purchaser of the property and received the treasurer's certificate of sale; that in March, 1896, the county treasurer of Missoula county executed and delivered to Low a treasurer's deed for the property; that in 1896 Low and his wife executed and delivered to the defendant a quitclaim deed to the property; that from 1894 to 1901 the property was assessed to Low, and from 1902 to 1906 to this defendant; that all the taxes levied upon the property for 1894 and 1895 were paid by Low, and the taxes for 1897 to 1906 were paid by the defendant. The answer prays that, if it be found that the title to the property still remains in Larson and Woods, the defendant be adjudged to have a lien upon the property for the amounts paid by himself and his predecessor. The cause was tried to the court sitting without a jury. A decree was rendered and entered quieting plaintiff's title to an undivided one-half interest in the property, subject to a lien of defendant upon the whole property for the different amounts paid for taxes. From this judgment the plaintiffs have appealed.

¹³² It may be conceded that the proceedings taken in connection with the taxes for 1893 were so far irregular that the sale of the property by the county treasurer did not operate to divest Larson and Woods of their title to the property; and it may be conceded, further, for the purposes of this case, that, by reason of such irregularities, neither Low nor Peppard could maintain an action at law to recover back the amounts paid by him. But this is an action prosecuted under the provisions of section 6870, Revised Codes, and this court has repeatedly held that such an action is one in equity: *Montana Ore Pur. Co. v. Boston & Montana Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114; *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963; *North Real Estate L. & T. Co. v. Billings L. & T. Co.*, 36 Mont. 356, 93 Pac. 40. Larson, then, having appealed

to a court of equity to relieve his property from the outstanding claim of the defendant, the court could properly apply to him the maxim, "He who seeks equity must do equity." The property was subject to taxation. There was at least an attempt made to levy and collect the taxes. Larson and Woods owed the duty to bear their just proportion of the burden of state, county and city governments. They failed to discharge the duty in this instance, and Peppard and his predecessor discharged it for them, under the mistaken belief that they thereby acquired an interest in the property. The payments made were not voluntary, in the sense that they were made merely to discharge the obligations of Larson and Woods. But in a case of this character the particular inquiry which the court makes is to ascertain whether the property was in fact subject to taxation; whether the proceedings were so far in compliance with the law that the court can say that the land owners should have paid the taxes, and that such taxes were their just contributions toward the support of government. If these facts appear, then equity will compel the tardy land owners to do that which they should have done in the first instance—pay the taxes. It is certainly not imposing upon them any unreasonable or unjust burden to require them to bear their just proportion of the expense of government. No reason is ¹³³ suggested why these particular parties should be relieved from the payment of any taxes whatever upon this property for sixteen or seventeen years. When Larson applied to the district court, sitting as a court of equity, to quiet the title to his property as against any claim of the defendant, and it appeared that the defendant's claim rested upon the payment of taxes under the circumstances of this case, the court in effect said to him: "You and your co-owner ought to have paid the taxes on this property, and, as a condition precedent to your having such property free from any claim made by the defendant by reason of his having paid the taxes which you ought to have paid, you must now discharge your duty, as nearly as can be done, by paying the amounts to this defendant, together with legal interest thereon."

The authorities are not entirely in harmony upon this subject. Some of the courts deny the right to impose any condition whatever; but the rule adopted by the trial court, and which is approved in principle, has the support of many courts and text-writers, and, in our opinion, is right and ought to prevail in this state.

The assessment and sale of property for delinquent taxes is a proceeding in invitum. The purchaser at such sale buys at his peril, and the rule of caveat emptor applies (*Birney v. Warren*, 28 Mont. 64, 72 Pac. 293); but the mere fact that the rule of caveat emptor applies is not any ground for relieving the land owners from the payment of burdens for which the land was in fact responsible, without first requiring such land owners to do that which they ought to have done. "The owner comes into a court of equity, asking that he be relieved from tax proceedings which he claims to be illegal. Before his prayer should be granted, he should do equity himself, and reimburse the tax purchaser": *Powers v. First Nat. Bank*, 15 N. D. 466, 109 N. W. 361.

In a very large number of jurisdictions it has been held that in a suit to quiet title or to determine adverse claims to real estate, instituted by the owner against the tax deed holder, the ¹³⁴ rule, "He who seeks equity must do equity," applies with full force and vigor, and that the payment or tender of the taxes which the owner ought to have paid will be held to be a condition precedent to his right to the relief demanded. In *Boeck v. Merriam*, 10 Neb. 199, 4 N. W. 962, the supreme court of Nebraska states the rule in the terse and vigorous language of Chief Justice Maxwell, as follows: "But can the party claiming to be the owner of the land be permitted to have a tax deed declared void upon the ground that it is a cloud upon his title, unless he states some ground for equitable relief other than a mere irregularity in the assessment? The burdens of taxation must be borne by the taxable property in the state, and a fair proportion of such taxation is to be assessed upon all such property according to its value, and is in justice and equity a just charge against the same. When a taxpayer, therefore, for any cause escapes taxation, an act of injustice is committed against every other taxpayer in the state, as this additional burden is thrown upon them. . . . And if the owner of real estate can wait until his land has been sold for taxes and until the certificate of sale has ripened into a deed, and then upon a mere technicality, without the payment or offer to pay the taxes justly chargeable against his property, have delivered up and canceled at the costs of the tax purchaser, as in this case, the tax deed, he not only entirely escapes the payment of legitimate taxes, but the owner of the tax deed is deprived of a valuable legal right—that of trial by jury—and is mulcted in costs for his temerity in purchasing at tax sale, while the party claiming to be the owner of the land takes no hazard of losing his land

from adverse title. But such is not the law. He who seeks to have a tax deed declared void where the taxes for which the land was sold were lawful taxes, and justly chargeable against the same, if legally assessed, must, as a condition of relief, pay or offer to pay the taxes justly due thereon. Otherwise he states no ground for equitable relief. He does not offer to do equity. He seeks the aid of the court to aid him, by giving effect to mere technicalities, to shield him from his just liabilities. It ¹³⁵ is difficult to imagine a case more utterly barren of equity than this."

Early in the history of North Dakota the rule for which appellants here contend was recognized. In a case of this character the delinquent land owner was permitted to have the title to his property quieted without the payment of back taxes (see *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919); but in *State Finance Co. v. Beek*, 16 N. D. 374, 109 N. W. 357, the former decisions were overruled, and, among other things, the court said: "If the sale is set aside unconditionally, even though the tax is not canceled, the county is chargeable with the accrued interest, and plaintiff gets the benefit of the use of the money without interest, which he ought to have paid years before, and his tax-paying neighbors must suffer for his laches. A court of equity will not tolerate such injustice. It will grant relief only on the condition that the party seeking it does equity. The burden of each taxpayer's neglect of his obligations should be borne by himself. Hence we shall hold that, as a condition to the vacation of the sale in question, the plaintiff must pay to the defendant Beek, or into court for him, the amount for which the land was sold, with interest thereon at seven per cent per annum from the day of sale. . . . We do not question the well-established rule that a tax title purchaser buys at his peril. The doctrine of caveat emptor applies to such a sale to its full extent. However circumscribed the rights of the tax title purchaser may be as compared with those of the land owner, the latter is not entitled to more than his legal rights. The infirmities of the tax title do not absolve the taxpayer from his obligation to do equity when he seeks equity. We agree that the tax title purchaser is entitled only to his pound of flesh in whatever form he demands it. But confining the tax title purchaser to his strict legal rights is one thing, and relieving the tax debtor from his just share of taxes at the expense of his neighbors is quite another. This case is a fair illustration of the injustice resulting from adhering to the rule, heretofore in force in this state, of not requiring payment of just taxes as a condition precedent ¹³⁶ to relief

in this class of cases. The owner of the land in this case has not paid a cent of tax on this property for more than twenty years. It is not claimed that any of the taxes were excessive or unfair, or that they otherwise infringed any of the land owner's constitutional rights. The technical requirements of the law as to the procedure have not been followed with precision; and the land owner not only asks to have the tax sales set aside, but declines to pay or offer to pay a cent of the taxes which are confessedly just. Under the rule heretofore in force, he was sustained in that position. . . . By overturning the precedents on this question established by former decisions, we do not in any way disturb the rules by which the validity of past or future tax sales are to be tested. We disturb no rights which are justly entitled to protection. It surely cannot be claimed that those who have neglected to pay their just taxes are in any position to invoke the doctrine of stare decisis to continued immunity from their obligation to do equity when they seek equitable relief. We are satisfied that public policy necessitates this modification of former decisions, and it is further justified by the fact that it restores in this state the rule recognized and applied in other jurisdictions. . . . Chapter 166, page 232, Laws of 1903, is an express legislative establishment of the rule we have been discussing. As indicated above, the court has inherent power, independent of such a statute, to do what the statute requires."

In principle, the rule is stated and adopted by the following courts: *Wagner v. Underhill*, 71 Kan. 637, 81 Pac. 177; *Hole v. Van Duzer*, 11 Idaho, 79, 81 Pac. 109; *Hart v. Smith*, 44 Wis. 213; *Smith v. Gage*, 12 Fed. 32, 11 Biss. 217; *Fenton v. Minnesota etc. Co.*, 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363; *Phelps v. Harding*, 87 Ill. 442; *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751; *Baldwin v. City of Elizabeth*, 42 N. J. Eq. 11, 6 Atl. 275. See, also, 2 *Desty on Taxation*, 901, 982; *Black on Tax Titles*, sec. 442. Many other authorities might be cited in support of this doctrine, but those given are deemed sufficient. In some of the states statutes have been enacted requiring the enforcement of ¹³⁷ this rule, but the cases cited above were determined without reference to any statutory provision upon the subject.

The district court, however, erred in allowing interest at the rate of two per cent per month upon the payment made January 19, 1894. This is not a proceeding to redeem from a tax sale, and has not any of the characteristics of such a proceeding. The court should have allowed interest only at the legal

rate. The form of the judgment or decree seems to have the approval of some of the authorities. We approve the action of the court in applying the maxim, "He who seeks equity must do equity," but in our judgment, the logical result from the application of that maxim would seem to be that the payment of the several amounts should be made a condition precedent to plaintiffs' right to the relief demanded. We think that the better practice would be, in a case of this kind, for the trial court to enter an order requiring the plaintiffs to make such payment within a reasonable time, say thirty days. If the payment is made, then the decree quieting the title should be made and entered; but if the payment be not made within the time allowed, then the plaintiffs should be denied any relief whatever.

The cause will be remanded to the district court for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

Mr. Chief Justice Brantly and Mr. Justice Smith concur.

Actions to Quiet Title are discussed in the note to *Helden v. Hellen*, 45 Am. St. Rep. 373. The plaintiff in a suit to remove a cloud on his title caused by a void tax sale may be required to pay the amount justly due for the taxes included in such sale: *Fenton v. Minnesota Title Ins. etc. Co.*, 15 N. D. 365, 125 Am. St. Rep. 599. As to whether a void tax sale constitutes a cloud upon title, see *City of Ensley v. McWilliams*, 145 Ala. 159, 117 Am. St. Rep. 26, and cases cited in the cross-reference note thereto.

STATE v. DISTRICT COURT.

[38 Mont. 166, 99 Pac. 291.]

DIVORCE—Necessity of Service on Insane Defendant.—Personal service upon the insane defendant in an action for divorce is necessary to confer jurisdiction. (p. 639.)

DIVORCE—Absence of Service on Lunatic—Validity of Decree.—Where, in an action against an insane man for a divorce, a guardian ad litem is appointed who files a demurrer on behalf of the defendant, a decree subsequently rendered is valid on its face, notwithstanding there was no personal service on the defendant. The summons with the return thereon is no part of the judgment-roll in such a case. (p. 639.)

DIVORCE—Relief by Motion or Appeal from Decree Against Lunatic.—Where a decree of divorce is rendered against an insane defendant who was not personally served, but for whom a guardian ad litem was appointed, who filed a demurrer in the action, relief cannot be had from the decree on appeal, for the reason that the defect in the service of summons does not appear of record. Nor

can relief be had by motion in the trial court after the expiration of the statutory limit of six months, for the decree is fair on its face, and its infirmity can be made to appear only by evidence dehors the record. (p. 640.)

DIVORCE—Relief in Equity from Decree Against Insane Person.—Where a decree of divorce is entered against an insane defendant upon whom personal service was not made, but for whom a guardian ad litem was appointed, who filed a demurrer, equity has jurisdiction to grant relief after the expiration of the six months allowed by statute to move for the vacation of a judgment. If the general guardian of the incompetent refuses to institute the suit, his daughter may do so as next friend, and ask for the appointment of a guardian ad litem. (p. 641.)

DIVORCE—Relief in Equity—Mandamus to Compel.—Mandamus is the proper remedy to compel the district court to proceed when it declines to assume jurisdiction of proceedings in equity for relief from a decree of divorce, brought on behalf of a lunatic against whom the decree was entered without personal service, but for whom a guardian ad litem appeared. (p. 644.)

MANDAMUS to Compel Court to Assume Jurisdiction.—Mandamus lies to compel a district court to assume jurisdiction to proceed in its regular exercise whenever, through an erroneous determination of a question of practice or procedure, it has refused to proceed, if no other remedy is available. (p. 644.)

John A. Luce, for the plaintiff.

Walrath & Patten, for the defendant.

¹⁶⁷ BRANTLY, C. J. Mandamus. Henry F. Toepper and Albertine Toepper, husband and wife, resided in Gallatin county. On November 16, 1901, Henry F. Toepper was by the district court of said county adjudged insane, and committed to the custody of the state contractors for the care of the insane, in the insane asylum at Warm ¹⁶⁸ Springs, Deer Lodge county. This judgment has never been reversed or set aside, and the said Toepper has been since the date mentioned, and still is, confined in the asylum. On April 10, 1907, Albertine Toepper, being still a resident of Gallatin county, brought her action in the district court of that county to secure a decree of divorce from her husband, the ground therefor alleged in her complaint being cruel treatment by her husband. Accompanying the complaint was an application for the appointment of a guardian ad litem to make defense to the action, the application alleging that said Toepper had been adjudged insane and that he was a proper party defendant. The summons issued in this action was never served on the defendant Toepper. The court, however, appointed a guardian ad litem, and summons was on April 15th served upon him. This was the only service ever made. On April 22d the guardian appeared in the action for the defendant by filing a demurrer to the complaint. On May 31st the demurrer was overruled. On

June 15th the default of the defendant for want of answer was entered. On the same day, upon evidence submitted by the plaintiff, the court decided that she was entitled to the relief demanded, and rendered and caused to be entered a decree in accordance with its decision. No proceedings were instituted by anyone on behalf of the defendant to set aside the decree, until the action was brought out of which this proceeding grew, Charles Papke, his general guardian, appointed subsequent to the entry of the decree, refusing to take any steps in the matter. On April 3, 1908, the plaintiff herein, the daughter of Toepper, filed a complaint as next friend of her father, setting forth the facts above recited, naming Albertine Toepper defendant therein, and demanding judgment that the decree of divorce be set aside on the ground that the same had been entered without jurisdiction. Accompanying the complaint was an application alleging that the general guardian had refused to bring the action, and asking that a guardian ad litem be appointed to prosecute it on behalf of her father. Summons having been issued and served upon Albertine Toepper, counsel for plaintiff ¹⁶⁹ herein brought her application for the appointment of a guardian to the attention of the court. The defendant had, in the meantime, appeared by counsel and interposed a demurrer to the complaint on several grounds, among them that it did not state facts sufficient to constitute a cause of action. Counsel for Albertine Toepper orally objected to the appointment of a guardian. The ground of the objection does not appear, nor was any evidence submitted in support of it. Thereafter, on May 4, 1908, the court made an order refusing to make the appointment. Thereupon the plaintiff filed a verified petition in this court, embodying a statement of all the foregoing facts and proceedings, and praying for a writ directing the district court to assume jurisdiction by the appointment of a guardian to prosecute the action instituted by her. In response to notice of the application, the Honorable W. R. C. Stewart, judge of the district court, filed his verified answer admitting the truth of the statements set forth in the petition, but denying the legal conclusion stated therein; that, by his action in refusing to appoint a guardian to prosecute the action of Toepper v. Toepper, he wholly denied Henry F. Toepper his day in court to submit and have his rights determined with reference to the action of divorce wherein the decree was entered against him.

The demurrer was not submitted to, nor were the questions raised by it determined by the court. The theory upon which the order refusing to appoint the guardian was made was that

the application was addressed to the discretion of the court, and that, in refusing to appoint the guardian and allow the cause to proceed, no substantial right was denied to Henry F. Toepper. That this was the court's theory is apparent from the answer filed to the petition in this court, and the contention made by counsel at the argument that its action was justified by the fact that no showing of special circumstances was made by plaintiff to move the court's discretion.

Though the petition alleges that the decree in the action for divorce is void, it is not in fact so upon the face. Summons should have been served upon the defendant personally: Rev. 170 Codes, sec. 6519, subds. 5, 7. Under a similar statute in California it is held that the court has no jurisdiction to appoint a guardian ad litem for an incompetent defendant until he has been brought into court by personal service of summons (*Sacramento Savings Bank v. Spencer*, 53 Cal. 737; *Redmond v. Peterson*, 102 Cal. 595, 41 Am. St. Rep. 204, 36 Pac. 923), and this seems to be the rule generally: *Taylor v. Lovering*, 171 Mass. 303, 50 N. E. 612; 22 Cyc. 1236. But it is not necessary to pursue the inquiry as to the order of procedure in such cases. In any event, under either of the provisions of the statute, *supra*, personal service upon the incompetent was necessary to confer jurisdiction to proceed to decree. But while all that is true, in view of the presumptions which must be indulged in favor of the decree, upon the facts alleged, it is voidable only. Nothing appearing to the contrary, we must presume that the complaint upon which it is based states a cause of action, for we may not presume that the decree would otherwise have been granted. This being so, and there having been an appearance thereto by demurrer on behalf of the defendant, the decree is upon its face valid. The summons with the return thereon is no part of the judgment-roll in such cases: Rev. Codes, sec. 6806, subd. 2. Hence there is nothing upon the face of the record to reveal any infirmity: for this provision does not require the summons with proof of service to be made a part of the record in any case, other than those falling within the exception stated, and the exception does not include this case. Under these circumstances, whether this court should grant the relief demanded by the plaintiff depends upon the solution of two questions: (1) Does an action in equity lie in favor of Toepper to set aside the decree, and, incidentally, does it rest entirely within the discretion of the district court to say, in limine, whether he may bring and prosecute it? And (2) is mandamus the proper remedy?

1. That such an action lies, under the circumstances existing here, we have no doubt. Not only is there no other adequate remedy, but in fact no other remedy. Assuming, as we must, ¹⁷¹ that the decree is valid on its face, an appeal, though it lay at the time application was made for the appointment of the guardian ad litem by plaintiff, could not be effective, for the reason that the defect in the service of summons does not appear from the record. Nor could relief be had by motion in the district court, for the same reason; for, though a judgment void on the face may be set aside on motion at any time (*Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585; *Harvey v. Whitlatch*, 2 Mont. 55; *State v. District Court*, 21 Mont. 155, 69 Am. St. Rep. 645, 53 Pac. 272; *State v. Minar*, 13 Mont. 1, 31 Pac. 723; *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *Ex parte Crenshaw*, 15 Pet. 119, 10 L. ed. 682; *People v. District Court*, 33 Colo. 405, 80 Pac. 1065; 1 *Freeman on Judgments*, 98), this rule does not apply to judgments fair on their face, the infirmity of which must be made to appear by evidence dehors the record. Under the statute (*Rev. Codes*, sec. 6589), the motion in such cases must be made within a reasonable time after the date of the entry of judgment, but in no case exceeding six months, and the statute is the limit of the court's power in such cases. After the expiration of the time limit fixed therein, the power of the court over the judgment absolutely ceases, and it is without jurisdiction to vacate or modify it: *Canadian & Am. Mortgage & Trust Co. v. Clarita Land & Investment Co.*, 140 Cal. 672, 74 Pac. 301; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Young v. Fink*, 119 Cal. 107, 50 Pac. 1060; *Schwarz v. Oppenheimer*, 90 Ala. 462, 8 South. 36; *People v. District Court*, 33 Colo. 405, 80 Pac. 1065; 23 *Cyc.* 907. Toepper, therefore, has no remedy by motion. Is he to be denied relief because he did not proceed under the statute within the six months? We think not. While it might with propriety be said that if the action had been brought within six months, relief should have been denied on the ground that he had an existing adequate remedy at law, the fact that proceedings were not taken in his behalf under the statute is not a conclusive reason why relief should be denied him now. In ¹⁷² *Bibend v. Kreutz*, 20 Cal. 109, in considering a condition similar to that presented here, Mr. Justice Cope said: "The assistance of equity cannot be invoked so long as the remedy by motion exists; but when the time within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, there is nothing in reason

or propriety preventing the interference of equity." He quotes from Story's Equity Jurisprudence, section 885, with approval, as follows: "In general, it may be stated that in all cases, where by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained."

In this state the statute applies to judgments at law as well as decrees in equity. No distinction is made between them, except as to the character of relief granted by them. They are both judgments within the meaning of the statute: *Raymond v. Blanegrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A., N. S., 976. And whether the application for relief be denominated, technically, a bill of review or an original bill in equity, the relief will be granted against them subject to the rule that a court will not, in the exercise of its equity power, interfere so long as there is another subsisting adequate remedy. As has heretofore been pointed out, relief cannot be had under the statute; nor is there any remedy other than an action in equity. Certiorari will not avail, because the defect of jurisdiction does not appear upon the face of the record. If it did, the judgment would be void upon the face of it, and it would be open to attack by motion invoking the power of the court to clear its record of that which purports to be a judgment, but which is in fact not such.

We do not see that a decree of divorce rests upon any other or different ground than any other judgment determining the property or personal rights of the defendant, when it has been¹⁷³ obtained as it seems was the decree in this case. The courts and text-writers make no distinction: *Freeman on Judgments*, sec. 489; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193; *Newcomb's Exrs. v. Newcomb*, 13 Bush (Ky.), 544, 26 Am. Rep. 222. While here the attack upon the decree is direct on the ground of a want of jurisdiction (*Burke v. Interstate S. & L. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879), and that in the case of *Newcomb's Exrs. v. Newcomb*, 13 Bush (Ky.), 544, 26 Am. Rep. 222, was collateral, the remarks of the court in that case, involving, as it did, a decree of divorce obtained without notice, upon the right of a defendant to be heard before he is finally concluded, are pertinent here: "Everyone whose rights are to be affected

by a judicial proceeding must have his day in court. This is one of the fundamentals of the law, and, when a judgment has been rendered without citation or summons, there must be some remedy afforded the party complaining." The principle embodied in this statement has been enforced by this court, though in proceedings of a different nature: *State v. Clancy*, 24 Mont. 359, 61 Pac. 987. It is not necessary to cite authorities in support of it.

It is not our purpose here to discuss the character of the allegations necessary to be made in order to obtain relief in this or any other character of case. The questions touching the sufficiency of the complaint filed by the plaintiff in the district court are not before us, because the demurrer was never submitted to nor decided by that court. It decided in limine, upon the oral objection of the defendant named therein, that it would not appoint a guardian and assume jurisdiction to determine the case on the merits. As we have seen, resistance is made to the granting of any relief by this court, by the assertion of the proposition that it rested in the discretion of the court or judge to allow the case to proceed. And this brings us to the consideration of the incidental question, whether this assertion is correct.

It cannot be doubted that if Henry F. Toepper were *sui juris*, he would have the absolute right to bring his action to have the ¹⁷⁴ decree vacated. The court would not be permitted to reject his application in limine, without hearing, either upon the sufficiency of the facts stated, or after issue made, upon the sufficiency of the evidence tendered by him in support of the case made by his pleading. Can it be said that because he has become a helpless incompetent his rights may be taken away without notice, and that he may not thereafter be heard to complain because the judge of the court to which he happens to apply has an exclusive discretion vested in him by law to deny the right, and that, too, without the statement of any pertinent fact or circumstance invoking such discretion? An incompetent, whether plaintiff or defendant, must appear either by his general guardian, or, in case he has none or the guardian fails or refuses to appear, by a guardian *ad litem* appointed by the court: Rev. Codes, sec. 6481. The guardian *ad litem* is appointed upon the application of a friend or relative, or by one of the parties to the action. We apprehend that, in all cases where the incompetent is plaintiff, the application should be made by a relative or friend: Rev. Codes, sec. 6482.

From the use of the word "may," in the last sentence of section 6481, *supra*, wherein it is declared that "a guardian ad litem may be appointed," etc., it is argued that the power to appoint is discretionary in any case, it being the intent of the statute that the presiding judge should, in all cases in which infants or incompetents are parties plaintiff, determine in the first instance whether they, being in a sense wards of the court, should be permitted to engage in expensive litigation, or whether, when, as in this instance, there is a general guardian, his judgment as to the propriety of bringing the action should be overruled and disregarded. It may be remarked that if the appointment of a guardian ad litem on behalf of a plaintiff infant or insane incompetent is lodged in the discretion of the district court exclusively, the same rule would apply to the power of appointment of such a guardian on behalf of an infant or insane defendant, because the language used is general and applies to both plaintiffs and defendants belonging to this class. This is clearly not the meaning of the statute. To what extent, ¹⁷⁵ however, if any, this view should be upheld, we shall not undertake to decide definitely. Under the facts presented, the necessity does not arise. The assertion of the defendant in this regard may be conceded for the purposes of this case.

There was filed on behalf of the incompetent a complaint showing a clear violation of his personal rights. Evidently, the sufficiency of the statements therein to invoke the power of the court to grant the relief demanded was not considered. Indeed, it could not be considered, because their sufficiency was never questioned. It was shown that the action could not proceed without the guardian, because the general guardian, it appeared, had refused to act. In the absence of a showing to the contrary of facts and circumstances appealing to the alleged discretion of the court, there was nothing to put it in motion to deny an application which was *prima facie* sufficient. The action of the court amounted to such an abuse of discretion as that it may be said to have been arbitrary: *State v. Clements*, 37 Mont. 100, 127 Am. St. Rep. 705, 95 Pac. 845. It is undeniable that it is the intent of the statute that the court should exercise a broad discretion in the selection of the person who shall represent the infant or insane incompetent; but the discretion to be exercised in respect of permitting or refusing to permit the action to proceed, by appointing or refusing to appoint a guardian, if there be any, does not extend to a refusal to make the appointment and to assume jurisdiction of the

action when a *prima facie* right to prosecute it is made to appear. It may well be maintained that it is the duty of the court to guard carefully the rights of those who cannot act upon their own judgment because they are *non sui juris*. The discretion in this regard, however, is to be directed rather to the situation developed by the proceeding itself after the court has taken cognizance of the merits, than to a determination in limine of the rights involved and without knowledge of the merits. Courts have discretion in this regard: *Robinson v. Talbot*, 25 Ky. Law Rep. 1914, 78 S. W. 1108.

2. Is mandamus the proper remedy? The action of the court was evidently based upon a misconstruction of the statute as ¹⁷⁶ to its duty in the premises. It was tantamount to a refusal to take jurisdiction of the action and proceed, under this mistaken construction of the law. Mr. Iligh, in his work on Extraordinary Legal Remedies, says: "A distinction is recognized between cases where it is sought by mandamus to control the decision of an inferior court upon the merits of a cause, and cases where it has refused to go into the merits of the action, upon an erroneous construction of some question of law or of practice preliminary to the final hearing. And while, as we shall see, the decision of such court upon the merits of the controversy will not be controlled by mandamus, yet if it has erroneously decided some question of law or of practice presented as a preliminary objection, and upon such erroneous construction has refused to go into the merits of the case, mandamus will lie to compel it to proceed": Section 151. This language was quoted with approval by this court in *Raleigh v. District Court*, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991, to support the conclusion of the court that mandamus will lie to compel a district court to assume jurisdiction and proceed in its regular exercise whenever, through an erroneous determination of a preliminary question of practice or procedure, upon which the court refused to examine the merits, it has refused to proceed. In that case was involved the question whether, upon the refusal of a district court to entertain a second contest of a will filed in time, but after a former contest had been dismissed on the ground that it did not state sufficient facts, mandamus would lie to compel it to assume jurisdiction and proceed. This court held that, since an appeal did not lie, mandamus lay to compel the district court to take jurisdiction of the case and proceed. That case cannot in principle be distinguished from this case.

We think mandamus is the proper remedy, and therefore direct a peremptory writ to issue commanding the district court to proceed in accordance with the views herein stated.

Writ issued.

Mr. Justice Smith and Mr. Justice Holloway concur.

The Power of a Guardian Ad Litem to waive service of process is discussed in the note to Fletcher v. Parker, 97 Am. St. Rep. 1003. In Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457, it is held that where the court does not acquire jurisdiction of the persons of minor heirs in the mode provided by statute, in a proceeding to sell the real estate of a decedent by his administrator, such jurisdiction is not conferred by the appointment of a guardian ad litem and his answer for the heirs.

A Petition for the Appointment of a Guardian Ad Litem for an infant defendant by a master must show that the infant has been served with process of subpoena to appear, or that he has been proceeded against as an absentee and an order obtained for his appearance under the statute: Grant v. Van Schooven, 9 Paige Ch. 255, 37 Am. Dec. 393.

Relief from Judgments after the time specified in the statute is the subject of a note to Nicklin v. Robertson, 52 Am. St. Rep. 795; and the jurisdiction of equity to grant relief from judgments is the subject of a note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 218.

PLAINS LAND AND IMPROVEMENT COMPANY v. LYNCH.

[38 Mont. 271, 99 Pac. 847.]

ADMINISTRATOR'S SALE—*Allegations of Condition of Estate*.—The failure, in a petition for the sale of land of a deceased person, to allege the condition and value of his real estate as required by statute is not a jurisdictional defect, and does not render the sale based thereon void nor open to collateral attack. (p. 652.)

ADMINISTRATOR'S SALE—*Entry in Minute-book*.—An entry in the minute-book of an order to show cause against the sale of the land of a decedent is sufficient evidence that the order was made. If the clerk has affixed the judge's signature to the order, this may be treated as surplusage, for the statute does not require an order made in open court to be signed by the judge. (p. 653.)

ADMINISTRATOR'S SALE—*Failure of Order to State Terms*. The failure of the order to sell a decedent's land to state the terms of sale is cured by the confirmation of the sale, when the return shows that the property was sold for cash and for more than its appraised value. (p. 653.)

ADMINISTRATOR'S SALE.—*Confirmation Cures All Irregularities* in the proceedings leading up to the sale of a decedent's property. (p. 653.)

ADMINISTRATOR'S SALE—Public or Private Sale.—The court may order a sale of a decedent's land at public or private sale in the alternative. (p. 654.)

ADMINISTRATOR'S SALE—Divestiture of Title.—The Order of Court to sell a decedent's land is only a determination that the sale is necessary and an authority to make it. It does not affect the title or grant any right. It is the order of confirmation which finally operates to divest the heirs of their title and to secure the property to the purchaser. (p. 655.)

ADMINISTRATOR'S SALE—Misdescription of Land.—A clerical mistake in substituting "range 25" for "range 26" in the order for the sale of a decedent's land does not vitiate the proceedings when there was but a single piece of land involved, and it was correctly described in the petition, notices, confirmation, and deed, and no one could have been injured by the mistake. (pp. 656, 657.)

ADMINISTRATOR'S SALE—Effect of Irregularities.—Where the petition for a sale of a decedent's land is sufficient to confer jurisdiction upon the court to hear the application, subsequent errors in the proceedings cannot render the sale void and subject to collateral attack. (p. 658.)

Woody & Woody, Marshall & Stiff, H. J. Burleigh, Albert J. Galen and W. H. Poorman, for the appellants.

T. J. Walsh, W. N. Noffsinger, H. D. Folsom, Jr., and H. C. Schultz, for the respondents.

277 HOLLOWAY, J. This is an action to quiet title. The plaintiffs claim under a deed from the administratrix de bonis non of the estate of Neptune Lynch, Sr. The defendants are three of the four heirs at law of Neptune Lynch, Sr., and claim an estate in the property in controversy by inheritance. The trial court found the issues in favor of the defendants, and a decree was rendered and entered quieting their title to an undivided three-fourths interest in the land in controversy, subject, however, to a lien in favor of the plaintiffs for eighteen hundred and fifty-four dollars and eighty cents, that being three-fourths of the amount paid for the property at the sale by the administratrix. From the judgment and order denying them a new trial the plaintiffs appeal. Counsel for respondents in their brief point out a number of defects in the probate proceedings leading up to the sale, which they insist render the sale void.

1. The first of these alleged defects relates to the petition to sell real estate. Section 7562 of the Revised Codes provides that a petition for the sale of real estate shall set forth (1) the amount of personal property that has come into the hands of the administrator; (2) how much thereof, if any, remains undisposed of; (3) the debts outstanding against the decedent, as far as can be ascertained or estimated; (4) the

amount due upon the family allowance, or that will be due after the same has been in force one year; (5) the debts, expenses and charges of administration already accrued; (6) an estimate of what will or may accrue during the administration; (7) a general description of all the real property of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest; (8) the condition and (9) the value thereof; (10) the names of the legatees and devisees, if any; and (11) the names of the heirs of the deceased, so far as known to the petitioner.

278 The petition in this instance omits any reference, in terms, to the matters required in subdivisions 2, 4, or 10; attempts to state the requirements of subdivision 5 by giving the amount of debts, expenses, and charges of administration accrued and remaining unpaid; recites, with reference to the requirements mentioned in subdivisions 7, 8 and 9, that "the following is a full description of all the real estate of which the decedent died seised, or in which he had any interest, or in which said estate has acquired any interest: Lot Number One (1), and the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Section Number Twenty-seven (27), Township Twenty (20) North, Range Twenty-six (26) West, less right of way of Northern Pacific Railway Company, and parcel set apart for school ground, and appraised at the sum of \$2,000.00"; and in other respects the petition appears to have complied literally with the section above. The petition itemizes the personal property which had come into the hands of the administratrix, and prays for an order to sell all of it, so that it may be said to appear that all of the personal property that had come into her hands remained undisposed of. The petition also sets forth that Neptune Lynch, Sr., died intestate, and this may be treated as a sufficient statement that there are not any legatees or devisees. It does not appear from the petition what, if anything, is due upon family allowance, if any ever had been made. But since the purpose of requiring these various items of debts, charges and expenses to be stated is to inform the court of the financial condition of the estate, and whether or not in any event a sale of property is necessary, and since a family allowance is in fact a charge against the estate, and since the petition in this instance assumes to state the full amount of all of such charges, one of two conclusions seems inevitable: Either that there was not any family allowance made, or, if made, it is included in the total charges enumerated. However, this particular defect is not urged upon us by counsel for respondents in their brief, and

we may treat the petition in this respect as complying substantially with the requirements of the statute.

279 The principal contention, however, arises over the alleged failure of the petition to state the condition and value of the real estate. All that is said in the petition on the subject is quoted above. But counsel for appellants contend that the language, "less right of way of Northern Pacific Railway Company and parcel set apart for school grounds, and appraised at two thousand dollars," refers to the condition of the land, and is a sufficient reference to enable the court to proceed with a hearing on the petition. We content ourselves with saying that, if this was intended for the purpose, it is so indefinite and uncertain as to be of no practical use; and since we must assume that the legislature had some purpose in mind in requiring this matter to be stated, that purpose would obviously be circumvented by allowing a statement of this character to meet the requirement. We prefer to treat the petition as omitting any statement as to the condition of the real property. But is this such a defect as to render the order of sale void and open to collateral attack?

As we understand counsel for respondents, they do not insist that every fact required to be stated by section 7562 is jurisdictional, for they do not insist upon a literal compliance with the statute, but concede that the rule of construction is that a substantial compliance with the requirements of the statute is all that is required. The object of the proceeding under this section is to obtain an order to sell, and before such order can be made, the necessity for the sale must be made to appear; and while this section, in subdivision 11, requires the names of the heirs, so far as known, to be given, it is inconceivable that the name of a particular heir could be of the slightest possible assistance to the court or judge in determining whether the necessity for the sale exists. With the object of this proceeding before us, we imagine that it will be conceded by everyone that a petition which on its face shows the sale to be necessary will be sufficient when drawn in question by a collateral attack upon the order of sale. But what are the facts which show the sale to be necessary? In the early case of *Haynes v. Meeks*, 20 Cal. 288, Chief Justice Field, speaking for the court, said **280** in effect that the petition must show, first, the insufficiency of the personal property to pay the debts, and, second, the necessity for selling real estate, and that such necessity does not follow as of course from a mere insufficiency of personal property; that if the real estate is yielding an income sufficient to pay

the outstanding debts and charges, there would not be any necessity for a sale, and that the necessity must appear from the description of the land, its condition and value. The opinion is further expressed that facts showing the description, condition and value of the land cannot be dispensed with from the petition any more than the statement of the debts or personal property. This case was decided in 1862. In January, 1877, the same court, in construing the same statute, said: "The court should be informed by the petition of the condition of the property; that is, whether the property is improved or unimproved, productive or unproductive, occupied or vacant, and the like. Such information is necessary to enable the court to intelligently exercise its judgment in the selection of the property of the estate which can be most advantageously sold": *Smith's Estate*, 51 Cal. 563. This was the last and controlling pronouncement by that court at the time we adopted the statute from California in February, 1877; and upon the theory that, in adopting the statute, we also adopted the construction placed upon it at the time by the highest court of the state from which we took the statute, we might content ourselves by saying that such construction must be deemed controlling, in the absence of any good reason for a contrary holding. It is only fair, however, to say that in 1880, after we had incorporated the statute in our laws, the supreme court of California, in *Boland's Estate*, 55 Cal. 310, reiterated the doctrine announced in *Haynes v. Meeks*, 20 Cal. 288, and also that in *Smith's Estate*, 51 Cal. 563, and, by way of giving emphasis to the views of the court, said, in effect, that the description, condition and value of the real estate are jurisdictional facts which must appear from the petition. Again, in *Kertchem v. George*, 78 Cal. 597, 21 Pac. 372, the doctrine announced in *Smith's Estate* is repeated; but the court there holds ²⁸¹ that unless the condition of the real estate appears in the petition or in the order of sale, the sale is void for want of jurisdiction in the court to order it. Later, in *Devincenzi's Estate*, 119 Cal. 498, 51 Pac. 845, the same court held that an entire absence from the petition of any reference to the condition of the real estate would render the petition insufficient, and the court would fail to obtain jurisdiction. At the same time it reiterates again the doctrine announced in *Smith's Estate*, 51 Cal. 563. In *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458, the same court, speaking through Mr. Justice Temple, said: "I think there has been no time since 1858 when a sale of real estate would have been declared void because it omitted to

give a description of all the real estate of which the deceased died seised or the valuation or condition of the different parcels. . . . Section 1537 expressly required the statement of some facts which have no bearing upon the question of the necessity of the sale. The description of the real estate or its value throw no light upon that matter. These and some other matters are required to be stated to enable the court to exercise its discretion more intelligently after it has determined the sale to be necessary. . . . The facts showing that a sale is necessary are that there are debts, that an allowance has been made for the support of the family, or that there are expenses of administration, and that there is not sufficient money in the hands of the administrator to pay them." And, finally, in *Levy's Estate*, 141 Cal. 639, 75 Pac. 317, decided in 1904, the same court again announced the rule in *Smith's Estate*, 51 Cal. 563.

From these cases it is apparent at once that while the supreme court of California has adhered strictly at all times since 1877 to the rule announced in *Smith's Estate*, it has not been at all consistent in applying the rule, and has apparently not given any attention to the conflicting doctrines announced in other respects. In our view of these cases they announce two irreconcilable theories as to the purpose of the statute. These theories are aptly illustrated in *Boland's Estate*, 55 Cal. 310, and in *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458. In the first it is held that the condition of the ²⁸² real estate is a jurisdictional fact, and the statement of such condition of the very essence of the petition. In the latter it is held that the purpose of requiring the condition to be given is to enable the court to exercise its discretion more intelligently after it has determined the sale to be necessary, and that the statement of the condition does not involve any question of jurisdiction. The decision in *Boland's Estate* follows upon the reasoning of the court in *Haynes v. Meeks*, while *Burris v. Kennedy* is founded upon the rule announced in *Smith's Estate*. We have reviewed these cases at length, because of the fact that some of them are relied upon confidently by counsel for appellants, while others are just as confidently relied upon by counsel for respondents. So that we find ourselves confronted by these two theories announced by the highest court in the state from which we took our statute, and the necessity of determining which, if either, we shall adopt in this state.

Very many of the matters arising in the due course of administration of an estate may properly be characterized as

routine. Many of the proceedings are *ex parte*, but one of the most prominent purposes to be accomplished is the payment of the debts of the estate. This is the point at which the interests of the estate and of third persons—creditors—meet, and much more consideration is given to this than to any other subject connected with such administration. That the debts shall be paid is the injunction of the law. Sections 4799 and 7546, Revised Codes, provide:

“Sec. 4799. When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this Code and the Code of Civil Procedure.”

“Sec. 7546. All the property of the decedent shall be chargeable with the payment of the debts of the deceased, the expenses of the administration, and the allowance to the family, except as otherwise provided in this Code and in the Civil Code. And the said property, personal and real, may be sold, as the court or judge may direct, in the manner prescribed in this chapter. ²⁸³ There shall be no priority as between personal and real property for the above purposes.”

The exceptions in each of these sections refer to homesteads set apart and allowances made for the support of the family pending the appointment of an administrator, to estates in which the property is sought to be disposed of by will, and to estates of which summary disposition is made. But, barring these, the sections just quoted impress upon us the idea that all of the property of the estate is subject to the payment of the debts, using that term in its general sense, to include debts, family allowances, expenses, and charges of administration already accrued and to accrue.

Section 7561 provides: “When a sale of the property is necessary to pay the allowance of the family or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies, the executor or administrator may also sell any real as well as personal property of the estate for that purpose upon the order of the court or judge; and an application for the sale of real property may also embrace the sale of personal property.” Taken in connection with the sections quoted above, and sections 7611-7613, if this section means anything, it is this: That the existence of debts and the inadequacy of available funds to pay them give rise to the necessity to sell property: *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458. And if such necessity appears, the real as well as personal property may be sold upon an order for that purpose. When the various sections above are

considered together and with section 7651, it would appear to be a matter of discretion in the court or judge whether the personal property or real estate be sold first; but whether this be so or not is of no consequence here. If, then, the debts of the estate appear to exceed in amount the available means at hand, it may fairly be said to appear that a sale is necessary; and if real estate is to be sold, the court or judge may properly consult the recitals of the petition as to the condition of the real estate to determine whether all or only a portion ²⁸⁴ should be sold, and if only a portion, then what particular portion.

In our opinion the requirement of section 7562, above, that the condition of the real estate be given in the petition, was not intended to confer jurisdiction upon the court, and that this petition states facts sufficient to authorize the court to proceed. We think the rule announced in *Smith's Estate*, 51 Cal. 563, not many years after the statute was adopted in California, correctly represents the purpose of the legislature in requiring the condition to be stated in the petition, and in adopting the statute we ought to give full force and effect to the rule of construction then placed upon it, and which seems in perfect harmony with our other statutory provisions. The result of the application of that rule leads to the conclusion announced in *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458.

It is said that the value of the real estate sought to be sold is not stated in the petition; and while there is room for argument as to the meaning of the statement contained in the petition, when tested by strict rules of grammatical construction, we think it may be said that it fairly appears that the petitioner meant that the property described and sought to be sold is appraised at two thousand dollars. Since it appears from this record that the appraisement was had less than a year prior to the presentation of the petition to sell, it is a sufficient statement of the value: *Silverman v. Gundelfinger*, 82 Cal. 548, 23 Pac. 12; *Levy's Estate*, 141 Cal. 639, 75 Pac. 317. We do not mean to say that the statements of the condition and value of the real estate are inconsequential matters, but we do mean to say that they are not matters of jurisdiction. They are intended to give to the court a better idea of the property belonging to the estate before an order of sale is made; and upon review on appeal in the probate proceeding itself, this court would be justified in applying the statute with some rigor, to the end that the errors might be corrected and the purposes of the statute fully

carried out. But after the sale has been made and confirmed, and purchasers have parted with their money and have gone into possession of the property, ²⁸⁵ upon a collateral attack this court would not be justified in setting aside the proceedings and holding them for naught because of a defect of this character.

2. It is next contended that there was not any competent evidence that an order to show cause why the real estate should not be sold was ever made. In the minute-book kept for probate proceedings, as required by section 7701, there is an order to show cause entered at length. It is true that it purports to bear the signature of the district judge, but the signature is by the clerk of the court who entered the order. Since, however, the statute does not require that an order made in open court shall be signed by the judge, we may properly treat the signature as surplusage and the entry sufficient evidence of the fact that the order was duly made. There is not any requirement of law that the clerk shall recite that the order was made; but he is required to enter the order as made.

3. It is said that the order of sale is void because "(a) it fails to describe the terms and conditions of sale; (b) it fails to order a public sale or to adjudge that it would be for the benefit of the estate that the property be sold at private sale; (c) the lands described in the order are not the lands described in the petition or in the administrator's deed or in the order of confirmation."

(a) It is true that the order fails to state the terms of sale as required by section 7569; but that section limits the terms which may be made to cash or credit for not more than one year. The return shows that the property was sold for cash and for a considerable sum more than its appraised value. After a full hearing, the district court confirmed the sale, and thereby ratified the action of the administratrix in selling for cash. It is a general rule of law that the confirmation of the sale cures all irregularities in the proceedings leading up to the sale: 17 Am. & Eng. Ency. of Law, 993; 18 Cyc. 793.

(b) The petition in this instance asked for authority to sell at public or private sale, and the statute (section 7569) specifically ²⁸⁶ authorized the court to make the order in the alternative, as was done in this instance.

(c) The most serious question arises over the description of the property in the order of sale. The land belonging to the estate was situated in range 26 west, and the petition for the sale, the notices of sale, the order of confirmation, and

the deed correctly describe it. But in the order of sale and in the return it is described as in range 25 west. The order of sale was the warrant of authority by which the administratrix acted, and without it she could not have proceeded: *Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546. But, after all, it is but a determination that the sale is necessary and an authority to make the sale. It does not affect the title or grant any right. It is the order of confirmation which finally operates to divest the heirs of their title and to secure to the purchaser the property: 12 Cyc. 787; 11 Am. & Eng. Ency. of Law, 1114. Section 7578, Revised Codes, provides that when the order of confirmation is made, "the sale from that time is confirmed and valid."

In *Davie v. McDaniel*, 47 Ga. 195, the order of sale was as follows: "The application of Thomas A. Blanchard, administrator of Uriah Blanchard, to sell the lands belonging to the estate of said Uriah Blanchard, having been published according to law, and no one coming forward and objecting, it is ordered that Thomas A. Blanchard, administrator, have leave to sell the lands belonging to the estate of Uriah Blanchard, deceased." Speaking of an objection to this order, the court said: "But it is said that the order of sale is void because it does not more definitely describe the land ordered to be sold. Section 2518 of the code requires the order to 'specify' the land 'as definitely as possible.' Conceding that the land is not so specified, yet it appears to a majority of the court that this is only directory to the ordinary, certainly not an objection which can be successfully urged in a collateral attack upon the judgment."

In considering a statute similar to our section 7569 above, the supreme court of Texas, in *Davis v. Touchstone*, 45 Tex. 490, 287 said: "The provisions of the statute requiring the order to describe the property to be sold, like the provision requiring the application of the administrator to be accompanied by an estimate of expenses, claims, and to be verified by affidavit, must be regarded as directory."

"It is well settled that the description in the order of sale may be aided by other portions of the probate record": *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325.

In *Wells v. Polk*, 36 Tex. 120, the order of sale referred to the land as any land and as much land of the estate as will suffice to pay the debts of the estate; and of this the court said: "Though there may have been irregularity in the order of the probate court, it was not such as to render the proceeding absolutely void; and it cannot, therefore, be collat-

erally impeached. The probate court had jurisdiction to order the sale of the land, and though the order may not have been made in the precise manner pointed out by the statute, it was not void."

In *Schnell v. City of Chicago*, 38 Ill. 382, 87 Am. Dec. 304, the inventory and order of sale each described the land as in section 23, while in fact it was in section 33. The court said: "The petition describes the land correctly as in section 33, but the order of sale directs that the land in the petition be sold, namely, lots 45, 46, 48, and 49, in section 23. The notice of the sale contained a true description of the location of the lots, and so does the deed from the administrator to the appellee. If the intestate was shown to have possessed lands in section 23, or if it had been shown that section 23 had been subdivided into outlots, numbered as these are numbered, there might be some ground for the objection. But nothing of the kind is shown, and this misdescription of the section in the inventory and order of sale must be held to be a mere clerical error, not affecting the validity of the sale, since it is clear the proper lots prayed to be sold were sold, and were the lots intended to be sold. The description is as particular in the petition as in the inventory and order of sale, and the lands described in the petition were the lands ordered to be sold."

²⁸⁸ Counsel for respondents cite *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702, and *Melton v. Fitch*, 125 Mo. 281, 28 S. W. 612, as leading cases which hold a sale void under such circumstances as here presented. It will be observed, however, that in *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702, the court said: "But the records of the probate court received in evidence show that in the inventory of Hanson's estate, and in all other records and papers relating to the sale, except the administrator's deed, the land was described as situate in section 13, township 101, range 5, instead of range 6." And in Missouri it would appear that the rule that reference may be had to other probate records to aid the order is not recognized.

In the case before us the petition to sell the real estate correctly describes it, and declares it to be "all the real estate of which the deceased died seised or in which he had any interest, or in which said estate has since acquired any interest." In the order of sale, reference is made to the petition, and the court having found that due publication of the order to show cause had been made, and it appearing to the court that

it was necessary and for the best interests of the estate and all parties interested therein "that the real estate of the decedent" should be sold, the order was accordingly made. In her return of the sale the administratrix states that she caused notices to be given of the intended sale, in which notices the land was described with common certainty (and correctly described), and at the time and place mentioned in the notices she sold said real estate. In the order of confirmation the court recites that, after a full hearing, it appeared that the administratrix had sold the land, correctly described, to the highest and best bidder, etc., "and all and singular the law and the premises being by the court here seen, heard, understood, and fully considered, wherefore it is by the court ordered, adjudged, and decreed that the said sale be and the same is hereby confirmed and approved and declared valid, and the proper and legal conveyances of said real estate are hereby directed to be executed to said purchaser by said Mary Boyer, administratrix of the estate of said Neptune ²⁸⁹ Lynch, Sr., deceased." It further appears that on the same day the administratrix executed and delivered to the purchaser a deed for the property, again correctly describing it. From a consideration of all these records we think it clearly appears that the misdescription in the order of sale is but a clerical error.

If the estate had been interested in more than one piece or parcel of land, and after a hearing the district court or judge had directed one parcel or a number of parcels less than all to be sold, then the importance of the description in the order would become manifest at once. But under the circumstances of this case, where there was but a single piece of land involved, and it was correctly described throughout by sectional subdivisions, by section and township, and accurately described in the petition and the notices of sale, in the order of confirmation and in the deed, and the order of sale refers to the petition and attempts to direct the sale of the same property; where the sale appears to have been fairly conducted and no one could possibly be injured or misled by the mistake in the order; where the purchaser has parted with his money, and the estate has, and indirectly these heirs have, reaped the benefit; where the purchaser has been let into possession, and, acting in good faith, has changed its situation, has sold a large portion of the property to others, city additions have been platted from portions of the land, and a considerable time has elapsed—we do not think the mere mistake in writing into the order the figures "25" for "26"

should be held to vitiate the entire proceeding. "Public policy requires that there should be stability in judicial sales, and therefore every reasonable presumption should be indulged in favor of sustaining them, and they should not be disturbed for slight causes, nor should the courts be astute in finding out objections to them": 17 Am. & Eng. Ency. of Law, 994.

If, then, the court had jurisdiction to make the order, and the order itself is not void, any defects in the proceedings were errors within jurisdiction and subject to review on appeal in the probate proceedings only, and not subject to attack in a collateral ²⁹⁰ proceeding such as this. As was said in Devineenzi's Estate, 119 Cal. 498, 51 Pac. 845: "The order of sale was made May 12, 1896, and was an appealable order. Any error that the court may have committed in making it could have been corrected only upon a direct appeal therefrom. If, however, the petition upon which the order was made is so defective that the court did not acquire jurisdiction, the order may be assailed at any time upon a collateral as well as upon a direct attack; but if the facts stated in the petition were sufficient to confer jurisdiction upon the court to hear the application, its order directing a sale cannot be impeached upon a collateral attack: *Morrow v. Weed*, 4 Iowa, 77, 66 Am. Dec. 122; *Bryan v. Bauder*, 23 Kan. 95; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 453." And in *McNitt v. Turner*, 16 Wall. 352, 21 L. ed. 341: "Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceedings, being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error": See, also, 18 Cyc. 802.

Whatever may be said of the particular means by which the payment for the property was made, in law it amounted to a payment of the purchase price to the administratrix. Apparently McGowan, the purchaser, parted with his money in good faith, and received a deed for the property. The failure of the petition to comply literally with section 7562, and to state all the facts required by that section to be stated, and the other errors herein considered, amount only to irregularities in the proceedings, which are to be disregarded; for section 7625 provides that a sale by an administratrix of her decedent's real estate to a purchaser for a valuable consideration paid to such administratrix in good faith (and such

sale has not been set aside by the district court) shall be sufficient to sustain the deed given by such administratrix to the purchaser, and all irregularities in obtaining the order of court for such sale, and all irregularities in making or conducting the same by such administratrix shall ²⁹¹ be disregarded. In our opinion the probate proceedings were not so far irregular or defective as to render the sale void or open to collateral attack.

The judgment and order are reversed, and the cause is remanded to the district court, with directions to set aside the judgment and order heretofore made, and to enter a decree in favor of the plaintiffs, quieting their title to the land in controversy.

Reversed and remanded.

Mr. Justice Smith concurs.

Mr. Chief Justice Brantly Dissented, saying: "I think that the petition for the order of sale fails to meet substantially the requirements of the statute, and that the order itself is fatally defective, in that it describes property other than that belonging to the estate. I think the proceedings void."

A Petition for the Sale of a Decedent's Land which fails to allege the value and condition of his real estate as required by statute is not a jurisdictional defect, and the sale based thereon is therefore not void or open to collateral attack. This rule announced by the Montana court in the principal case is certainly commendable, and has recently been declared the law in California: *Dane v. Layne* (Cal. App.), 101 Pac. 1067. That the absence of an affidavit to the petition for a sale is a mere irregularity, see *Robbins v. Boulware*, 190 Mo. 33, 109 Am. St. Rep. 746. It is well understood that where the petition for the sale of the real property of a decedent is sufficient to confer jurisdiction on the court, subsequent errors which creep into the proceedings cannot render the sale void: *Neville v. Kenney*, 125 Ala. 149, 82 Am. St. Rep. 230; *Moore v. Cottingham*, 113 Ala. 148, 59 Am. St. Rep. 100.

The Effect of a Defective Description of a Decedent's Land in the petition, order of sale, or other proceedings is considered in *Henley v. Johnston*, 134 Ala. 646, 92 Am. St. Rep. 48; *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692.

MIZE v. ROCKY MOUNTAIN BELL TELEPHONE COMPANY.

[38 Mont. 521, 100 Pac. 971.]

NEGLIGENCE.—The Proximate Cause of an Injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, without which the injury would not have occurred. It is not necessary to show that the wrongdoer ought to have anticipated the particular injury which did result; it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence. (p. 663.)

ELECTRICITY—Guy and Fallen Wires.—Where a private telephone wire under the control of a telephone company falls across an electric light wire at a point where there are no guards or insulation, where it remains for several hours, and the current from the electric light wire is conducted by the telephone wire some ten or twelve miles to a guy wire, and by the guy wire to a fence wire, and by the fence wire to a point where a man was rightfully at work, the telephone and electric light companies are liable for his death caused by contact with the fence. (p. 664.)

RAILROAD COMPANY—License to Construct Ditch.—A railway company may grant a license to construct an irrigating ditch over its right of way. (p. 665.)

ELECTRICITY—Who not a Trespasser.—Where a railway company has permitted a land owner to construct an irrigating ditch over its right of way, an employé of the land owner at work on such ditch is not a trespasser to whom a telephone company having wires near by owes no duty. (p. 665.)

DEATH—Damages Recoverable by Widow.—In estimating the damages caused by the negligent death of a married man the jurors may take into consideration the pecuniary loss to the widow on account of her being deprived of his comfort, protection, society and companionship. (p. 665.)

DEATH—Defective Pleadings and Verdict.—The fact that the complaint and verdict in an action for wrongful death are in unusual form, and not according to the practice, are not such defects as justify a reversal when they could not have prejudicially affected the defendant. (p. 666.)

ELECTRICITY—Placing Wires Contrary to Ordinance.—Where an ordinance, which is a grant of a franchise to a telephone company, provides that whenever it is necessary for an electric light or power wire to cross a telegraph or telephone wire, the same shall not approach to or cross such wires at a distance of less than four feet, applies to both the telephone and the light and power company, and a violation thereof is prima facie negligence. (p. 666.)

ELECTRICITY—Failure to Prove All Facts Alleged.—In an action against a telephone and an electric light company for the death of a person caused by their negligence in the management of wires, it is not necessary for the plaintiff to prove every act of negligence charged; it is enough for her to prove to the satisfaction of the jury facts sufficient to show that the negligence of the defendants directly produced the death. (p. 669.)

H. G. & S. M. McIntire, for the appellant, Rocky Mountain Bell Telephone Company.

J. L. Templeman and Hartman & Hartman, for the appellant, Gallatin Light, Power and Railway Company.

Walrath & Patten, for the respondent.

528 HOLLOWAY, J. On May 20, 1907, and for some time prior thereto, the defendants Rocky Mountain Bell Telephone Company, hereinafter referred to as the "Bell company," maintained a telephone exchange in Bozeman, and owned and maintained pole lines in various streets and alleys and had wires suspended from such poles, as a part of its telephone system. At all such times the Gallatin Light, Power and Railway Company, hereinafter referred to as the "light company," owned and operated an electric light and **529** power plant, and, as a part of its plant, it owned and maintained certain pole lines in the streets and alleys of Bozeman and the wires attached to such poles. At all such times the Bozeman Milling Company and the Benepe-Stanton Grain Company, hereinafter referred to as the "private companies," owned and operated a private telephone line from Bozeman to Belgrade, a distance of eleven or twelve miles. On May 20, 1907, John Mize was killed at a point near the private telephone line and nine or ten miles from Bozeman. His wife, as administratrix of his estate, brought this action against the Bell company and the light company to recover damages. It is alleged in the complaint that for a period of about two years prior to and including May 20, 1907, the Bell company had assumed and exercised full charge, supervision, and control of the private telephone wire from Third Avenue North, to Tracy Avenue North, a distance equal to three city blocks, in the city of Bozeman. It appears from the complaint that the portion of the private telephone line just mentioned was strung upon poles belonging to the Bell company, which poles were set along an alley cutting both Third Avenue and Tracy Avenue at right angles. It appears also that the light company had wires strung to poles along Grand Avenue North—an avenue running parallel with and between Third and Tracy avenues and cut by the alley at right angles also. On May 20, 1907, the private telephone wire, which crossed above the light wires at right angles, became detached from the Bell company's poles, near the intersection of the alley and Grand Avenue, fell upon a wire belonging to the light company, and received a charge of about

two thousand volts of electricity from the light wire. About nine or ten miles from Bozeman, the private telephone line, following the course of the public road, turned from north to west. For the purpose of securing the corner pole, a guy wire was attached to the pole near the top and between the two private wires, and then attached to a fence post on the outer line of the right of way of the Northern Pacific Railway Company. It appears that the guy wire touched one of the private telephone wires and also came in contact with one strand of fence wire. ⁵³⁰ This fence ran south a short distance where it connected with another wire fence, called the "inner right of way fence," and at a point on this inner right of way fence, about three-fourths of a mile from the point of intersection of the two fences, John Mize was at work in an irrigating ditch belonging to his employer, Young, on the late afternoon of May 20, 1907, when, coming in contact with a wire on the fence, he was killed. It is alleged that the current of electricity received by the private telephone line wire from the light wire was conducted along the telephone wire to the guy wire, thence over the guy wire to the outer right of way fence wire, thence over that wire to the wire of the inner right of way fence, and along the wire of the inner right of way fence to the point where Mize was at work, and that when he came in contact with this wire he received the charge of electricity and was killed thereby. It is charged that the defendants were negligent in the following particulars: 1. (a) The Bell company in permitting this private telephone wire to become detached from its poles; (b) The light company in permitting the insulation on its wires to become defective; (2) In failing to provide a guard or device at the point where the wires crossed, to prevent the wires from coming in contact; (3) In violating a city ordinance of the city of Bozeman; (4) In failing to break the contact between the two wires for a period of six hours or more. From a judgment rendered and entered in favor of the plaintiff, and from an order denying them a new trial, the defendants have appealed.

A review of the authorities cited would not serve any useful purpose. There is not any substantial conflict in the authorities upon the general rules of law applicable in negligence cases, and we might select cases from the briefs of appellants or respondent in support of the principles which we announce, with one or two possible exceptions. The difficulty which the courts generally experience is, not in ascertaining the rules of law, but in applying them to the facts of particular cases.

1. Legal duty: It is urged by counsel for appellants that they did not owe any legal duty to Mize. This contention is aptly ⁵³¹ answered in *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426, 31 L. R. A. 570, a case in many respects similar to the one before us. The street railway company maintained a power line through certain streets in Little Rock. White owned a private telephone line running at right angles to one of the railway company's lines. The private telephone wire came in contact with the power line and received a supercharge of electricity. Conery came in contact with the private telephone wire and was injured. He recovered against the street railway company and White, the owner of the private telephone wire. On appeal by the street railway company the question now before us was raised. The court said: "The next question is: Upon what duty of the appellant to the appellee can this action be based? The answer to it is: Upon the duty enjoined by the rule which requires everyone to so use his property as not to injure another. The applicability of this rule may be shown by many illustrations. One is where an owner of a vicious animal accustomed to do hurt, knowing his habits, negligently allows him to escape. He is responsible for the mischief the animal does, because it was the duty of the owner to keep him secure. . . . This rule applies with equal force to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross-arms, and wires, and other apparatus, along streets and other highways. They are required to do so for the protection of persons and property": 21 Am. & Eng. Ency. of Law, 2d ed., 476.

2. Proximate cause: One of the principal contentions made in this case is that, assuming the negligence of the defendants, such negligence was not the proximate cause of Mize's death, for the reason that the guy wire intervened and broke the causal connection between the negligence of the defendants and the death of Mize. The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred: *Goodlander M. Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. ⁵³² 583; 1 *Shearman & Redfield on Negligence*, sec. 26; 6 *Current Law*, 757; *Missouri Pac. Ry. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Claypool v. Wigmore*, 34 Ind. App. 35, 71 N. E. 509.

What intervening cause will break the chain of sequence and so far insulate the first wrongdoer's negligence from the injury as to relieve such wrongdoer? The courts have experienced some difficulty in answering this inquiry, and they are not altogether in harmony upon the subject; but to this extent they may be said to agree: That to relieve the original wrongdoer the result must be such that he could not reasonably have anticipated it. In 29 Cyc. 499, the rule is stated as follows: "The mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or persons does not necessarily make the result so remote that no action can be maintained. The test is not to be found in the number of intervening events or agencies, but in their character and in the natural connection between the wrong done and the injurious consequence, and if such result is attributable to the original negligence as a result which might reasonably have been foreseen as probable, the liability continues." What ought to be foreseen or anticipated as the probable consequence of the wrongdoer's negligence? In the first instance, it is not necessary to show that he ought to have anticipated the particular injury which did result; but it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence. This is the meaning of section 6068, Revised Codes, and expresses the rule announced by this court in *Reino v. Montana M. L. Dev. Co.*, 38 Mont. 291, 99 Pac. 853.

The evidence is conclusive upon one point: That with the current of electricity necessary to operate this private telephone line, and telephone lines generally, the wires are entirely harmless. The evidence also shows that telephone wires are frequently exposed where persons—even children—may come in contact with them. The defendants are chargeable with knowledge ⁵³³ of these facts, and therefore chargeable with knowledge that this private telephone line itself was, or wires leading from it were, likely to be so placed that persons might rightfully come in contact with one or more of them. In our view of this case, the manner in which the guy wire was attached is not of any consequence. If, as shown by the evidence, the current of electricity necessary to operate this private telephone line was harmless, then the owners of the private line might have attached their wires directly to the fence posts of the inner right of way fence (if they had permission to do so). We say this to emphasize

our view that these defendants were chargeable with the consequence which might reasonably be expected to follow the charging of this private wire with a dangerous current of electricity, in view of the fact that telephone wires are likely to be exposed where persons, rightfully about their business may come in contact with them. It will not do for defendants to say that they could only expect that this dangerous current would be carried over the private line, eighteen or twenty feet above the ground, to Belgrade. They were chargeable with knowledge that the current would go wherever there was a metallic substance to conduct it; and while it is not necessary in this case to adopt the broad rule announced by Shearman & Redfield on Negligence, section 29, to the effect "that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not) would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind," we do go to the extent of saying that these defendants ought reasonably to have anticipated that, by their negligence in permitting this private wire to become charged with a dangerous current of electricity, serious injury would result to some one if in fact the private wire, or a wire leading from it, was exposed as it might be exposed.

3. Was Mize a trespasser? The evidence shows that Mize met death while at work in an irrigating ditch. The portion of the ⁵³⁴ ditch in which he was at work at the time of his death is over and upon a portion of the right of way of the Northern Pacific Railway Company. Concerning this ditch, Young, the employer of Mize, testified: "I remember the occasion of his death. He was working for me at that time. . . . My irrigating ditch is on the south side of the road and on the north side of the road also. Crossing the road it runs through a flume, and this ditch is made out of rocks, and he was cleaning this ditch when he came in contact with this fence. John Mize's work would call him to the place where he was killed. . . . I found him lying under the fence dead. That was the right of way fence. He was lying with his body toward the flume, but he was as well as over the fence before that, kind of on his back in the irrigating ditch. . . . It is my ditch, and heads not in a slough, but in a regular running stream there near the railroad track." This evidence was not contradicted in any way and is sufficient to make

out a prima facie case that Mize was not a trespasser; but counsel for appellants insist that the railway company cannot alienate any portion of its right of way, and therefore Mize must be presumed to have been a trespasser, and *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. Rep. 671, 47 L. ed. 1044, is cited. But that case is only authority for the proposition that title to a portion of such right of way cannot be acquired by adverse possession. It may be conceded that the Northern Pacific Railway Company cannot alienate its right of way, or any part of it, so as to interfere with the full performance of the functions of the railway; but that an additional servitude may be imposed upon a portion of such right of way, or that the railway company may grant a license for such use of its right of way as will not interfere with the proper operation of its railway system, we entertain no doubt.

4. Measure of damages: Over the objection of defendants, the court permitted evidence to be introduced tending to show the marital relations of plaintiff and her husband up to the time of Mize's death, and in instruction 34 the court advised the jury that if they found for the plaintiff, then, in estimating ⁵³⁵ the damages, they might take into consideration the pecuniary loss, if any, of the widow on account of her being deprived of the comfort, protection, society and companionship of her husband. In each of these instances we think the trial court was correct. Section 6486, Revised Codes, provides that "such damages may be given as under all the circumstances of the case may be just." The authorities are not harmonious upon this question, but in California, where they have a statute similar to our section 6486 above, the rule announced has been in force for many years: *Beeson v. Green Mt. G. Min. Co.*, 57 Cal. 20; *Cook v. Clay St. H. R. Co.*, 60 Cal. 604; *Cleary v. City R. Co.*, 76 Cal. 240, 18 Pac. 269; *Munro v. Pacific C. etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *Wales v. Pacific Elec. M. Co.*, 130 Cal. 521, 62 Pac. 932, 1120; *Green v. Southern Pac. Ry. Co.*, 122 Cal. 563, 55 Pac. 577; *Green v. Southern Cal. Ry. Co. (Cal.)*, 67 Pac. 4; *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972; *Evarts v. Santa Barbara C. R. Co.*, 3 Cal. App. 712, 86 Pac. 830. While not directly deciding the question, this court, in *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142, intimated that the rule we have announced would be followed.

5. Form of verdict: The verdict in this case reads as follows: "We, the jury in the above-entitled cause, find the issues herein in favor of the plaintiff, George Mize, and against the defendants, Rocky Mountain Bell Telephone Company and Gallatin Light, Power and Railway Company, on each and all of the four causes of action set forth in the complaint herein, and fix and assess her damages at the sum of six thousand dollars (\$6,000)." The complaint is drawn in four separate counts or causes of action, but in fact it states but a single cause of action and specifies separately the acts of negligence. While under our code practice there may arise cases in which it is proper to set forth a single cause of action in separate counts, this is clearly not such a case. The verdict, too, is unusual in ⁵³⁶ form; but these defects, we think, are not such as could have prejudicially affected the rights of either defendant. The verdict is in effect a general verdict and is sufficient: 5 Ency. of Pl. & Pr. 339; Lancaster v. Connecticut Mut. L. Ins. Co., 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23.

6. Instructions: Exceptions were taken by the appellants to the action of the trial court in giving certain instructions and in refusing to give instructions asked by defendants; but after a careful review of the instructions given and refused, we are unable to find any error prejudicially affecting the rights of either appellant. The charge, as a whole, seems to us to present the law of the case fairly.

7. The evidence: Without rehearsing the evidence, it is sufficient to say that in our opinion it is ample to sustain the verdict. It tends to show such supervision and control of the private wire by the Bell company, at the point where the two wires came in contact, as renders that company liable for its negligence in permitting the wire to become detached and to fall upon the light wire. It is also sufficient to show the negligence of the light company in failing to keep its wire properly insulated. It is sufficient to go to the jury upon the question of the negligence of both defendants in failing to break the contact between the wires for many hours after they came in contact and before Mize's death.

There was a palpable violation of the city ordinance, and neither of these defendants can escape liability by saying that the ordinance applies only to the other. While the ordinance is a grant of a franchise to the Bell company, it is more than that. Section 5 provides: "Whenever it is necessary for any electric light or power wire to approach or cross the line of any fire alarm, police telegraph, telegraph or telephone wires, the same shall not approach to or cross either

of said wires at a distance of less than four feet either above or below said fire-alarm, police telegraph, telegraph or telephone wire." This provision is a general municipal law applicable to both of these defendants (*Hayes v. Michigan Cent. Ry. Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369, 28 L. ed. 410; *Heidt v. Southern Telephone Co.*, 122 ⁵³⁷ Ga. 474, 50 S. E. 361; *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51, 16 L. R. A. 43), and its violation was *prima facie* negligence: *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, 73 N. E. 780; 1 *Thompson on Negligence*, sec. 1196; 1 *Shearman & Redfield on Negligence*, sec. 13.

It is clear from this evidence that neither of these defendants took any precaution to prevent the wires, where they crossed, from coming in contact, other than to fasten the wires to poles. In 1 *Joyce on Electricity*, section 490a, the author says: "Where electric wires are maintained by different companies in the streets, obligations are by law imposed upon each, not only with respect to the others, but also to individuals and to the public in general to prevent a contact of the wires, which may result in injury to property or person. The question as to the duty of such companies arises most frequently where an injury has resulted from the contact of a telegraph or telephone wire with an electric light or trolley wire by which the dangerous current of the latter is conveyed into the former. From a consideration of the several cases in which the liability of a company under such circumstances is considered, the rule may be deduced that, where companies of such a character occupy the streets with their poles and wires, each company is under the obligation to exercise reasonable or due care—that is, a degree of care which is reasonable in view of the circumstances and commensurate to the dangers and risks involved—to prevent its wires from coming into contact with the wires of another company, and that a company which has been negligent in the performance of its duty in this respect will, in the absence of contributory negligence on the part of the persons injured, be liable for the injury resulting from such contact."

The evidence was amply sufficient to show negligence on the part of the Bell company in failing to use well-known simple devices to prevent the private wire from coming in contact with the high tension wire of the light company. The evidence upon this point, so far as it relates to the light company, is very slight; but, after all, it was a question for the jury, under all ⁵³⁸ the circumstances of the case, to say whether the light company had used reasonable care to pre-

vent the contact of the two wires. In discussing this subject in a case arising from an injury received from crossed wires, the supreme court of Wisconsin, in *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. 1101, 27 L. R. A. 365, said: "The negligence which is alleged and claimed against the defendant is its omission to place guard wires over its trolley wires in such a way as to prevent the telephone wires, in case of their falling from any cause, from falling upon and coming in contact with the trolley wires. . . . No doubt it is the duty of the defendant to use such customary and approved appliances as are known and used in the business of operating electric railways. So far as reasonable knowledge, in the present state of the science and the practical use of electricity as a motive power for street railways, and reasonable foresight, can go, it is bound to guard the public against the perils attendant upon this use of electricity; but it is liable only for what is known as reasonable care. The present state of the science, and the present practical knowledge of the most practical and effectual means and methods of guarding against such perils as are incident to its use, are a most important element in the question of what is reasonable care. In the present condition of the science and of the practical knowledge on this subject, it cannot be said, as matter of law, what method of guarding the wires shall be required, nor whether any guards shall be required, for it is not known to the law that any method now known will prove effective; but it is a question for the jury, under all the facts in the cause, to determine whether the method actually used was negligent."

The case of *Hamilton v. Bordentown Electric Light & M. Co.*, 68 N. J. L. 85, 52 Atl. 290, presents facts very similar to those in the case before us. For brevity the companies are referred to as the "light company," the "telegraph companies," and the "telephone company." It appears that the low tension wire of the telegraph companies crossed above the high tension wire ⁵³⁹ of the light company, and some distance away crossed under the low tension wire of the telephone company. The telegraph wire was permitted to come in contact with the wire of the light company, and received a supercharge of electricity. The telephone wire came in contact with the telegraph wire, and likewise received a dangerous current. Plaintiff's intestate, attempting to remove the telephone wire, was killed. The light company and the telegraph companies were held liable, and, speaking of their duty, the court said: "It is assumed that the defendants were each maintaining wires in the public highways in the exercise

of a franchise. Hence each was bound to take reasonable care not to injure other users of the street. It was the duty of the electric light company to use reasonable care that other uninsulated telegraph wires that crossed it should not be allowed to come in contact with its wire, which was insulated, and which carried a powerful electric current, and remain for so long a time in contact therewith as to wear away the insulation and divert the powerful current to the telegraph wire, to the probable injury of persons who should come in contact with the telegraph wire, or in contact with other wires which might be brought in touch with the charged telegraph wire. It was the duty of the three companies maintaining the telegraph wire to use reasonable care to prevent their wire from coming in contact with the highly charged electric light wire and remain in contact therewith in such a way and for so long a time as to wear off the insulation and divert the current to its own wire, to the danger of those who should touch it or touch another wire with which it might come in contact: *New York etc. Telephone Co. v. Bennett*, 62 N. J. L. 742, 42 Atl. 759." See, also, *Western Union Tel. Co. v. State*, 82 Md. 293, 51 Am. St. Rep. 464, 33 Atl. 763, 31 L. R. A. 572. But in the view we take of this complaint, it was not necessary for plaintiff to prove every act of negligence charged. She did prove to the satisfaction of the jury facts sufficient to show that the negligence of these defendants directly produced the death of Mize.

⁵⁴⁰ The case was fairly submitted, and the correct result appears to have been reached. The judgment and order are affirmed.

Mr. Chief Justice Brantly and Mr. Justice Smith concur.

The Duties and Liabilities of Electric Companies in the management of their wires is the subject of a note to *Hebert v. Lake Charles Ice Co.*, 100 Am. St. Rep. 515. Electricity being an exceedingly dangerous agency, those dealing with it are held to a high degree of care commensurate with the danger: *Gilbert v. Duluth General Electric Co.*, 93 Minn. 99, 106 Am. St. Rep. 430; *Barto v. Iowa Telephone Co.*, 126 Iowa, 241, 106 Am. St. Rep. 347; *Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225. As to the application of this rule to guy and intersecting wires, see *Wilbert v. Sheboygan Light etc. Ry. Co.*, 129 Wis. 1, 116 Am. St. Rep. 931; note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 530; as to the duty to place guards between intersecting wires, see *Guinn v. Delaware etc. Tel. Co.*, 72 N. J. L. 276, 111 Am. St. Rep. 668; note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 533; and as to the liability to licensees and trespassers, see *Guinn v. Delaware etc. Tel. Co.*, 72 N. J. L. 276, 111 Am. St. Rep. 668; *Temple v. McComb City etc. Power Co.*, 89 Miss. 1, 119 Am. St. Rep. 698; *Cumberland Telegraph etc. Co. v. Martin*, 116 Ky. 554, 105 Am. St. Rep. 229.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

MUNDT v. SIMPKINS.

[81 Neb. 1, 115 N. W. 325.]

SALES—Rescission and Recovery of Damages.—As a general rule, a party who counterclaims for damages for breach of a contract will be held to have affirmed it, and cannot be heard to assert its nonexistence because of its rescission. (p. 672.)

SALES—Rescission and Recovery for Repairs or Improvements. An exception to the rule above set out may exist where one expends money or material in the improvement of property before discovering the fraud by which he was induced to purchase it, or where the purchase is made on a warranty of its fitness for a prescribed use, and repairs are required to be made before the article can be tested and its fitness for the use ascertained. In such cases the purchaser may rescind the contract of sale and recover the reasonable cost of improving the property or of repairs made thereon. (p. 672.)

SALES—Rescission for Breach of Warranty.—A sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded. (pp. 672, 673.)

SALES—Rescission—Return or Tender of Goods.—The right of rescission is limited to cases where the seller can be put substantially in the position which he occupied before the contract, and this makes it the duty of the buyer, who would rescind for breach of warranty of quality, to restore the seller substantially to his former position, and requires him to return or tender back to the seller whatever of value to himself or to the other he has received under it. (By the editor.) (p. 673.)

SALES—Rescission—Tender of Goods, What is not.—In order to work a rescission, it is not sufficient for the purchaser, who has taken delivery of the goods at the vendor's place of business, to give notice to the vendor that he holds the goods subject to his order, or that the goods are at a designated place subject to his disposal. The goods must be returned to the place where accepted, unless, upon an offer to return, such offer is refused by the vendor. (p. 674.)

(Syllabi by the court except when stated to be by the editor.)

Ray J. Abbott and Landis & Schiek, for the appellant.

J. R. Swain and T. P. Lanigan, contra.

² DUFFIE, C. In August, 1903, the defendants, Simpkins and McCune, purchased from Mundt, the plaintiff, a second-hand steam traction engine, belting, and water wagon, for the sum of two hundred and twenty-five dollars, for which they executed their promissory notes. Plaintiff brought suit on these notes in the county court of Greeley county, and from a judgment entered in favor of the defendants he appealed to the district court, where judgment again went in favor of the defendants. He brings this appeal.

Plaintiff's petition was the ordinary one declaring upon negotiable paper. In their answer defendants allege that at the time they purchased the engine plaintiff represented it to be in good working condition and warranted it to be capable of performing the services for which they were purchasing it, to wit, running a thirteen or fourteen horse-power separator, which separator, plaintiff informed them, he had seen, and knew the engine to be capable of operating; that he represented to them that originally the engine was a twelve horse-power engine, but that he had procured the cylinder to be bored out, and that it was then equal to a thirteen horse-power engine, and guaranteed it to do the same work that a twelve horse-power engine would do; that relying upon these warranties, and not knowing to the contrary, they purchased the engine, and executed their notes to the plaintiff for the consideration agreed on. They further allege that at the time of making this purchase they were unskilled in the construction and working of steam engines, and so explained to the plaintiff, and relied solely upon the representations of the plaintiff regarding the condition, capacity and power of ³ the engine. They further allege that the engine as originally constructed was only ten horse-power; that it was badly out of repair and wholly unfit to do the work for which it was purchased; that the engine was purchased from the plaintiff at Utica, Nebraska; that it was tested at Greeley Center, Nebraska, where defendants commenced the work of threshing; that it was wholly inadequate to run their separator; that many parts of the engine had to be repaired; and that upon discovering the failure of the engine to meet the warranty given them they notified the plaintiff in writing that they would not keep or pay for it, that it was on the railroad right of way at Greeley Center, Nebraska, subject to his order, and that he might govern himself accordingly. A second count of the answer set up what is denominated a "counterclaim" for repairs to the engine, loss of time, payment of freight, etc., amounting to

one hundred dollars, for which the defendants pray judgment.

Upon what theory the defendants expected to wholly defeat the plaintiff's action by showing a rescission of the contract, and at the same time recover upon such contract by way of counterclaim, is not explained in their brief. The law is too well settled to need discussion that if a party elects to rescind a contract he cannot sue thereon to recover damages for its breach, and if he affirms the contract by suing for a breach he cannot thereafter rescind. An exception to the general rule exists in case where one expends money or material in the improvement of property before discovering the fraud by which he was induced to purchase it. In such case he may rescind the contract of sale, return the property, and recover for what he has necessarily expended, as the vendor gets the benefit of the improvements made upon the property when the same is returned to him: *Farris v. Ware*, 60 Me. 482. In the case we are considering the circumstances all tend to show that the parties understood that no test of the engine was contemplated until it was taken to Greeley Center, where the purchasers resided and were ⁴ to use it. For any improvements or repairs which were rendered necessary in order to transport it to Greeley Center, or to test it after arriving there, the defendants could recover had they rescinded the contract.

As the verdict of the jury was in favor of the defendants, it is evident that they found that the contract had been rescinded. This requires us to examine the answer filed and the evidence offered by the defendants in support thereof, to ascertain if the verdict can be upheld. In the first place, it might be observed that there are no facts alleged in the answer showing a rescission. The facts relied upon to show rescission by the defendants are stated in the following language: "That immediately upon discovering the defects set out the defendants notified the plaintiff in writing, at Utica, Nebraska, of the same, and that said engine was not the same as represented to be by him; that it would not do the work guaranteed by him, and that it was worthless to the defendants; that they could not, or would not, keep it or pay for it; that it was on the railroad right of way at Greeley Center, Nebraska, subject to his order, and that he could govern himself accordingly." It is undoubtedly the better law that a sale of personal property with a warranty of quality, even without fraud on the part of the vendor, may be treated as a sale upon conditions subsequent, at the election of the pur-

chaser, and in the event of a breach of warranty the property may be returned and the sale rescinded, since a breach of the warranty may be equally injurious to the buyer, whether the vendor acted in good faith or bad faith: *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77. The right of rescission is limited to cases where the seller can be put substantially in the position which he occupied before the contract, and this makes it the duty of the buyer, who would rescind for breach of warranty for quality, to restore the seller substantially to his former position, and requires him to return or tender back to the seller whatever of value to himself or to the other he has received under it. As stated in *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77: "The word 'offer' is frequently used by courts and text-writers as synonymous with 'tender,' and it may be properly so used with reference to articles capable of manual delivery and actually produced. But with respect to heavy articles of merchandise situated at a distance from the place to which they must be transported if restored to the vendor, the phrase 'offer to return' is more commonly and aptly applied to express a willingness, or to make a proposal to rescind the contract and return the goods. It is not sufficient, however, for a buyer who has taken delivery of the goods at the vendor's place of business merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. But if he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless upon making the offer so to do he is relieved of the obligation, as stated, by a refusal to receive them if tendered."

The above quotation states with clearness and exactness the duty of a vendee who seeks to rescind on account of breach of warranty of quality, and, measured by this rule, the defendants' answer is fatally defective, and their evidence does not in the least tend to cure the defects found in the answer. The only evidence offered upon the question of rescission was that of the defendant Simpkins. He testified that after testing the engine at Greeley Center he wrote and addressed a letter to the plaintiff at Utica, informing him of the failure of the engine to do the work for which it was purchased, and that the engine was at Greeley Center, on the railroad right of way, subject to his order. This letter was not deposited in the postoffice, but was given to the party who

had the contract of carrying the mail sacks to and from the railway station, with a request that he should mail it on the mail car of the departing train. The plaintiff denies having received the letter. There is no presumption that it ever reached him, ⁶ it not being shown that it was deposited in the United States mail; but had the evidence shown the receipt of the letter by the plaintiff, still it contained no offer to return the engine at the defendants' expense, the inference from the language used being that the defendants expected and required the plaintiff to receive the engine at Greeley Center, many miles distant from his place of residence, where it was delivered to the defendants. The attempt to show a rescission signally failed, and that question, under the evidence and pleadings in the case, should not have been submitted to the jury.

We recommend a reversal of the judgment and remanding the cause for another trial.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for another trial.

The Right of the Buyer of Goods to Rescind on a breach of the contract is discussed in *American Bronze Co. v. Gillette*, 88 Mich. 231, 26 Am. St. Rep. 286; *Post v. Weil*, 115 N. Y. 361, 12 Am. St. Rep. 809; his right to rescind on the ground of misrepresentation or fraud is discussed in *Whitworth v. Thomas*, 83 Ala. 308, 3 Am. St. Rep. 725; *Nash v. Minnesota Title etc. Co.*, 163 Mass. 574, 47 Am. St. Rep. 489; *Boles v. Merrill*, 173 Mass. 491, 73 Am. St. Rep. 308; and his right to rescind because of a breach of warranty is discussed in *Gale Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606, 23 Am. St. Rep. 739; *Smith v. Hale*, 158 Mass. 178, 35 Am. St. Rep. 485. As to the time within which the right of rescission must be exercised, see *Boles v. Merrill*, 173 Mass. 491, 73 Am. St. Rep. 308; as to the waiver of the right to rescind, see *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 40; *Woonsocket Rubber Co. v. Loewenberg*, 17 Wash. 29, 61 Am. St. Rep. 902; and as to the duty to place the vendor in statu quo, see *Wright v. Dickinson*, 67 Mich. 580, 11 Am. St. Rep. 602; *Merchants' & Mechanics' Sav. Bank v. Frazee*, 9 Ind. App. 161, 53 Am. St. Rep. 341.

STATE v. ROUTZAHN.

[81 Neb. 133, 115 N. W. 759.]

ACCOMPLICES—Officer Exacting Money from Law-breaker.—

The keeper of a house of prostitution who enters into a corrupt criminal agreement with a public officer to pay, and does pay, to him certain sums of money at stipulated times, as a consideration for the privilege of carrying on her unlawful business and selling liquor without a license, is an accomplice in crime within the meaning of the law, and on the trial of the officer for that offense it is not error to so instruct the jury. (p. 677.)

CRIMINAL LAW—Evidence of Other Bribes or Extortions.—

On the trial of such officer charged with having entered into a conspiracy to obtain money from a keeper of a house of prostitution as a consideration for allowing her to carry on her unlawful occupation, and with having for several months received from her the sum of fifty dollars each month for that purpose, proof of payments of other sums of money to the defendant at or about the same dates, under like agreements by other persons engaged in the same unlawful occupation, may be received for the purpose of corroborating the principal witness upon the material facts of the transaction as alleged in the information. (p. 679.)

(Syllabi by the court.)

F. M. Tyrrell and C. E. Matson, for the plaintiff in error.

A. S. Tibbets and Stewart & Munger, contra.

¹³⁴ BARNES, C. J. Olin M. Routzahn and William A. Bentley were tried in the district court for Lancaster county on an information describing them as the chief of police and the city detective (officers of the city of Lincoln, respectively), and charging them with the crime of blackmail, by forming a conspiracy to levy and collect certain sums of money from one Dolly Palmer, the keeper of a house of prostitution in that city, by means of threats of prosecution, coupled with an agreement for protection from arrests, the privilege of conducting her unlawful business, and selling beer to frequenters of her said house. It was also alleged in the information that the said conspiracy, and the agreement in pursuance thereof, was carried out by securing, collecting and obtaining from the prosecutrix the sum of fifty dollars a month from and including the month of September, 1904, to and including the month of April, 1905. The trial resulted in an acquittal, and the state has ¹³⁵ brought the case here under the provisions of section 515 of the Criminal Code to settle certain questions of law arising upon the trial which were decided adversely to the views of the prosecuting attorney.

1. The state's first contention is that the district court erred in instructing the jury as follows: "While it is a rule of law

that a person accused of crime may be convicted upon the testimony of an accomplice or accomplices, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination, in the light of the other evidence in the case, and the jury ought not to convict upon such testimony alone, unless after a careful examination of such testimony they are satisfied beyond a reasonable doubt of its truth, and that they can safely rely upon it. The jury are instructed that in this case Dolly Palmer would be an accomplice in the commission of the crime she alleges to have occurred." The prosecution maintains that in cases of blackmail and extortion the victim is not an accomplice; therefore Dolly Palmer was not an accomplice of the defendants in the transactions complained of. In order to determine this question, we must resort to the evidence introduced by the state to establish the charge contained in the information. Without quoting the evidence in full, it is sufficient to say that the prosecuting witness testified in substance: "That in the month of September, 1904, and a few days before the fair, they [meaning the defendants] came down and asked me if I would be willing to pay them fifty dollars to have the privilege of running an open house and selling beer during the fair. I said, 'Yes, sir.' I did not pay them any money till the week following after the state fair. The conversation took place in my room, and there was nobody present but Mr. Routzahn and Mr. Bentley and myself. They both talked it over with me. I told them, if the rest of the landladies were willing to pay, why I would be willing. They gave me the impression that the rest of the landladies were willing to pay the same as I did. I didn't pay them the fifty dollars then, at ¹³⁶ that time, because they told me I would not have to pay until after the fair. Well, after the fair they came down together, and they took my money. I paid the money, but I cannot recall the conversation. The amount I paid was fifty dollars, and I paid it to Mr. Routzahn, and Mr. Bentley was present at the time. On the first of the next month they came down. I saw them in my room. Mr. Routzahn and Mr. Bentley and myself were the only persons present. I knew what they came for, and I paid them fifty dollars." It appears that this sort of proceeding occurred on the first of each month until the defendants went out of office, which was about the first of May, 1905. It is doubtful if the evidence of the state was sufficient to establish the charge of blackmail or extortion, a point which is not decided; but it would seem

clear that this evidence, if true, was sufficient to convict the defendants of the crime of bribery. If the prosecuting witness was to be believed, then the defendants solicited from her the payment of certain sums of money for an agreement on their part to refrain from performing their plain duty in the premises, which was by all lawful means to prevent her from running a house of prostitution and illegally selling beer. That they were willing to accept and receive a money consideration therefor, and that she was willing to pay, and did pay, them fifty dollars on or about the first of each month for the time set forth in the information, seems clear. This, without doubt, constituted bribery on her part and the acceptance of a bribe by the defendant officers, and would make the prosecuting witness an accomplice in the crime, which her evidence tended to prove. Therefore the instruction complained of was proper, and the state's first exception is overruled.

2. It appears that on the trial the state offered to prove, by keepers of some four or five other houses of prostitution, that the defendants made agreements with each of them similar to the one testified to by the prosecuting witness, and received payments of like sums of money from them for the same purposes. A part of the ¹³⁷ evidence thus offered was received; but no evidence of the payment of money to the defendants by persons other than the prosecutrix was allowed to go to the jury. The state excepted, and now contends that the court erred in excluding the evidence of such payments, while the defendants contend that this proof was properly rejected because it was evidence of other crimes independent of, and not at all connected with, the one for which they were being tried. While the general rule is that on the trial of one charged with a criminal offense proof of his commission of other crimes is not admissible, yet to this rule there are certain well-known exceptions; and the question now is: Does the proof offered fall within such exceptions? In *Cowan v. State*, 22 Neb. 519, 35 N. W. 405, *Berghoff v. State*, 25 Neb. 213, 41 N. W. 136, and *Morgan v. State*, 56 Neb. 696, 77 N. W. 64, evidence of the commission of like crimes by the defendants was held admissible for the purpose of showing guilty knowledge. In *State v. Sparks*, 79 Neb. 504, 113 N. W. 154, and in *Clark v. State*, 79 Neb. 473, 113 N. W. 211, which were cases where the defendants' guilt of the crime charged depended upon the intent, purpose or design with which the alleged criminal acts were done, evidence of the commission of other like crimes by the defend-

ants at about the same time was held admissible for the purpose of showing guilty knowledge and intent. In *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455, this question came before us the first time. In that case Roger C. Guthrie, the city marshal of the city of Omaha, was convicted on a charge of having received money from Charles Branch and other gamblers of that city, as a consideration for allowing them to carry on their business, and refraining from prosecuting them. It was urged that it was error for the trial court to permit the introduction of evidence tending to show the payment to the defendant of other sums of money at other times and by other persons than Branch. It was said in the opinion: "It [evidence of other payments by other gamblers at other times] was properly admitted as part of the transaction in which the three hundred dollars was paid by Branch to plaintiff in error. The fact of the carrying out ¹³⁸ of this system was proper evidence for the purpose of corroborating the testimony of Branch, and showing the purpose, understanding and intent with which the money was received as alleged in the indictment, and for the purpose of showing the system under which these several transactions were had." In *State v. Ames*, 90 Minn. 183, 96 N. W. 330, the defendant (who was the mayor of the city of Minneapolis) was charged under the criminal statutes of Minnesota with levying blackmail or tribute from the women of the town. It appeared that one Cohen represented the mayor in collecting the various sums from the various women. The state was permitted to prove over the objection and exception of the defendant payments of money to Cohen by the other women referred to, and to relate conversations had with him in reference thereto. It was held that the evidence was admissible, and the court, in discussing the question, said: "But, reduced to its narrowest compass, the true rule is that evidence of the commission of other crimes is admissible when it tends corroboratively or directly to establish the defendant's guilt of the crime charged in the indictment on trial, or some essential ingredient of such offense, . . . or is a part of a common scheme or plan embracing two or more crimes so related to each other that the proof of one tends to establish the other." Commenting on the evidence the court further said: "It established beyond question a scheme concocted by the defendant to put the abandoned women of Minneapolis under tribute to him in return for his official protection, and each and every payment was a part of the one scheme. It was practically one transaction—each act,

each payment, an essential part of the whole plan of corruption—and the evidence was competent.”

In the case at bar the defendants, two public officers, whose duty it was to enforce the law, were charged with conspiring together and adopting a general plan or scheme of holding up the prosecuting witness, a supposed violator of the law, and obtaining from her by blackmail, or, as the testimony tended to show, by bribery, certain sums of ¹³⁹ money as the price of her immunity from punishment, and that they actually entered upon and carried out that plan. In such cases the defendants of necessity operate secretly and privately. There is usually but one other witness to each transaction, and that is the victim, the supposed criminal from whom the money is extorted, or upon whom the blackmail is practiced, and who, in case of bribery, as above stated, is an accomplice. In pursuance of his general scheme, the defendant goes from one to another of the same class of supposed wrongdoers, and by the same threats, agreements and promises of immunity obtains money from them as a consideration for allowing them to violate the law. This appears to have been the plan adopted by the defendants in this case; and this was done not only once, but for a considerable time at regular intervals. It follows that the proof offered would be corroborative of the testimony of the prosecuting witness, and for that purpose it was admissible.

We are therefore of opinion that the evidence offered falls within the exception to the general rule above stated, that the district court erred in excluding it, and the state's second exception is sustained.

Judgment accordingly.

Convictions Based on the Testimony of an Accomplice are discussed in the note to *Stone v. State*, 98 Am. St. Rep. 158.

Bribery and the Solicitation of Bribes are discussed in the note to *Rudolph v. State*, 116 Am. St. Rep. 38.

The Crime of Extortion is the subject of a note to *State v. Coleman*, 116 Am. St. Rep. 446.

HARRINGTON v. HAYES COUNTY.

[81 Neb. 231, 115 N. W. 773.]

DISQUALIFIED JUDGE—Effect of His Judgment.—A district judge is disqualified from making an order confirming a judicial sale in an action which he commenced and prosecuted to judgment as attorney for the plaintiff, and where the fact of such disqualification appears upon the record, the order of confirmation made by the judge so disqualified is void, and may be collaterally attacked. (p. 682.)

JUDICIAL SALE—Confirmation a Judicial Act.—An order confirming a judicial sale is a judicial, and not a ministerial, act. (p. 683.)

DISQUALIFIED JUDGE—Suit to Vacate His Judgment.—In an action to set aside a sheriff's deed upon the ground that the order confirming the sale which it was executed to carry out was made by the judge disqualified to act, an allegation that the plaintiffs are the owners in fee simple of the land in question is a sufficient plea of ownership, when the petition is attacked by a general demurrer. (pp. 683, 684.)

(Syllabi by the court.)

Starr & Reeder, for the appellants.

M. F. Harrington and C. A. Ready, contra.

232 CALKINS, C. On the second day of January, 1902, the county of Hayes, by its then attorney, commenced an action against the defendant Harrington, a nonresident of the state, to foreclose its lien for taxes upon a tract of land then owned by her. Service was had by publication, and on the thirty-first day of March, 1902, a decree was rendered as prayed, upon which an order of sale was afterward issued, and the sheriff, at a sale held on the fourth day of August, 1902, struck off the premises to the defendant Mansfield upon his bid of one hundred dollars. On the fourth day of March, 1904, the purchaser paid the amount of his bid. At this time the county attorney had become judge of the district court, and, being then holding a term of said court in said county of Hayes, made an order confirming the said sale, in pursuance of which order the sheriff on the second day of July, 1904, made and executed a deed conveying said premises to the defendant Mansfield.

This action is brought by Adelaide L. Harrington and Jesse C. McNish against the county of Hayes and the purchaser Mansfield, and they allege, in addition to the facts above stated, that the plaintiff Harrington was, during the proceedings above mentioned, and that she and the plaintiff McNish were, at the commencement of this action, the owners in fee of the premises in question; that the plaintiffs had

no actual notice of the pendency of said ²³³ action in time to appear and defend the same, and that they had on the twentieth day of December, 1904, tendered and offered to pay to the defendant Mansfield the amount of taxes chargeable against said land, with interest, penalties and costs. It appeared that the action of foreclosure was brought without an antecedent sale by the county treasurer, and that the plaintiff Harrington would have had good defense to said action. To the plaintiffs' petition the defendants filed a general demurrer, which was sustained, and judgment rendered for the defendants, which this appeal is brought to review.

1. We have therefore to consider whether a judgment rendered by a disqualified judge is void, or simply erroneous. At common law the latter rule prevails: Freeman on Judgments, 4th ed., sec. 145. In many of the states statutes have been enacted prohibiting judges from acting in certain specified cases, and where the statute in direct and positive terms forbids a judge to act in such cases the prohibition goes to the jurisdiction, and the judgment is void: Freeman on Judgments, 4th ed., sec. 146, and note to *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. Such seems to be the rule uniformly adopted where the prohibition is direct and positive, and there is no provision for a waiver by the parties of objections to the judge upon that ground. Our own statute in force at the time of the confirmation of the sale in this case provided: "A judge or justice is disqualified from acting as such, except by mutual consent of parties, in any case wherein he is a party, or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, . . . or where he has been attorney for either party in the action or proceeding, and such mutual consent must be in writing and made a part of the record": Comp. Stats. 1905, c. 19, sec. 37. In at least two other states statutes containing similar provisions have been enacted. The statute of Tennessee (Code, sec. 4098) provides: "No judge of any court, chancellor or justice shall sit in any cause or proceedings ²³⁴ in which he is interested, or has been of counsel, or where he is related to either party by consanguinity or affinity, within the sixth degree, computing by the civil law, except by consent of the parties entered of record." The supreme court of Tennessee, in construing its statute, held that there must be a waiver of the judicial incompetency as required by the statute, or the judgment will be void: *Pierce v. Bowers*, 8 Baxt. (Tenn.) 353; *Reams v. Kearns*, 5 Cold. (Tenn.) 217; *Hilton v. Miller*, 5 Lea (Tenn.), 395. On the

other hand, it is said by the supreme court of Alabama, in construing a similar statute, that if the provisions for consent had not been introduced there could not have been any question about the construction, but that the consent giving authority seems to imply a personal privilege, and the court accordingly decides that the disabilities mentioned in the statute do not render the proceedings void, though no consent appears upon the record: *Hine v. Hussy*, 45 Ala. 496. And this rule has since been followed in that state, whose courts seem to have been influenced by the gravity of the consequences to follow from annulling judgments of courts having apparent jurisdiction to render them. The importance of these considerations cannot be denied. There should be confidence in the judgments of courts, and the titles resting upon judicial proceedings should not be lightly set aside for matters not appearing upon the record, and which the intending purchaser at a judicial sale could not have discovered by a diligent examination of the proceedings. However, the question whether a judgment rendered in a court of general jurisdiction by a judge apparently qualified should, upon the considerations above referred to, be held void when collaterally attacked upon the ground that the judge was disqualified by reason of facts not shown upon the record is not presented in this case, and need not be decided. Here the disqualification complained of appears by the inspection of the record. It is there shown that the person who, as county attorney, brought and prosecuted the action to judgment, and the ²³⁵ person who, as district judge, confirmed the sale, had the same name. Identity of names is *prima facie* evidence of identity of persons, and the disqualification of the judge to act was apparent from the inspection of the record of the proceedings. In such a case, the reason for the rule adopted by the Alabama court does not apply, and the rule should not, therefore, govern the disposition of this case. We have no doubt that where the disqualification of the judge affirmatively appears upon the record, and there is no waiver of such disqualification, as required by statute, the acts of such disqualified judge are void, and it follows in this case that the order of confirmation and proceedings subsequent thereto are invalid and of no effect.

2. It is asserted that an order confirming a sale upon foreclosure does not involve the exercise of any judicial discretion, and it was therefore one which a judge who had been attorney for one of the parties might properly make. Section 498 of the Code provides that the court may make the

order of confirmation if, after having carefully examined the proceedings of the foreclosure, it is satisfied that the sale has in all respects been made in conformity to the provisions of law. This law, it is held, cures the irregularities in the proceedings, and that could not be said of a mere ministerial act. In fact, the crux of the defendants' contention is that this order should be accorded the respect given to judicial determinations, and it is highly inconsistent for them to at the same time argue that for the purpose of determining whether the judge was disqualified we should regard the confirmation of the sale as a mere ministerial act. We are not impressed with the view that, if the proceedings were regular, so that there was but one thing for the judge to do, the act becomes merely formal. That argument, logically carried out, would apply to all decisions and all judgments; for, when the facts and the law are ascertained, the judge has no discretion—he must pronounce the decision that the law commands. The principles applicable to some cases are so ²²⁶ obvious and generally understood that the judge reaches his conclusion easily and pronounces his decisions with the utmost confidence. Other cases are so complicated that it is a task of infinite difficulty to unravel the tangled skein of legal principle and follow each thread from its source to its proper application. When this is done, however, the judge has no more discretion in the latter than in the former case. He must pronounce the judgment of the law. The disqualification of the statute is not a disqualification to decide erroneously. It is a disqualification to decide at all.

3. It is contended that the petition is defective in not showing that the plaintiffs have such title to the land in question as to enable them to prosecute this action. The petition contains the allegation, "the plaintiffs Adelaide L. Harrington and Jesse M. McNish are the owners in fee simple" of the land in question, and in another part it pleads that the plaintiff Harrington was at the time of the beginning of said foreclosure proceeding, and at the time of the confirmation of such sale, the "owner in fee." The claim was made by the plaintiffs that their petition might be regarded as an application to open up the judgment under the provision of section 82 of the Code, giving such relief to defendants served constructively. The defendants contended that to entitle the plaintiffs to such relief the plaintiff Harrington, who was the sole owner of the land at the time of the foreclosure proceedings, must still remain such sole owner.

We presume, therefore, that this argument was directed to the petition as an application to open up the judgment under section 82, and that, since we have not so considered the petition, it has no application. In any event, we are satisfied that in an action by two parties to cancel a cloud upon the title of real estate the allegation that the plaintiffs are the owners in fee simple of the land in question is a sufficient allegation of ownership, when the petition is attacked by a general demurrer.

We therefore recommend that the judgment of the district ²³⁷ court be reversed and the cause remanded for further proceedings in accordance with this opinion.

Fawcett and Root, CC., concur.

By the COURT. For the reasons above stated, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with the foregoing opinion.

Where a Judicial Officer, Such as a Judge, is Disqualified to sit in a proceeding, a judgment therein rendered by him is by some authorities said to be voidable only (Fowler v. Brooks, 64 N. H. 423, 10 Am. St. Rep. 425), but by other authorities it is said to be void: Chicago etc. Ry. Co. v. Summers, 113 Ind. 10, 3 Am. St. Rep. 616; Horton v. Howard, 79 Mich. 642, 19 Am. St. Rep. 198. See, also, Crook v. Newborg, 124 Ala. 479, 82 Am. St. Rep. 190; Ex parte Hilton, 64 S. C. 201, 92 Am. St. Rep. 800; First Nat. Bank v. McGuire, 12 S. D. 226, 76 Am. St. Rep. 598; Whitesell v. Strickler, 167 Ind. 602, 119 Am. St. Rep. 524; Conant's Appeal, 102 Me. 477, 120 Am. St. Rep. 512; Rollins v. Connor, 74 N. H. 456, 124 Am. St. Rep. 983.

STARR v. BANKERS' UNION OF THE WORLD.

[81 Neb. 377, 116 N. W. 61.]

BENEFIT SOCIETY—Purchase of Business of Another Society. A fraternal beneficiary association organized under the laws of the state has no authority to purchase the business and assume the risk of another association of like character. (pp. 686, 687.)

BENEFIT SOCIETY—Purchase of Business of Another Society. Where a fraternal beneficiary association obtains possession of the funds of another association of like character, it cannot defend an action for conversion on the ground that the acts by which it secured the funds were not within its corporate capacity. (p. 687.)

TROVER—Liability of Agent.—One Who Aids and assists in the wrongful taking of chattels is liable for the conversion thereof, though he acted as agent for another. (p. 687.)

RECEIVERS.—The Recital of Jurisdictional Facts in an Order Appointing a receiver is prima facie evidence of the existence of such facts. (p. 688.)

RECEIVERS — Appointment for Foreign Benefit Society.—Where all the property, books and records of a fraternal beneficiary association organized under the laws of another state are brought into this state, and the business of the association is attempted to be here carried on by persons assuming to act as the officers or agents thereof, the courts of this state have power to appoint a receiver to administer the property of such association. (p. 689.)

(Syllabi by the court.)

Weaver & Giller, Robert Ryan and John W. Burdette, for the appellants.

Crane & Boucher, contra.

378 CALKINS, C. The Order of the Iron Chain was a fraternal beneficiary society organized under the laws of the state of Minnesota in 1898, and having its home office at Winnebago, in that state, until November 11, 1901. At that date it had cash on hand, five thousand four hundred and sixty-six dollars and one cent in the benefit fund, two thousand three hundred and forty-eight dollars and sixty-eight cents in the reserve fund, and two dollars and eighty cents in the extension fund. Under the rules governing the order the benefit fund was devoted to the payment of death claims, and the reserve fund was to be used to supplement the benefit fund when the regular benefit assessments exceeded the number of twelve in any one year, while the extension fund was to be used in extending the organization. During 1901, and prior to November 11th, there had been twelve regular benefit assessments, and in addition thereto there were valid outstanding death claims amounting to about twenty thousand dollars. On November 4, 1901, the defendant, the Bankers' Union of the World, which was a fraternal beneficiary society organized under the laws of **379** Nebraska, by its directors, authorized the defendant Spinney, its president, "to confer with the directors of the Order of the Iron Chain and make such arrangements as he should deem necessary and proper to effect a consolidation of the said Order of the Iron Chain with the Bankers' Union of the World." November 11, 1901, the defendant Spinney, at Winnebago, Minnesota, entered into a written contract with the directors of the Order of the Iron Chain, which stipulated that the management, property, assets and money of the Order of the Iron Chain should be set over to the Bankers' Union of the World; and the latter should use the sums of money set over in a manner conformable to the regulations and by-laws of the former, and pay the mortuary claims then pending and thereafter accruing against that order in accordance with the terms of its certificates,

constitution and by-laws. In pursuance of this contract the funds, books, records and other property of the Order of the Iron Chain were turned over to the defendants and brought to Omaha, where the money was placed in the treasury of the Bankers' Union of the World and the books and records kept in its office. The head clerk of the Order of the Iron Chain was brought to Omaha and placed in charge of these books and papers. The defendant Spinney assumed the title of supreme chancellor of the Order of the Iron Chain, and proceeded to send out notices of assessment to members of that order, from which a very small sum seems to have been collected. There is no evidence as to what was done with the moneys received from the Order of the Iron Chain, and, so far as the record shows, it still remains in the hands of the defendants. In January, 1904, upon the application of James H. Womack, a beneficiary whose claim against the order of the Iron Chain had been approved prior to November 11, 1901, the plaintiff was by the district court of Douglas county appointed receiver of the Order of the Iron Chain, with directions to commence such actions as might be necessary against any persons for the recovery of any property or effects of the order which might seem to have ³⁸⁰ been converted by them or found to be in their possession. The plaintiff, having qualified as such receiver, brought this action in the district court for Douglas county against the defendants, the Bankers' Union of the World and Edmond C. Spinney, charging the conversion by them of the funds as aforesaid received by them from the Order of the Iron Chain. The defendants answered, asserting the validity of the contract, and denying the jurisdiction of the court to appoint the plaintiff receiver, and upon the issues so formed there was a trial had to the court, who found for the plaintiff, and rendered a judgment against the defendants for the full amount claimed. From this judgment the defendants appeal.

1. That the defendant, the Bankers' Union of the World, had no authority to purchase the business or assume the risks of the Order of the Iron Chain is settled by the decision of this court in *State v. Bankers' Union of the World*, 71 Neb. 622, 99 N. W. 531. The fact that the statute law of Minnesota undertakes to regulate the consolidation of such societies may be taken as a recognition of the powers of societies organized under the laws of that state to make such an agreement, but it cannot be held to confer such a power upon the Nebraska society. The Nebraska society not having the legal capacity, the obligation it attempted to assume in the

contract in question was void as well in Minnesota as Nebraska.

2. Any distinct act of dominion wrongfully exerted over one's property in denial of his right is a conversion: 2 Cooley on Torts, 3d ed., 524; Hill v. Campbell Commission Co., 54 Neb. 59, 74 N. W. 388; Stough v. Stefani, 19 Neb. 468, 27 N. W. 455. While the defendant society is not liable on its contract to assume the risks and liabilities of the Order of the Iron Chain, it cannot defend an action for the conversion of the funds of that order on the ground that the acts by which it secured the funds thereof are not within its corporate power: Cook on Corporations, 5th ed., sec. 15b; First National Bank v. Graham, 100 U. S. 699, 25 L. ed. 750; Mendel v. Boyd, 3 Neb. (Unof.) 473, 91 N. W. 860.

³⁸¹ 3. The question whether the defendant society would have been liable had it never had the money is not here involved, for it is admitted that it was received by it and placed in its treasury. That the defendant Spinney, through whose agency it actually procured possession of these funds, is also liable therefor cannot be doubted. Where several parties unite in an act which constitutes a wrong to another under circumstances which fairly charge them with intending the consequences which follow, it is a very just and reasonable rule of the law which compels each to assume and bear the responsibility of misconduct of all: 1 Cooley on Torts, 3d ed., 153. Hence, it is held that one who aids and assists in a wrongful taking of chattels is liable for the conversion, though he acted as agent for a third person: McCormick v. Stevenson, 13 Neb. 70, 12 N. W. 828; Stevenson v. Valentine, 27 Neb. 338, 43 N. W. 107; Cook v. Monroe, 45 Neb. 349, 63 N. W. 800; Hill v. Campbell Commission Co., 54 Neb. 59, 74 N. W. 388; Osborne Co. v. Plano Mfg. Co., 51 Neb. 502, 70 N. W. 1124.

4. It is argued with much insistence that the order of the district court for Douglas county appointing the plaintiff as receiver of the Order of the Iron Chain was void for want of notice required by the statute to be given in such cases, and that the plaintiff has not, therefore, the legal right to sue. The petition alleges that on the seventh day of January, 1904, in the action of James H. Womack against the Order of the Iron Chain, he was duly appointed receiver of its property, etc., and authorized to bring any action for the collection of any property of, or debts due to, such Order of the Iron Chain. There was a further allegation that the Order of the Iron Chain was organized under the laws of the state of Minnesota; that its home office was in the city of Winnebago, in

said state, prior to the eleventh day of November, 1901, since which time its home office and all its property had been in the city of Omaha; that the defendant Spinney had since said date been the supreme chancellor of said order. These allegations were met in the answer by statements that the district court was without jurisdiction, and that the only ³⁸² notice served in said case was upon the defendant Spinney as supreme chancellor; that said Spinney was never supreme chancellor of said order and never acted as such. The new matter in this answer was controverted by reply, and the plaintiff introduced in evidence the order appointing him as receiver and the bond showing its proper qualification. The order contains a finding that due and legal notice of the application for the appointment of a receiver was given to the defendant according to law. There was no further proof as to the giving of notice of the application for the receiver. The recital of jurisdictional facts in the order appointing a receiver is prima facie evidence of the existence of such facts: *Edee v. Strunk*, 35 Neb. 307, 53 N. W. 70; *Hagerman v. Thomas*, 1 Neb. (Unof.) 497, 96 N. W. 631. There being no evidence to rebut this presumption, it must prevail.

5. The defendants contend that the courts of this state cannot administer the affairs of a foreign corporation, and that the district court for Douglas county had, therefore, no jurisdiction of the subject of the action. Where the general administration of the assets of an insolvent corporation is proceeding in the state of its creation, there are good reasons, founded on the principles of judicial comity, why the courts of another state should not appoint receivers of such of its assets as may be found in its jurisdiction; but the impounding of assets of the debtor by means of a receiver being in the nature of a proceeding in rem, it is believed that no principle can be suggested which disables a court of equity from taking that course with the assets of a nonresident debtor, corporate or unincorporate: 5 *Thompson on Corporations*, sec. 6861. The power to appoint a receiver of the assets of a foreign corporation is constantly exercised: 5 *Thompson on Corporations*, sec. 6861; 3 *Cook on Corporations*, 5th ed., sec. 865. That a court should not appoint a receiver to administer the internal affairs of a foreign corporation is a very general rule, the reason for which is that the court cannot obtain control of all the property, books, records and ³⁸³ members of the corporation so as to do full justice between all the parties interested, but the operation of this rule ceases when the reason for it no longer exists, and whatever might be the objection to appoint-

ing a receiver for the property of a foreign corporation found in this state where such property is only part of its assets, and where the books and records and officers of such corporation are beyond the process of the court, they do not apply in this case. Here all the assets, books and records were brought into this jurisdiction. Here the defendants assumed to exercise the power and authority of the foreign corporation. No assets, no books, no person assuming to act as its officer remained in the state of its creation. Clearly the courts of this state, in which all that remained of the Order of the Iron Chain had been brought by these defendants, would be better able to take jurisdiction of an action by its beneficiaries and members than would the courts from the state from which it was abducted: 6 Thompson on Corporations, secs. 8010, 8011. There nothing remained for the jurisdiction of that state to act upon, no funds, no records, and no officers, but those who had abdicated their authority and ceased to act for the order. None of the ordinary reasons why the courts of this state should not take jurisdiction of these assets remained, but whether the suit in which the receiver was appointed is considered as one to subject the assets of the foreign corporation found in this state to the payment of its debts, or whether it be considered as a suit to administer and wind up the affairs of such corporation, every reason exists why the courts of this state should take jurisdiction.

We therefore conclude that the judgment of the district court was right, and recommend that it be affirmed.

Fawcett and Root, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Purchase by One Corporation of the Assets and property of another is the subject of a note to Tanner v. Lindell Ry. Co., 103 Am. St. Rep. 548. The effect of the consolidation of corporations is the subject of a note to Morrison v. American Snuff Co., 89 Am. St. Rep. 604.

The Question as to When It is Proper to Appoint a Receiver of a corporation is discussed in the notes to Hall v. Nieukirk, 118 Am. St. Rep. 198; Cameron v. Groveland Imp. Co., 72 Am. St. Rep. 29. According to Blackwell v. Mutual Reserve etc. Assn., 141 N. C. 117, 115 Am. St. Rep. 677, a receiver will not be appointed for a foreign insurance company when it has no assets or property within the state other than assessments to become due against its policy-holders therein.

BECKER v. WILCOX.

[81 Neb. 476, 116 N. W. 160.]

LOTTERY TICKET—Recovery by Vendee of Money Paid.—

The rule that courts will not permit the recovery of the consideration paid upon an executed contract prohibited by statute does not apply to the vendee of a lottery ticket, for whose benefit the statute was enacted. *Bowen v. Lynn*, 73 Neb. 215, 102 N. W. 460, distinguished. (p. 693.)

(Syllabus by the court.)

L. D. Holmes, for the appellant.

James B. Kelkenney, contra.

⁴⁷⁶ EPPERSON, C. The petition and answer herein in effect alleged and admitted that the defendant was the owner of a lottery ticket issued to him by the Devore Diamond Company, which he sold to the plaintiff. This action is brought to recover the purchase price. The court below sustained defendant's motion for a judgment on the pleadings. Plaintiff appealed.

The lottery ticket is substantially the same as that considered by this court in *Bowen v. Lynn*, 73 Neb. 215, 102 N. W. 460. It was there held that the purchaser of such lottery ticket or contract could not recover under the provisions of section 214 of the Criminal Code, which provides for the recovery by civil action of money lost at gambling. The plaintiff herein does not rely upon the provisions of that section; but it is her contention that, because section 225 of the ⁴⁷⁷ Criminal Code prohibits the sale of lottery tickets and imposes a penalty upon the vendor, she is not in *pari delicto*. and, as there was a complete failure of consideration for the purchase price paid to the defendant, she is entitled to recover. It is the general rule that one in *pari delicto* cannot enforce an executory contract, and, moreover, cannot recover back the amount paid upon an executed illegal contract. Cases are numerous which refuse recovery to one who has become the victim of a gambling adventure or of a lottery scheme, and such decisions are invariably founded upon the maxim, "*In pari delicto potior est conditio defendentis.*" On the other hand, it is a well-established rule that, where one has paid money for an illegal consideration, he can, on account of its illegality, recover the same when he is not *particeps criminis* and is not in *pari delicto*. The sale of lottery tickets was not prohibited by the common law. It is made illegal in this state by section 225 of our Criminal

Code, which provides: "If any person or persons shall vend, sell, barter, or dispose of any lottery ticket or tickets, order or orders, device or devices, of any kind, for, or representing any number of shares, or any interest in any lottery, or scheme of chance, . . . every such person shall be fined in any sum not exceeding five hundred dollars, or be imprisoned not exceeding six months, or both, at the discretion of the court." This it will be observed, imposes no penalty upon the vendee. Had the statute declared the sale of lottery tickets illegal, and had it imposed a penalty upon both the vendor and vendee, or had it prescribed no penalty whatever, there can be no doubt but that the parties to a contract for the sale thereof, whether executed or executory, would be in *pari delicto*, and neither could appeal to the court for relief. But, as the legislature imposed the penalty upon the vendor only, it would seem that the statute was intended for the protection of purchasers of lottery tickets, and for this reason the purchaser by participating in the illegal transaction is neither *particeps criminis* nor in *pari delicto*.

478 A review of many of the authorities construing the rights of parties under a prohibited contract may be found in *Storz v. Finklestein*, 46 Neb. 577, 65 N. W. 195, 30 L. R. A. 614. It is unnecessary to again quote from the same authorities. Especially, however, we desire to direct attention to *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132, and *Sacketts Harbor Bank v. Codd*, 18 N. Y. 240. In *Storz v. Finklestein*, 46 Neb. 577, 65 N. W. 195, 30 L. R. A. 644, it was held: "No action can be maintained in a contract the consideration of which is either wicked in itself or prohibited by law." That rule is not applicable to the case at bar. It is to be followed in actions brought for the enforcement of executory contracts, or in actions founded upon any contract where the parties are in *pari delicto*. In *Gray v. Roberts*, 2 A. K. Marsh. (Ky.) *208, 12 Am. Dec. 383, it was held: "A contract in violation of law is void, and the courts will neither enforce payment nor enable one who has paid money thereon to recover it, if both parties are in *pari delicto*; but, if the law violated was intended to protect one of the parties against the acts of the other, they are not in *pari delicto*, and the party designed to be protected may recover money paid in violation of such law. Money paid for lottery tickets, where the lottery is forbidden by law, may be recovered, for the law is designed for the purchaser's protection; but if the money was paid under a judgment of a court of competent jurisdiction, it cannot be recovered." That case in principle is iden-

tial with the case at bar. In the opinion we find the following: "If both parties are equally guilty of a breach of the law, a court of justice cannot interpose its aid in behalf of either; for it is a settled rule that *pari delicto potior est conditio defendentis*; but where the transaction is in violation of a law made for the protection of one party against the acts of the other, they are not equally guilty, and the innocent party, when he has paid money upon such a transaction, may, without doubt, recover it back. . . . The act of 1769, for preventing and suppressing private lotteries, which was the law in force at the time of the ⁴⁷⁹ contract in this case, appears manifestly, from the preamble of the act, to have been designed by the legislature to protect the interest of others against the devices of those who should set up a lottery; and the enacting clause is made to operate upon the latter only. For it is only persons who set up the lottery, and not those who purchase the tickets, that offend against the provisions of the act."

The rule originated in England, and was adopted by American courts at an early date. The case of *Jaques v. Golightly*, 2 W. Black. *1073, was an action to recover money paid for the insurance of lottery tickets. Blackstone, J., said: "These lottery acts differ from the stock-jobbing act of 7 George II, chapter 8, because there both parties are made criminal and subject to penalties." In commenting upon that case it is said in *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132: "The rule here suggested for determining whether the parties are in *pari delicto* seems reasonable and just. There are, undoubtedly, other cases in which the parties are not equally guilty; but it is safe to assume that, whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as *par delictum*. In *Browning v. Morris*, 2 Cowp. (Eng.) 790, Lord Mansfield, after referring with approbation to the case of *Jaques v. Golightly*, 2 W. Black. *1073, reiterates the argument of Blackstone, J., in that case. He says: 'And it is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side—upon the office-keeper.' " "This distinction seems to have been ever afterward observed in the English courts, and, being founded in sound principle, is worthy of adoption as a principle of common law in this country": *Inhabitants of Worcester v. Eaton*, 11 Mass. *368. In *Mount v. Waite*, 7 Johns. 434, an action to recover back money which the plaintiff had paid to defend-

ant for issuing lottery tickets contrary to the statute, Chief Justice Kent said: "The plaintiffs here committed no crime in ⁴⁸⁰ making the contract. They violated no statute, nor was the contract *malum in se*. I think, therefore, the maxim as to parties in *pari delicto* does not apply, for the plaintiffs were not in *delicto*."

I am unable to find recent American cases holding to this same doctrine with reference to moneys paid for lottery tickets, but the same rule has recently been applied to other contracts prohibited by statutes which imposed a penalty only upon one party. In *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327, 45 Pac. 76, 41 L. R. A. 548, it was held that the purchaser could recover back money paid by him under a contract prohibited by statute for the purchase of a patent right, and the same court, in *Latham Mercantile & Commercial Co. v. Harrod*, 71 Kan. 565, 81 Pac. 214, held: "A policy-holder in a fire insurance company not authorized to transact business in this state is not in *pari delicto* with the company or its agents." Cases are numerous holding that, under statutes prohibiting contracts for the payment of usury, the party injured may bring an action for the excess of legal interest. The theory of all such cases is that, inasmuch as the statutes were made for the protection of the party injured, he is not in *pari delicto*, and he may recover the amount paid for the illegal promise of the other party. The reasoning of the English cases and of the early American cases above cited with reference to lottery tickets and lottery schemes have appealed to us as the better rule. We are unable to find any case to the contrary, unless *Bowen v. Lynn*, 73 Neb. 215, 102 N. W. 460, may be considered as such. It seems, however, that, if we are right, then the conclusion reached in *Bowen v. Lynn* should have been different, for the contracts are substantially the same. The penalty imposed by section 224 upon the operators of a lottery is the same as that imposed by section 225 upon the vendors of lottery tickets. It was said in the opinion in *Bowen v. Lynn* that section 224 affords the losing party no civil remedy, and that the action is sought to be maintained under the proviso of section 214. It is apparent, therefore, that the reasoning ⁴⁸¹ in *Bowen v. Lynn* is not contrary to the conclusion we have reached in this case. Undoubtedly, had the plaintiff there relied upon the rule adopted by the early American courts, instead of attempting to recover under the provisions of section 214 of the Criminal Code, the conclusion would have been different.

We recommend that the judgment of the district court be reversed and this cause remanded for further proceedings.

Duffie and Good, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

The Rule of Pari Delicto is the subject of a note to *Hobbs v. Boat-right*, 113 Am. St. Rep. 724. For the application of this rule to persons dealing in lottery tickets, see *Branham v. Stallings*, 21 Colo. 211, 52 Am. St. Rep. 213; *Equitable Loan etc. Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177; *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112, 106 Am. St. Rep. 586.

ALLISON v. FIDELITY MUTUAL FIRE INSURANCE COMPANY.

[81 Neb. 494, 116 N. W. 274.]

CORPORATIONS—Express and Implied Powers.—A corporation possesses only such powers as are granted to it, and such further ones as are necessary to the enjoyment of the rights and privileges granted. (By the editor.) (p. 695.)

FIRE INSURANCE.—A Contract of Reinsurance is Simply to Indemnify the original insurer for a loss he may sustain upon his contract of insurance; it is a guaranty to reimburse him for any sum he may be compelled to pay under his contract of insurance with the owner. (By the editor.) (p. 697.)

REINSURANCE—Power of Mutual Company to Contract.—Mutual fire insurance companies organized under the provisions of chapter 45, Laws of 1897, are not authorized to transact a reinsurance business. (p. 698.)

REINSURANCE—Effect of Mutual Company's Contract.—A contract of reinsurance made by a mutual insurance company organized under the provisions of chapter 45, Laws of 1897, is ultra vires, and assessments cannot be collected on account of such policy. (p. 698.)

REINSURANCE—Effect of Mutual Company's Contract.—In an action by one insurance company against another, both of which were organized under the provisions of chapter 45, Laws of 1897, to recover assessments on policies of reinsurance, the reinsured company is not estopped from pleading the defense of ultra vires. (p. 698.)

(Syllabi by the court except when stated to be by the editor.)

Isaac E. Congdon, for the appellant.

Baldrige & De Bord, contra.

494 GOOD, C. The Merchants' and Manufacturers' Mutual Fire Insurance Company and the Fidelity Mutual Fire In-

insurance Company were each mutual fire insurance companies organized under chapter 45, Laws of 1897, entitled "An act to authorize the organization of mutual insurance companies to insure city and village property against loss by fire, lightning, tornado, cyclone, or windstorm, and to regulate their conduct": Ann. Stats. 1907, secs. 6544-6563. Both companies failed and passed into the hands of receivers in actions instituted in the district court for Douglas county. In the case of Wells v. Merchants' & Manufacturers' Mutual Fire Ins. Co., Howell was appointed as receiver of ⁴⁹⁵ that company, and, in the case of Allison v. Fidelity Mutual Fire Ins. Co., Leigh was appointed receiver of the last-mentioned company. Howell, as receiver of the Merchants' company, filed in the Allison case a claim against the Fidelity company for assessments levied against the Fidelity company by the Merchants' company and by the district court; the former assessments being made before the company passed into the hands of the receiver, and the latter being ordered by the court in the receivership proceedings. The Merchants' company had issued to the Fidelity company a large number of policies, whereby it undertook to reinsure the Fidelity company on a number of risks written by it. The assessments which formed the basis of the claim were on these reinsurance policies. On the trial to the district court, judgment was rendered in favor of the defendant, the Fidelity company, and Howell, as receiver of the Merchants' company, has appealed.

The district court held against the claim of the plaintiff upon the ground that the companies were not authorized to transact a reinsurance business, and that the acts of reinsurance were ultra vires and void, and there could, therefore, be no recovery for assessments on the policies of reinsurance. It is a well-known and recognized principle of law that a corporation possesses only such powers as are granted to it. This is modified to the extent that all powers which are necessary to the enjoyment of the rights and privileges granted are included in the grant of powers. This is upon the theory that it is essential that the corporation shall have the right to carry out and enjoy the rights and privileges conferred upon it, so that any right or power which is essential to the enjoyment of the powers granted is implied. In *Smith v. Steele*, 8 Neb. 115, it is said: "But a corporation is a mere creature of the statute, and, being such, it possesses only those properties and powers which the charter of its creation confers upon it." In *State v. Atchison & N. R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164, 38 N. W. 43, it is held: "The powers of a corporation organ-

ized under legislative statutes are ⁴⁹⁶ such, and such only, as the statute confers. The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others." And in the body of the opinion, at page 162, the following language, taken from *Thomas v. West Jersey R. R. Co.*, 101 U. S. 71, 25 L. ed. 950, is quoted with approval: "Conceding the rule applicable to all statutes that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." In *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155, it is said: "Unlawful acts of a corporation are not limited to those which are mala prohibita and malum in se, but include powers which the corporation is not authorized to exercise, and contracts which they are not empowered to make."

The law under which these companies were organized did not specifically grant the power or right to reinsure, but appellant contends that the right of reinsurance is essential and necessary to the transaction of the business authorized to be carried on, and, therefore, the right to transact a reinsurance business is included in the powers granted. By an examination of the provisions of our statute, it is disclosed that the legislature, in authorizing the organization of stock insurance companies, specifically granted the power to reinsure, while in the several acts authorizing the organization of mutual insurance companies no reference in any of them is made to the right to reinsure. No limitation of the amount of a risk which the stock insurance companies might write is contained in the statute authorizing their organization, while such provision does not exist in the act under which the companies in question were organized. The greatest liability which they may incur upon a single risk is limited to three thousand dollars, while under certain conditions the liability on a single risk is limited to one thousand dollars. This would indicate that no limitation was placed upon the stock companies as to the amount of any risk, because they possessed the power to ⁴⁹⁷ reinsure, and thereby divide the risk that might to them appear excessive with other companies by reinsurance. But the legislature saw fit to determine what seemed to it a just limitation of the risks which a mutual insurance company might write. Section 6544, Annotated Statutes of 1907, provides that any number of persons, not less than one hundred, residing in this state, who own city or village, real or personal property, which they desire to have insured, may as-

sociate themselves together for mutual insurance. This would seem to imply that none but owners of property were entitled to become members of a mutual insurance company, and that no property might be insured except such as was owned by the members. Section 6546 requires that all persons who effect insurance in such companies shall become members thereof. All these provisions of the statute which we have referred to indicate that it was the purpose of the legislature to limit the business to be transacted by these mutual companies to the insurance of tangible property owned by their members.

At this point it seems proper to consider the nature of a contract of reinsurance. In *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, 45 Am. St. Rep. 438, 57 N. W. 314, it is said: "Reinsurance . . . is a contract of indemnity, in which the insurer reinsures risks in another company, and is solely for the benefit of the latter, and not of the policy-holders." In *Hunt v. New Hampshire F. U. Assn.*, 68 N. H. 305, 73 Am. St. Rep. 602, 38 Atl. 145, 38 L. R. A. 514, it is said: "By a contract of reinsurance, in whatever language expressed, the obligation of the reinsurer is to indemnify the insurer against his liability for the loss by fire of the property insured. They stand in a relation to each other much like that of principal and surety. The only material difference is that the reinsurer is not in law directly liable to the insured." In the case of *Goodrich & Hick's Appeal*, 109 Pa. 523, 2 Atl. 209, it is said: "'Reinsurance' is properly applied to an insurance effected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has ⁴⁹⁸ assumed; that is to say, after an insurance has been effected, the insurer may have the subject of insurance reinsured to him by some other." It is apparent, therefore, that the contract of reinsurance is not to insure the owner of the property against its loss by fire or other casualty, but is a contract to indemnify another insurance company or underwriter. Strictly speaking, it is purely a contract of indemnity, not against loss by fire or other hazard provided in the original policy, but against loss by or on account of the outstanding contract of insurance with the owner of the property. A contract of reinsurance is simply to indemnify the original insurer for a loss he may sustain upon his contract of insurance. It is a guaranty to reimburse him for any sum he may be compelled to pay under a contract of insurance with the owner. While it might be convenient, or even an advantage, to a mutual in-

insurance company to possess the right to reinsure its risks that to it might seem excessive, or to reinsure a portion of its risks where it has too great a number in the same locality, and while we do not decide that this cannot be done in a company empowered to assume such risks, yet such right is not necessary to the transaction of the insurance business. It has the right to limit the amount of any one risk, or the number of risks, that may be offered to it, to such an amount, or to such a number, as to it appears safe. But in no event can it go beyond the limitation placed upon it by the statute. For the reasons given, we are of the opinion that chapter 45, Laws of 1897, authorizing the organization of mutual insurance companies, was not intended to, and did not, confer upon them the right to transact a reinsurance business.

Appellant contends that the contracts of reinsurance were executed, and that the appellee is estopped from setting up the defense of ultra vires. In this we do not concur. The contracts were not executed, and this action is for the purpose of enforcing a liability upon the contracts. It follows from what has heretofore been said that it was beyond the powers of these companies to write ⁴⁹⁹ reinsurance, and, where the contracts are beyond the powers of the companies to write, they are not estopped from pleading ultra vires as a defense: 2 Cyc. 1416, 1417. There are several other questions raised by the appeal, but it is unnecessary to discuss them, for the judgment rendered was the only one that could have been properly entered.

It follows that the judgment of the district court should be affirmed.

Duffie and Epperson, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

Contracts of Reinsurance are discussed in the note to *Barnes v. Hekla Fire Ins. Co.*, 45 Am. St. Rep. 412. Reinsurance is a mere contract of indemnity, in which the insurer reinsures risks in another company; the obligation of the reinsurer is to indemnify the insurer against his liability for the loss by fire of the property insured: *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, 45 Am. St. Rep. 438; *Damm v. Damm*, 109 Mich. 619, 63 Am. St. Rep. 601. As defined in the case of *Ruohs v. Traders' Fire Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790, reinsurance is an insurance by the first insurer of the whole or of some part of his interest in the risk created by his contract of insurance; it is a contract that one insurer makes with another to protect the first from the risk he has already assumed.

MOHR v. MOHR.

[81 Neb. 499, 116 N. W. 267.]

DIVORCE—Procedure and Notice of Orders.—In the trial of a divorce case the court should exercise a sound legal discretion in matters of procedure as well as in the consideration of the evidence adduced, and in the exercise of such discretion may require such notice of its orders from time to time as are necessary to a full and open presentation of the case by both parties thereto. (p. 701.)

DIVORCE—Pendency of Two Actions—Conclusiveness of Decree.—Where a husband and wife, living in different states or jurisdictions, have each commenced against the other a suit for divorce, and in the first suit called for trial both parties appear in person and by attorneys, and, upon issues duly joined, litigate their disputes and grievances to a final decree in said suit, and the court enters a decree of absolute divorce, and said decree is not appealed from, the marriage relation theretofore existing between the parties is completely severed, and the unsuccessful party is without standing to proceed in the suit pending in said other state or jurisdiction. (p. 701.)

DIVORCE—Setting Aside Decree for Fraud and Perjury.—And if said unsuccessful party proceeds in such other jurisdiction, and obtains a decree of divorce and judgment for alimony, without notice to the other party, upon perjured evidence and without advising the court of such prior divorce, such action constitutes a fraud upon the court as well as upon the other party to the suit, for which a court of equity should set aside said decree and permit the defendant in such suit to appear and defend the same. (p. 701.)

DIVORCE—Petition for Equitable Relief from Decree.—Petition examined, and held to state a good cause of action for equitable relief. (p. 702.)

(Syllabi by the court.)

George E. McConley and Boyle & Eldred, for the appellant.

J. W. Cole, contra.

500 FAWCETT, C. The defendant, Antonia Mohr, as plaintiff in an action in the district court of Hitchcock county, on an ex parte hearing, obtained a decree of divorce and a judgment for alimony against the plaintiff herein. Plaintiff thereupon brought this suit to set aside said decree on the ground that it had been obtained by fraud and perjury. Briefly stated, his petition alleges that on the ninth day of January, 1905, he commenced an action in the county court of Morgan county, Colorado, against the defendant, to secure a divorce; that defendant was personally served with summons in said action, and filed an answer and cross-petition therein, in and by which she prayed for a divorce from the plaintiff and for alimony; that on the ninth day of April, 1906, a trial was duly had before said court, the same being a court having jurisdiction of such causes, and a jury, and, the

jury having found the issues in favor of the plaintiff, a decree was by said court, on said date, entered in said action dissolving the marriage relation between the plaintiff and the defendant, and denying the defendant any relief for alimony; that on the ninth day of March, 1906, while the said action was pending in the county court of Morgan county, Colorado, the defendant commenced an action against the plaintiff in the district ⁵⁰¹ court for Hitchcock county, Nebraska, for a divorce and for alimony; that the plaintiff, relying upon the decree so rendered by the Colorado court, and believing that the district court for Hitchcock county, Nebraska, could not, and would not, render any decree against him in the action there pending, without proof of the existence of the marriage relation between plaintiff and defendant, and believing and assuming that the defendant would not commit perjury therein nor wrongfully and falsely mislead and deceive the court in the trial of said cause, was not in attendance upon said court at the time of the rendition of the decree complained of, and did not know of the rendition of said decree until after the adjournment of the term at which said decree was rendered. The petition does not set forth what notice the plaintiff had of the pendency of the Hitchcock county suit, but it may be assumed that the service therein, if any, was a substituted service, for the reason that his residence was in the state of Colorado. It is alleged, however, in the petition that the plaintiff filed a special appearance in said action. It is further alleged that on the sixteenth day of April, 1906, the defendant caused plaintiff's special appearance to be overruled and default to be entered in said action against him; that she immediately proceeded to trial ex parte, and obtained the decree of divorce and the judgment for alimony complained of. It is further alleged that the defendant testified on the trial of said cause in Hitchcock county that the relation of husband and wife, at that time, still existed between herself and the plaintiff herein; that said Antonia Mohr well knew said testimony to be false, fraudulent and perjured; and a new trial was prayed for. A general demurrer was sustained to plaintiff's petition, and he not desiring to amend, a judgment was rendered dismissing his action, from which judgment this appeal is prosecuted.

Plaintiff contends that the court erred in sustaining the demurrer to his petition, for the reason that the facts stated therein bring the case within the rule announced ⁵⁰² in *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151. In that case we held: "Where it appears that the

judgment depends for its support upon the (perjured) evidence of the successful party given at the trial, and that the defeated party has a valid defense which he was prevented from establishing by reason of such perjury, and where he has been guilty of no negligence and has exhausted all his ordinary legal remedies for obtaining a vacation of such judgment, then equity, in a proper proceeding, will vacate such judgment and grant the defeated party a new trial of the action." The petition alleges that the district court for Hitchcock county would not have rendered a decree of divorce and a judgment for alimony against the plaintiff if the defendant herein had not committed perjury by testifying that the relation of husband and wife then existed between the parties to said action; that by giving such testimony the defendant perpetrated a fraud upon the court, and by such perjury, fraud and deceit induced the court to render a judgment which it otherwise would not have pronounced. According to the well-established rules of equity, it was not only proper for the district court, but it was its duty, upon being advised by plaintiff's petition of the fraud and deceit that had been practiced by the successful party, to set aside the judgment thus obtained and award the plaintiff a new trial.

It is said by counsel for the defendant that plaintiff was guilty of laches in not pleading the judgment of the Colorado court in bar to defendant's action, and that, because of such neglect, he is not entitled to any relief in the present suit. It seems to us that this contention is not well founded. When the plaintiff was advised of the commencement of the defendant's action in Hitchcock county, he, for some alleged defect in the service, which is not fully disclosed by the record before us, filed a special appearance objecting to the jurisdiction of the court. The defendant, having joined issue with him in his action which was then pending in a court of competent jurisdiction in the state of Colorado, and having proceeded to a trial ⁵⁰³ upon the merits of said action, was bound by the judgment entered therein, and, so far as appears, she led him to believe that she acquiesced in such judgment, for no appeal therefrom was ever prosecuted by her. We think, therefore, that plaintiff had a right to rely upon his belief that the Colorado judgment settled all of the matters in controversy, and that no further proceedings would be taken by defendant in the district court for Hitchcock county. The defendant, however, without giving him any notice of her intention to further press that suit,

hastened to Hitchcock county, and induced the district court to overrule plaintiff's special appearance and objections to its jurisdiction, had his default entered therein, immediately proceeded to trial, and, by the perjury and fraud alleged and set forth in the plaintiff's petition, obtained the decree which is here complained of. It would seem that, having overruled the plaintiff's objections to its jurisdiction, the district court for Hitchcock county should have allowed a reasonable time to answer the petition in that action, and notice should have been given him, so that he might have made his defense thereto. This not having been done, it is apparent that plaintiff never had any reasonable opportunity to plead the decree of the Colorado court as a bar to the defendant's action. In our opinion, therefore, plaintiff has not been guilty of such laches or negligence as renders it necessary to deny him the relief prayed for in this action. Judgments obtained in the manner and by the means resorted to by the defendant in this action should not be allowed to stand; especially so in divorce proceedings, where not only the rights of the parties, but the right of the state, which is committed to the policy of the preservation of the marriage relation and the denial of divorces unless granted upon due notice and substantial grounds, are involved. We think that this case should be ruled by *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151; that the allegations of the plaintiff's petition are sufficient to entitle him to the relief prayed for; and that the demurrer thereto should have been overruled.

504 It is therefore recommended that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony therewith.

Judgments Entered in Divorce Cases are open to attack in the same manner and upon the same ground as are other judgments: *Nichells v. Nichells*, 5 N. D. 125, 57 Am. St. Rep. 540. They may be set aside for fraud of one of the parties: *State v. Watson*, 20 R. I. 354, 78 Am. St. Rep. 871; *Colby v. Colby*, 59 Minn. 432, 50 Am. St. Rep. 420; *Brown v. Grove*, 116 Ind. 84, 9 Am. St. Rep. 823.

Relief from Judgments because obtained by perjury is the subject of a note to *Pico v. Cohn*, 25 Am. St. Rep. 165; relief in equity from judgments is the subject of a note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218; and vacation of judgments after the time specified in the statute for granting relief is the subject of a note to *Nicklin v. Robertson*, 52 Am. St. Rep. 795.

BARBER v. STROMBERG-CARLSON TELEPHONE
MANUFACTURING COMPANY.

[81 Neb. 517, 116 N. W. 157.]

CONTRACT—Alterations, Presumption as to When Made.—Where a contract prepared by the use of a typewriter appears to have been changed after the first impression is made, the presumption is that such change was made before execution and delivery. (pp. 705, 706.)

CORPORATION—Authority of Manager to Contract.—The manager of sales of a manufacturing corporation has power to direct and contract in regard to the usual running business of selling its wares, and persons contracting with such corporation are not bound to know of a by-law thereof limiting the power of such manager to make the customary contracts. (p. 706.)

CORPORATION—Contract not Signed by Requisite Officer.—The rule that where the charter provides that a corporate contract shall be signed by certain persons, instruments not so signed are unenforceable, is so harsh and inconvenient that it has been widely departed from and practically abandoned. (By the editor.) (p. 706.)

CORPORATION—By-law Limiting Power of Agent.—Persons contracting with a corporation are not bound to know of a by-law limiting the powers of the agent to make the customary contracts appertaining to the business he is authorized to transact. (By the editor.) (p. 706.)

CORPORATION—Agent Exceeding Authority.—Where a Corporation Ratifies or knowingly accepts the benefits of a contract made by one of its agents, it cannot repudiate the same on the ground that the agent had no actual authority to execute such contract. (p. 707.)

(Syllabi by the court.)

Dorsey & McGrew, for the appellant.

Flansburg & Williams, contra.

517 CALKINS, C. The plaintiff brought action in the court below, alleging default in the performance of a contract in the words and figures following:

“Memorandum of agreement made this 17th day of August, A. D. 1903, by and between Mr. F. W. Barber, of Franklin, Neb., party of the first part, and Stromberg-Carlson Telephone Manufacturing Company, party of the second part, witnesseth: The party of the first part shall use his best efforts and in fact secure for the party of the second part the contract for the central office apparatus and telephones for the Home Telephone Co., of Grand Island, Neb., said telephone exchange to be built by Mr. J. F. Butterfield of the city of Chicago; **518** the price of said apparatus to be not less than \$8,474.10, or the same as those specified under specifications submitted to Mr. J. F. Butterfield, of the city of Chicago, under date of August 10, '03. For and in con-

sideration of the services rendered, the party of the second part hereby agrees to pay the party of the first part the sum of \$625, less advances made by the party of the second part of \$125, which said party of the first part agrees to pay to the party of the second part when the contract shall have been settled. It is understood and agreed by and between the parties hereto that this consideration shall be paid when the apparatus shall have been paid for either by the purchasing company or the contractor. It is further agreed by the parties hereto that said party of the second part has advanced the sum of \$436 as expenses for the securing of the franchise in the city of Holdrege, Neb., and that, whereas the party of the first part is part owner of the franchise in the city of Holdrege for the construction and operation of a telephone exchange, and whereas said party of the first part is in negotiation with one J. F. Butterfield to dispose of said plant, it is hereby mutually agreed that, when said Butterfield shall have paid either to said party of the second part or the party of the first part the sum of \$636, the valuation as placed upon the expenses as estimated as incurred in the securing of said franchise in the city of Holdrege, Neb., then said party of the second part shall pay to said party of the first part \$200 of said expenses. It is further agreed verbally under this date that all agreements for commissions on Orleans, Alma, Bloomington and Riverton still remaining unpaid under the agreement of Nov. 10, '02, shall be computed up to August 15, and no further commissions shall be paid for extensions or additions to the above properties, and shall terminate the arrangement as of Nov. 10, '02. It is understood and agreed that the Reamsville matter shall also be covered by the agreement of Nov. 10, and shall terminate on the completion of the original contract. It is agreed that on future business ⁵¹⁹ a separate agreement shall be made covering each individual case. In witness whereof the parties hereto have caused their seals and signatures to be attached this 17th day of August, A. D. 1903.

“(Seal)

F. W. BARBER.

“(Seal)

STROMBERG-CARLSON TEL. MFG. CO.,

“By G. W. STIGER.”

The answer was a general denial, and upon the trial to the court there was a general finding and judgment for the plaintiff, from which the defendant appeals.

1. At the trial the defendant produced a paper, which appeared to be a carbon impression of the draft for the contract in question. It bore the signatures of both the plaintiff and

Mr. Stiger. If the carbon impression produced by defendant was in fact made, as it appears to have been, by the same impression of the types as the ribbon copy produced by plaintiff, then the latter had been, after the duplicate impression had been made by the typewriter, altered by striking out the words, "G. W. Stiger of the," in the caption of the contract, and by inserting with the typewriter over the signature of Mr. Stiger the words "Stromberg-Carlson Telephone Mfg. Co., by." The originals of these papers are attached to the record, from which it appears that, while both bear the genuine signatures of the plaintiff and Mr. Stiger, such signatures are not duplicates. The names of both the plaintiff and Mr. Stiger appear to be signed to the ribbon impression with a fine-pointed pen and with what presents the appearance of a grayish black ink, while the plaintiff's signature upon the carbon impression seems to have been made with a much coarser pen and blacker ink, and Mr. Stiger's signature to the latter was with a blue pencil. The plaintiff was called as a witness, and testifies that the ribbon copy is in the same condition as it was when delivered to him, but does not explain how the difference in the two copies occurred, nor the circumstances under which he signed the carbon impression. Stiger was not called as a witness, and the proof of the circumstances attending the signing of these papers rests, so far as oral testimony is concerned, upon the testimony ⁵²⁰ of the plaintiff. Upon these facts the defendant insists that the plaintiff and Stiger made the contract in question as individuals, and that the latter did not assume to act for the telephone company or on its behalf. The defendant's theory is that the physical evidence of the papers produced is sufficient to show that the difference between the ribbon and the carbon copy is owing to alterations made after its execution and delivery. Conceding that this would be the case if the signatures were in duplicate, or even if they appeared to have been attached at one and the same time, we think the difference in the signatures actually shown destroys any presumption that might otherwise exist that they were executed at one and the same time, and consequently any presumption that the ribbon copy was altered after it was executed. The physical evidence of the papers does show that the ribbon copy was changed after the duplicate impression was made by the typewriter; but it does not show, nor tend to show, that such changes were made after the signatures were attached and the papers delivered. The presumption

of the law is that the changes were made before the execution and delivery of the papers: *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 645. While the evidence of the plaintiff tends to support this presumption, there is no evidence whatever to overcome it.

2. The defendant further insists that, if Mr. Stiger did in fact assume to act for and make the contract in question in the name of the defendant, it was beyond the actual and apparent scope of his authority. Mr. Stiger was the defendant's manager of sales. We are not cited to any judicial definition of the authority of a manager of sales of a manufacturing corporation; but since at common law the general manager of a corporation has power to direct and contract in regard to the usual running business of the corporation (2 Cook on Corporations, 5th ed., sec. 719), it would be fair to say that a manager of sales would have power to direct and contract in regard to the usual running business of selling its wares. In this ⁵²¹ case the vital question is: Did the manager of sales have real or apparent authority to agree to pay commissions on orders for goods? To show his want of actual authority the defendant corporation introduced in evidence its by-laws, which provided that the president should execute all contracts, when authorized so to do by its board of directors, and that the treasurer should appoint and discharge all agents and employes, subject to the approval of the board of directors, and have the general management of its affairs. The rule that, where the charter provides that a corporate contract shall be signed by certain officers, instruments not so signed are unenforceable, is so harsh and inconvenient that it has been widely departed from and practically abandoned: 2 Cook on Corporations, 5th ed., sec. 725. Persons contracting with corporations are not bound to know of a by-law limiting the power of the agent to make the customary contracts appertaining to the business he is authorized to contract: 2 Cook on Corporations, 5th ed., sec. 725. The treasurer of the defendant was called, and testified concerning the contract in question: "I state that G. W. Stiger was not authorized to sign or execute any such contract." It is to be observed he did not deny that Stiger had authority to make the kind of agreement embodied in the contract, or, what would have been still more to the point, that Stiger had no authority to agree to pay commissions on orders for goods. The denial of Stiger's authority is directed to his competency to sign and execute this written contract, and may be simply the witness' construction of the law under

the by-laws referred to. We think this testimony is not a denial of Mr. Stiger's authority to agree to pay to the plaintiff a commission in case he made the sale referred to in the contract. It further appears that Stiger had on several occasions made similar agreements to pay commissions on sales made by the plaintiff of the defendant's goods, and that defendant had from time to time paid such commissions.

3. There is evidence in the record sufficient to sustain ⁵²² a finding that the defendant knew of the contract in the form that it appears upon the carbon impression in November, 1903, and before the closing of the Grand Island sale. The plaintiff introduced a voucher for two hundred dollars "as portion of expenses incurred at Holdrege as per portion of agreement attached," and to this voucher is attached a typewritten copy of that part of the contract in question relating to expenses for securing the franchise in the city of Holdrege. The plaintiff testifies that he received these papers from the defendant's Rochester office, accompanied by a draft for two hundred dollars to his order, which draft was paid. If this is correct, then these papers must have passed through the defendant's auditing department, and it is hardly to be supposed that the voucher depending upon the contract, an extract from which was attached, would have been approved without any knowledge of the contract from which the extract purported to be taken. If the defendant ratified or knowingly accepted the benefits of the contract, it cannot now repudiate the same: *Brong v. Spence*, 56 Neb. 638, 77 N. W. 54; *United States School Furniture Co. v. School District*, 56 Neb. 645, 77 N. W. 62.

In any view of the case, we think the decision of the trial court was fully supported by the evidence, and therefore recommend that its judgment be affirmed.

Fawcett and Root, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Alteration of Written Instruments is the subject of a note to *Burgess v. Blake*, 86 Am. St. Rep. 80.

The Authority of Such Officers of a Corporation as its secretary, manager or president to bind it by his contracts is discussed in the recent cases of *Cushman v. Cloverland Coal etc. Co.*, 170 Ind. 402, 127 Am. St. Rep. 391; *Swedish-American Nat. Bank v. Koebernick*, 136 Wis. 473, 128 Am. St. Rep. 1090; *Lloyd v. Matthews*, 223 Ill. 477, 114 Am. St. Rep. 346, and authorities cited in the cross-reference note thereto.

KIRKPATRICK v. KIRKPATRICK.

[81 Neb. 627, 116 N. W. 499.]

DIVORCE—Requisites of Desertion or Abandonment.—The fourth subdivision of section 5328, Annotated Statutes of 1907, construed, and held to mean that not only must the act of desertion or abandonment be willful, but it must be willfully continued for a period of two years. (p. 710.)

DIVORCE—Abandonment or Desertion by Insane Spouse.—Where the wife abandons the husband without just cause, and thereafter becomes insane, a cause of action for divorce does not accrue to the husband until the lapse of two years, exclusive of the time that she is insane. (p. 711.)

(Syllabi by the court.)

R. A. Beatty, for the appellant.

F. P. Olmstead, contra.

627 GOOD, C. The parties to this action were united in marriage in 1901, and lived together as husband and wife until December, 1903, when, so far as the record discloses, without any cause, the wife took her clothing and left the home of her husband and went to the home of her sister. In less than a year she was adjudged insane and committed to the hospital for the insane at Lincoln, Nebraska, where she has since remained, except that she was released on parole for a period of two months in the summer of 1905. In September, 1906, Robert Kirkpatrick, the husband, brought this action for a divorce upon the ground of willful abandonment for two years. A guardian ad litem was appointed, and answered for the defendant. The answer was a general denial, coupled with an averment of the facts as to her insanity and commitment to the asylum. Upon a trial of the issues thus joined, the district court found in favor of the defendant, and denied plaintiff a divorce. 628 upon the sole ground that the defendant had not been of sound mind for two years since she had abandoned the plaintiff, and held that the abandonment must be continued willfully for two years. To review this judgment the plaintiff has appealed to this court.

The appeal presents but a single question for determination: Can abandonment be a ground for a divorce when the offending party has been sane for less than two years after the abandonment? The determination of this question rests upon the construction to be given to the fourth subdivision of section 5328, Annotated Statutes of 1907. This section states the grounds for which a divorce from the bonds of matrimony may be granted. The ground stated in the fourth subdivision

is: "When either party shall willfully abandon the other without just cause for a period of two years." Appellant contends that the fact that while of sound mind the appellee abandoned her home and husband with the intention of not returning and that she had not returned to him for more than two years are sufficient to entitle him to a divorce, and that it is immaterial that she was of unsound mind during a portion of the two years. Upon the other hand, it is contended by the guardian ad litem of the appellee that not only must the act of abandonment be willful, but the continuation of it for two years must be willful; that appellee, having become insane within less than a year, was incapable of being willfully absent or of willfully continuing the abandonment of her husband; and that therefore no right of action for divorce accrued to the appellant. The precise question does not appear to have been frequently before the courts, and but few precedents can be found. The supreme court of Iowa, in *Douglass v. Douglass*, 31 Iowa, 421, construed a statute somewhat similar to ours, and held that it was immaterial that the offending party became insane after the abandonment and before the expiration of the period requisite to constitute a ground for divorce. The Iowa statute reads as follows: "When he willfully deserts his wife and absents himself without a reasonable cause for the space of ⁶²⁹ two years." The court in construing this statute held that the statute means that, if the husband willfully deserts his wife when she by her conduct has not given him a reasonable cause, and if he afterward remains away for the requisite period without her giving him any reasonable cause, she is entitled to a divorce. It is held that the reasonable cause which would justify the desertion or absence could only be established by proof of wrongful conduct on the part of the wife, and that no other cause for the absence than that arising from the misconduct of the wife could be shown to defeat her right of action, and that the absence of the husband could only be excused by the fault or misconduct of the wife, and could not be excused by the misfortune of the husband. In a more recent case the supreme court of New Hampshire held that, to entitle the husband to a divorce against his wife on the ground of abandonment while she was sane, such abandonment must be continued for the full statutory period prior to her insanity: *Storrs v. Storrs*, 68 N. H. 118, 34 Atl. 672. It was there held that the time during which the defendant was insane could not be included in computing the statutory period. It is a universal rule that, where one spouse abandons or deserts the other and

returns to the unoffending party before the expiration of the statutory period, a ground of divorce does not arise or accrue. Our statute has fixed the period of two years, and the offending party could return at any time prior to the expiration of two years and thus prevent a cause of action accruing to the other party. Separation, no matter how long continued, unless there was an intent not to return, or, in other words, an intent to abandon, would not constitute a ground for divorce. On the other hand, no matter how willful the desertion may be, nor how destitute of reasonable cause, there is no ground for divorce, unless it is continued for a period of two years. As is aptly stated in *Albee v. Albee*, 141 Ill. 550, 31 N. E. 153: "At any time during that period the offending party has an undoubted right to put an end to it, and if that is done no cause for divorce has ⁶³⁰ arisen. If at any time during the two years the party guilty of the desertion, in good faith and with an honest intention to resume the marital relations, returns or offers to return to the deserted husband or wife, the continuity of the desertion is broken. Nor can the deserted party prevent this by refusing to receive back and to resume marital relations with the one guilty of desertion. He or she cannot, because the other has taken a position, however willful or causeless it may have been, hold him or her to it. For the two years the door of repentance and return must be kept open, and, if it is closed and barred when an offer to return is made in good faith, not only is the desertion terminated, but the circumstances may be such as to reverse the legal attitude of the parties, and constitute the party originally offended against, from that time forth, the offender."

We are of the opinion that the statute means and contemplates that the abandonment should be willfully continued by the offending party for the full period of two years. If this were not true, we can see no reason why any definite time should be fixed in the statute for the abandonment to exist. The statute does not contemplate that the act of abandonment alone shall be sufficient ground for divorce. It must be continued for a period of two years. The cause of action does not accrue until that time. If the one of sound mind is entitled to have the door of repentance held open to him for two years, we think that the same opportunity should be afforded to one who is mentally incompetent; and it cannot be said that she is afforded such opportunity so long as her intellect is so clouded that she is incapable of forming the intent to return. A spouse who is insane cannot, under our statute, be guilty of

conduct that will constitute a cause for divorce in favor of the other, for the reason that she is incapable of intentionally doing or committing an act that will constitute a ground for divorce. The ground for divorce did not exist in favor of the appellant in this case at the time that appellee became insane. The cause of ⁶³¹ action had not yet accrued to him. We are of the opinion that it could not accrue to him during her period of insanity. It follows that no part of the time during her insanity could be reckoned as a part of the two years' abandonment necessary to constitute a cause or ground for divorce.

The judgment of the district court is right, and should be affirmed.

Duffie and Epperson, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

Desertion as a Ground for Divorce is the subject of a note to Pfannebecker v. Pfannebecker, 119 Am. St. Rep. 617.

Divorces Against Insane Persons is discussed in the note to Kimball v. Kimball, 82 Am. Dec. 200. According to Harrigan v. Harrigan, 135 Cal. 397, 87 Am. St. Rep. 188, a divorce may be granted against an insane defendant whose insanity did not exist at the time when the right to a divorce accrued.

KNUTSON v. ROSENBERGER.

[81 Neb. 761, 116 N. W. 687.]

EXECUTION — Sale of Several Mortgaged Articles.—Where several articles of personal property subject to the same mortgage are seized upon execution, in the absence of any direction or request on the part of the mortgagor, it is the duty of the officer to sell the property included in the mortgage en masse, and subject to the mortgage. (p. 713.)

EXECUTION — Sale of Several Mortgaged Articles.—Where several articles of personal property subject to the same mortgage are seized upon execution against the mortgagor, who, after being informed that the articles cannot be sold separately without taking care of the mortgage, persists in the request that such articles be sold separately, such action on the part of the mortgagor is sufficient to support a finding that he consented to the sale of the goods free from the mortgage, and to the payment of the same from the proceeds. (p. 713.)

(Syllabi by the court.)

Millard & Snider and Wilbur F. Bryant, for the appellant.

J. C. Robinson, contra.

⁷⁶² CALKINS, C. On or about the nineteenth day of January, 1906, the plaintiff was the owner of a team of horses.

a wagon, harness, corn-sheller, and horse-power, subject to a chattel mortgage, upon which he was owing about the sum of two hundred and fifty dollars. He was also the owner of a cow, calf, and a single-seated buggy, which were unencumbered. Before that time one George Carmack had recovered a judgment against the plaintiff in the county court of Cedar county, for the sum of one hundred and thirty-five dollars and ninety cents and costs, upon which judgment an execution was issued, directed to the defendant, who was sheriff of Cedar county. Under this execution the defendant seized all of the above-described property, and advertised the same for sale. In his notices of sale the defendant stated that the property mentioned in said mortgage would be sold subject thereto. Before the beginning of the sale, the plaintiff requested that the different articles mentioned be sold separately. To this the defendant consented, telling the plaintiff that in such case the mortgage would have to be taken care of. The property was sold apparently for its full value, the defendant informing bidders that the mortgage would be "taken care of." Before the sale, the plaintiff in execution, Carmack, had taken up the mortgage and owned it. Out of the proceeds of the sale the defendant, after paying the costs, paid the amount due on the mortgage, and applied the remainder, some seventeen dollars, on the judgment. The plaintiff brought this action against the defendant, upon the theory that he had no right to pay the mortgage debt out of the proceeds, and that the execution debtor was entitled to the surplus for the payment of the amount of ⁷⁶³ the judgment and costs. There was a trial to a jury and a verdict for the defendant, and from a judgment rendered upon such verdict the plaintiff appeals.

1. Where several articles of personal property subject to the same mortgage are seized upon execution against the mortgagor, the equity of redemption, being indivisible, cannot be subdivided by separate sales of the various articles: Freeman on Executions, sec. 296. In the absence of any direction or request on the part of the plaintiff, it was the duty of the defendant to sell the property included in the mortgage en masse, and subject to the mortgage. This course was intended to be pursued by him, and his advertisement gave notice that the sale would be made in this manner. He, however, contends that he proceeded to sell the articles separately at the request of the plaintiff, with the understanding that the mortgage should be discharged out of the proceeds of the sale. While the technical assignment of errors by the plaintiff is directed to the giving of instructions by the court, the real

objection is that there was no evidence to support the same; and the only question presented by this appeal is whether the evidence was sufficient to support a finding that such a request was made, and such an understanding had.

2. A party cannot be heard to complain of an error which he himself has been instrumental in bringing about: *Missouri P. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744. And since it is impossible to sell separately different articles included in the same mortgage, subject to the lien of such mortgage, the request of the execution debtor that the articles be sold separately may well be regarded as tantamount to an agreement on his part that they shall be sold free from the lien of the mortgage, and that such lien may be discharged out of the proceeds of the sale. It is not necessary, however, to go so far as this to uphold the verdict in this case. The defendant, after testifying that the plaintiff requested him to have this property sold separately, says: "I told him if we sold it separately we would have to take care of the mortgage. 'Well,' he says, 'I want to ⁷⁶⁴ see it sold separately.' " We think this evidence sufficient to support a finding that the plaintiff, in consideration of the advantages to be obtained by selling the articles separately and free from the mortgage lien, consented that the mortgage might be discharged out of the proceeds of the sale. The plaintiff suffered no actual injury by the conducting of the sale in this manner. The mortgage is admitted to have been a valid and subsisting lien; and it appears that the property was sold for its full value, by means of the defendant's announcement that the mortgage would be taken care of.

The plaintiff's request to sell the articles separately was made on the ground that they would realize a better price if disposed of in that manner. That advantage he has secured, with no corresponding disadvantage to himself.

We therefore recommend that the judgment be affirmed.

Fawcett and Root, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Proper Practice in Execution Sales of Chattels Subject to a Mortgage is discussed in *Tollerton & Stetson Co. v. Skelton*, 118 Iowa, 543, 96 Am. St. Rep. 409; *Collins v. State*, 3 Ind. App. 542, 50 Am. St. Rep. 298; *Francis v. Sheats*, 153 Ala. 468, 127 Am. St. Rep. 61. As to how far the mortgagor's interest in mortgaged personal property is subject to execution, see *Newman v. Mantle*, 109 Ky. 292, 95 Am. St. Rep. 372; *Second Nat. Bank v. Gilbert*, 174 Ill. 485, 66 Am. St. Rep. 306; *Leadbetter v. Leadbetter*, 125 N. Y. 290, 21 Am. St. Rep. 738; *Manchester v. Tibbetts*, 121 N. Y. 219, 18 Am. St. Rep. 816.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

FARROW v. FARROW.

[72 N. J. Eq. 421, 65 Atl. 1009.]

HUSBAND AND WIFE—Proof of Gift Between.—A gift of personal property from husband to wife must be clearly proved. There must be clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it, and of vesting title in the wife. (p. 716.)

HUSBAND AND WIFE—His Ownership of Her Apparel and Ornaments.—The common-law rule that "suitable ornaments and wearing apparel of a married woman, which come to her through her husband during coverture, remain his personal property during his life, and he may sell and dispose of them during his life," has not been abrogated by our married woman's act (Gen. Stats., p. 2012), or by any other statutory provision. (p. 717.)

(Syllabi by the court.)

Howard Carrow, for the appellant.

James M. E. Hildreth and Charles H. Edmunds, for the respondent.

⁴²¹ TRENCHARD, J. This is an appeal from a decree of the court of chancery. The bill was filed by Ethel Farrow, the respondent, against her husband, William Farrow, Jr., the appellant, who was living apart from her, for the recovery of the possession or the value of one solitaire diamond ring, one turquoise ring with sixteen small diamonds around it, and one pair of diamond ear-rings, that were in the possession of the wife at the time her husband separated from her, and which were then taken by him ⁴²² forcibly, and since have been converted to his own use. In the bill the complainant averred that these jewels had been given to her by her husband, the defendant, and that he had allowed her to apply them to her separate use.

The prayer of the bill is that the defendant "may be ordered and decreed to deliver to your oratrix forthwith said personal property, or, in case he has sold or parted with the same, he may be ordered and decreed to pay to your oratrix such sum or sums as shall be a fair value of the same."

The answer of the defendant denies that the complainant was or is the owner of the said jewels; denies that he gave them to her, and that he allowed her to apply them to her separate use. It avers that the defendant "bought and purchased the jewelry mentioned in the bill of complaint for the personal adornment of his wife, the complainant, but that he never gave said jewelry, or any part thereof, to his wife, and never parted with his title or possession to said jewelry, and that they are his property and in his possession."

At the hearing it appeared that the defendant had parted with the jewelry, and the court of chancery decreed "that the defendant do pay unto the complainant, by way of compensation for said solitaire diamond ring, turquoise ring with sixteen small diamonds around it, and pair of diamond ear-rings, the sum of six hundred and seventy dollars."

On this appeal we are not concerned with that part of the decree which awards compensation for the solitaire diamond ring, because it appeared at the hearing that it was given by the husband to the wife before their marriage as an engagement ring; the gift was absolute, and the property remains hers notwithstanding the subsequent marriage. This is admitted to be the legal situation by the defendant. To the extent that the decree directed payment for the value of the solitaire diamond ring, which was shown to be one hundred and thirty dollars, it was admittedly proper.

The controversy on this appeal is concerning the propriety of the decree so far as it relates to the turquoise ring and the diamond ear-rings, together valued at five hundred and forty dollars.

⁴²³ The complainant, the wife, claims that this jewelry was given to her by her husband during coverture; that it was bought on the installment plan and that a considerable amount of the purchase money still remained unpaid at the time when the husband took possession of it. This is stated to be the fact by the wife, who says the unpaid amount was somewhere about three hundred dollars. She then goes on to say: "We paid so much a month; we undertook to pay forty dollars per month; we didn't always pay that much; we paid what we thought we could; we thought it was money

saved to buy the diamonds; that was the agreement between Will and me; that was the reason we bought them."

In the same connection she says: "I don't remember any such conversation before Mr. Eldridge. No; we talked about these affairs between ourselves.

"Q. Between yourselves? A. Not before Mr. Eldridge.

"Q. Then after you were by yourselves? A. Yes, sir; at times we talked over buying diamonds to save money; we did; yes."

The testimony shows beyond question that the jewelry was purchased with the husband's money. It therefore was his property, unless it was bestowed by him upon his wife as a gift.

A gift of personal property from husband to wife must be clearly proved. There must be clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it and of vesting title in the wife: *Skillman v. Skillman*, 13 N. J. Eq. 403; *Dilts v. Stevenson*, 17 N. J. Eq. 407. See, also, 14 Am. & Eng. Ency. of Law, 2d ed., 1033, and cases there cited.

Applying these principles to the case under consideration, we find nothing to justify the claim of the wife that the jewelry was bestowed upon her by her husband as a gift. The evidence shows that it was purchased by the husband, not as a gift to his wife, but as an investment for their joint benefit, and also for the purpose of ornamenting the wife on suitable occasions; in other words, either it remained the absolute property of the husband, ⁴²⁴ or, at most, it became the wife's paraphernalia. In either event the husband was entitled to take possession of it and deal with it as he saw fit. Of course, this is true if it became his absolute property, and there remains only to be considered the legal situation if it became the wife's paraphernalia.

At common law the husband is bound to maintain the wife, and to provide her with suitable clothing appropriate to their degree and his own circumstances and social position. That common-law obligation still rests upon the husband. As corollary to this obligation, the common law recognizes that articles of clothing and personal ornaments appropriate for the wife, which are purchased with the husband's money, or upon his credit, are his property, notwithstanding the fact that they are selected and purchased by the wife, or are intended for her personal and exclusive use. The wife's

clothing and ornaments are called her paraphernalia, and the common-law rule that the ownership thereof during the life of the husband was in him remains in force in all jurisdictions where that rule has not been abrogated by statute. It has not been abrogated in this state by the married woman's act (Gen. Stats., p. 2012), or by any other statutory provision. Except in cases where the wife herself purchases the paraphernalia with her own separate money or earnings, the rule remains exactly as it stood at common law. In Massachusetts it has been judicially declared that the common-law rule still prevails because of the absence of statutory provision changing it: *Hawkins v. Providence etc. R. R. Co.*, 119 Mass. 596, 20 Am. Rep. 353. So, too, in Michigan the same rule prevails and for the same reason: *Smith v. Abair*, 87 Mich. 62, 49 N. W. 109.

If, therefore, the jewelry became the paraphernalia of the wife, then the common-law doctrine of paraphernalia applies, and that is this: That "suitable ornaments and wearing apparel of a married woman, which come to her through her husband during coverture, remain his personal property during his life, and he may sell and dispose of them during his life": *Schouler on Domestic Relations*, 5th ed., 208.

So much of the decree as adjudges that the defendant make compensation unto the complainant for the turquoise ring with ⁴²⁵ sixteen small diamonds around it and for the pair of diamond ear-rings should be reversed. As the complainant was admittedly entitled to a decree for the value of the solitaire diamond ring, which was one hundred and thirty dollars, she is entitled to the costs in the court below.

To Constitute a Gift Inter Vivos two essential elements must combine: An intention to make the gift then and there, and such an actual or constructive delivery at the same time to the donee as divests the donor of all dominion over the subject and invests the donee therewith: *Reese v. Philadelphia etc. Ins. Co.*, 218 Pa. 150, 120 Am. St. Rep. 880; *Stevenson v. Earl*, 65 N. J. Eq. 721, 103 Am. St. Rep. 790; *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777. In some jurisdictions a married woman cannot acquire property by a direct gift from her husband, but a valid and irrevocable gift may be made from the husband to the wife through a third party: *Brown v. Brown*, 174 Mass. 197, 75 Am. St. Rep. 292. According to *Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242, verbal sales and gifts between husband and wife ought not to be admitted unless on clear and satisfactory proof that the property was divested out of the vendor and vested in the vendee or donee. The burden is upon the husband to show that a gratuitous transfer to him from his wife was made freely, and that the transaction was fair and proper: *Hovorka v. Havlik*, 68 Neb. 14, 110 Am. St. Rep. 387.

At Common Law Marriage Operated as an Absolute Gift to the Husband of the personal property of which the wife was possessed, and of

her choses in action reduced to possession during coverture: *Locke v. McPherson*, 163 Mo. 493, 85 Am. St. Rep. 546; *Birmingham Water-works Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43; *Trapnell v. Conklyn*, 37 W. Va. 242, 38 Am. St. Rep. 30; *Botts v. Gooch*, 97 Mo. 88, 10 Am. St. Rep. 286.

HEROLD v. COLUMBIA INVESTMENT AND REAL ESTATE COMPANY.

[72 N. J. Eq. 857, 67 Atl. 607.]

VENDOR'S IMPLIED COVENANT as to Subdivision of Tract. One who plats his land into streets and lots as shown by a map, and sells some of the lots in accordance therewith, does not impliedly covenant not to change the size of the remaining lots nor to refrain from devoting any part thereof to such public uses as streets or parks. (p. 720.)

VENDOR'S IMPLIED COVENANT as to Location of Streets According to Map.—One who plats his land into lots and streets as shown by a map, and sells lots in accordance therewith, impliedly covenants with his grantees that he will not change the location or width of the streets; and if he attempts to do so, they may have him enjoined. (p. 721.)

Weller & Lichtenstein, for the appellant.

Carrick & Wortendyke, for the respondents.

858 GUMMERE, C. J. The case made by the pleadings and supported by the proofs is as follows:

The defendant, the Ridgeford Land Company, was, in the year 1898, the owner of a tract of land in the county of Bergen, which it had laid out into certain lots and streets delineated upon a map of the property, which was prepared under its direction and filed by it in the office of the clerk of the county. On the 2d of December of that year it sold to Herold, the complainant, two of the lots shown on its map, namely, lots 10 and 12 in block G. Lot 10 fronts on a street designated upon the map as Summit avenue. Lot 12 adjoins lot 10 and is located upon the corner of Summit avenue and a street designated on the map as Prospect avenue. This latter avenue is laid out on a curve, one portion of it running at right angles to Summit avenue and another part of it running parallel to that avenue, and forms the boundary for the northerly and the easterly sides of block G.

In the year 1905 the complainant began the erection of a dwelling-house upon his two lots, the contract price for which was about fifteen thousand dollars.

In the meantime the Ridgefield Land Company, after selling a large part of its lots, either singly or in parcels, had disposed

of the remainder of its holdings in bulk to one Flood, who in turn conveyed the same, on the 8th of April, 1904, to a corporation known as the Industrial Savings and Loan Company.

⁸⁵⁹ On the 26th of September, 1904, this company filed in the office of the clerk of Bergen county another map of the whole tract, upon which many of the lots delineated upon the original map under which the complainant purchased his property are divided into smaller parcels. In addition, an alteration is made in the location and character of certain of the streets shown on the original map, and particularly of Prospect avenue, which is altered by extending the portion which forms the northerly boundary of block G in a straight line to a public highway known as Palisade avenue, and the easterly boundary of the original tract; and, further, by narrowing from fifty to forty feet that portion of the avenue which bounds block G on the east and by renaming it Rothwell avenue.

Subsequent to the filing of this second map the legal title was passed out of the Industrial Savings and Loan Company, but the beneficial interest in the property still remains in it, the legal title being held by a trustee for its benefit. The defendant, the Columbia Investment and Real Estate Company, as the agent of the Industrial Savings and Loan Company in charge of the tract, is engaged in selling lots as delineated on the second map, and in altering Prospect avenue so as to conform to the lines and locations shown on that map.

The complainant insists that these changes from the plan exhibited by the original map, if carried into effect, will materially interfere with his enjoyment of his building; the reduction in size of the lots, by causing the erection thereon of buildings of small size and little value, and the alteration of Prospect avenue by changing it into a thoroughfare, the user of which will entirely destroy the quiet of his residence. He further insists that the changes referred to will also largely depreciate the value of his property. For these reasons he seeks, by his bill, to restrain the defendants from altering the location or width of Prospect avenue, or of any of the other streets or avenues delineated on the original map, and from selling any of the land contained in the tract, except by the lots as shown upon that map.

The complainant also seeks to restrain the defendants from violating a so-called "Neighborhood scheme," which he alleges was put in force by the Ridgefield Land Company, and became
⁸⁶⁰ operative throughout the whole tract delineated upon its map, and by the provisions of which but one building was permitted to be erected upon a single lot, and was required to be

located a given distance from the front, rear and side lines thereof.

At the hearing of the case in the court of chancery the bill of complaint was dismissed upon the ground that the complainant's remedy, if he had one, was legal and not equitable. From the decree of dismissal this appeal is taken.

The proofs in the case fail to show the existence of any such neighborhood scheme as is alleged in the bill. It is, therefore, unnecessary for us to consider the question whether the purchaser of a number of lots, all of which have had impressed upon them a general scheme, restricting the number and location of buildings to be erected thereon, has a remedy in equity against the vendor to restrain him from selling other of his lots free from such restrictions. The failure to show the existence of such scheme is also fatal to the claim of the complainant that he is entitled to restrain the Ridgfield Land Company and its successors in title from selling its lands except in parcels delineated upon the original map. No such covenant is implied by the making of such a map and the sale of certain lots shown thereon, and the right of the owner to dispose of the unsold portion of his lots, singly or in bulk, or by subdividing them into smaller parcels and selling them in such parcels is complete. Not only may he sell the lands in such parcels as he may see fit, but he is under no obligation to his vendees to retain the unsold portion in private ownership. He may, if he sees fit, devote any part of it to public uses, either as streets, parks, or in other modes of a general nature calculated to give additional value to the rest of the tract. The refusal of the court of chancery to issue its injunction, either to compel the carrying into effect of the alleged neighborhood scheme, or to restrain the sale of the lands embraced in the original map in lots smaller in area than those shown thereon, was therefore justified.

But the attempt of the defendants to alter the location and narrow the width of certain of the streets delineated on the original map is clearly an infringement of the rights of the complainant, and for the protection of such rights he is entitled to the ⁸⁶¹ aid of a court of equity. In the case of *Lennig v. Ocean City Assn.*, 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491, this court held that whenever the owner of a tract of land lays it out into blocks and lots upon a map, and on that map designates certain portions of the land to be used as streets, and then conveys those lots by reference to the map, he becomes bound to the grantees not to use the portion so devoted to the common advantage otherwise than in

the manner indicated; that the grantees are regarded as purchasers, by implied covenant, of the right to use the streets as a means of passage to and from their premises, as appurtenant to the premises granted; that this private right is wholly distinct from, and independent of, the right to be acquired by the public, and declared that "the object of the principle is not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated." We further held that the threatened violation by the grantor or his assigns of this implied covenant in the deed entitled the grantee to relief in equity by way of injunction.

This decision is controlling both upon the question of the property right of the complainant and of his right to equitable relief. It is true that in the cited case it was shown that the threatened invasion of the complainant's right, if carried out, would greatly depreciate the value of the property purchased by him, and that in the present case the complainant has not made it clear that a like result will follow from the threatened change in the location and width of the streets shown on the original map filed by the Ridgefield Land Company. But this fact does not disentitle him to equitable relief. The threatened injury is, in its nature, a continuing one. If the defendants are permitted to retake into their exclusive possession any part of these streets, and then to sell such portions to purchasers by a reference to the second map, not only will the complainant necessarily become involved in numerous lawsuits with such purchasers if he attempts to enforce his rights in such land, but the outcome of such litigation it is difficult to foresee. Moreover, the remedy at law is plainly inadequate. If the defendants and their grantees should persist in ⁸⁶² retaining to their exclusive use the land withdrawn from public streets, notwithstanding the recovery of damages against them in actions at law, the complainant would be finally driven to a court of equity in order to be restored to his legal right. It is not equitable that he should be compelled to embark in a series of expensive litigations before being granted relief by injunction for the protection of his rights.

The decree appealed from should be reversed.

lots, and public squares, and then sells the land with reference to such map, he thereby makes an irrevocable dedication of the space, as represented on the map as streets, etc., to the use of the public, although there is no municipal corporation in existence at the time which could accept the dedication: *Village of Riverside v. McLain*, 210 Ill. 308, 102 Am. St. Rep. 164; *Roberts v. Mathews*, 137 Ala. 523, 97 Am. St. Rep. 56.

If Lots are Sold According to a Plat on which a square appears designated as "Alliquippa Grove," with serpentine paths through it and with the announcement to purchasers that a grove had been set out as a public park, the lands so designated become a public park, and purchasers of lots according to such plan may maintain suit to enjoin the use of the grove for any other purpose: *Morrow v. Highland Grove Traction Co.*, 219 Pa. 619, 123 Am. St. Rep. 677.

INTERNATIONAL SILVER COMPANY v. ROGERS.

[72 N. J. Eq. 933, 67 Atl. 105.]

TRADE NAME—Use of Own Name in Business.—Assuming that everyone has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, he may not, in such use of his name, resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. (p. 724.)

TRADE NAME—Name Previously Used by Another.—Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, is an artifice calculated to produce the confusion alluded to. (p. 724.)

TRADE NAME—Use of Personal Name.—While a personal name may not constitute a technical trademark, yet where an article has come to be known by that personal name, one may not use that name, even though it be his own, to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. If he uses his own name, it must be so used as not to deprive others of their rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact. (p. 725.)

TRADE NAME—Proof of Fraudulent Use of One's Own Name. The normal presumption that the use of one's own name is an honest one may be rebutted by showing a prior fraudulent use of it touching the matter in issue. (By the editor.) (p. 726.)

TRADE NAME—Use of Own Name—Distinguishing Mark.—Where a man's conduct has been such that he cannot engage in a particular business, even in his own name, without profiting by his prior fraud, to the detriment of another's trade, he must so distinguish his name as to avoid confusion. The words, "Not connected with any other of the same name," or words of similar import, do not suffice. (p. 727.)

(Syllabi by the court except when stated to be by the editor.)

Edward A. & William T. Day and John P. Bartlett, for the appellant.

Craig A. Marsh, for the respondent.

934 TRENCHARD, J. This is an appeal from a decree of the court of chancery. The suit is a continuation of the litigation heretofore carried on by the International Silver Company against the William H. Rogers Corporation, and reported in 66 N. J. Eq. 119, 51 Atl. 1037, and on appeal in 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187.

The decree in that case was directed against the William H. Rogers Corporation, and its officers and directors, and enjoined them from making and selling silver-plated flat ware under the corporate name of "Wm. H. Rogers Corporation" or under the name of "Wm. H. Rogers," or under any name of which the word "Rogers" is a part.

This suit has to do with occurrences since the rendition of that decree.

After that decree, and on or about April 6, 1905, the William H. Rogers Corporation changed its name to "Plainfield Silver Plate Company," and continued to carry on the business under its new name until May 25, 1905, when it went out of business. The defendant, who was in control of the stock of the company, and was its president, purchased from it all its unplated blanks, its machinery, tools and fixtures of every kind, its lease on its office and factory, and proceeded to carry on the same business in which it had embarked, under his own name of W. H. Rogers. He now stamps his manufactured goods (his knives, forks and spoons) with the words "W. H. Rogers of Plainfield, N. J.," and marks his packages "Not connected with any other Rogers."

Upon this state of facts the complainant filed its bill of complaint, in the nature of a supplemental bill, against the defendant, for an injunction, and the case came on before the vice-chancellor on the bill, answer and proofs taken in the cause and the record and testimony of the former case. The vice-chancellor dismissed the bill.

In its bill the complainant claims that the stamp which the defendant puts on his product, namely, the words "W. H. Rogers ⁹³⁵ of Plainfield, N. J.," tends to produce confusion in the trade to the injury of complainant's business, and to the wrong of the public, and the complainant asks that he be enjoined from the further prosecution of his business.

unless he stamps his product in such a way as to make it plain that it is not manufactured by the original William Rogers Company, to whose business the complainant was the successor.

The learned vice-chancellor thought the injunction should not go, holding that the defendant was under no obligation to do anything more than use his own name fairly; that the evidence showed no fraud, and that the mere fact that a competitor is, or may be, injured is not material.

In that view we cannot concur.

Assuming that everyone has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, he may not, in such use of his name, resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the articles produced by them, and thus produce injury to the other beyond that which results from the similarity of name: *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002, 41 L. ed. 118; *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 675, 17 N. E. 304; *Pillsbury v. Pillsbury*, 64 Fed. 841, 12 C. C. A. 432, 24 U. S. App. 395; *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 209; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Howard v. Henriques*, 3 Sand. 725; *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396, 34 L. ed. 997; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. Rep. 625, 35 L. ed. 247; *Coats v. Merriek Thread Co.*, 149 U. S. 562, 13 Sup. Ct. Rep. 966, 37 L. ed. 847.

The leading case is *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002, 41 L. R. A. 118, in which Mr. Justice White, after affirming the doctrine above set forth and citing the cases which support it, declared: "Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice⁹³⁶ calculated to produce the deception alluded to in the foregoing adjudications."

That proposition finds support in the following cases: *Howe Scale Co. v. Wycoff, Seamans & Benedict*, 198 U. S. 118, 25 Sup. Ct. Rep. 609, 49 L. ed. 972; *Walter Baker &*

Co. v. Baker, 87 Fed. 209; Centaur Co. v. Link, 62 N. J. Eq. 147, 49 Atl. 828; Chickering v. Chickering, 120 Fed. 69, 56 C. C. A. 475.

When this suit was originally before the court the vice-chancellor found that the name "Rogers" had acquired a secondary significance in connection with the manufacture of silverware. In his opinion, reported in 66 N. J. Eq. 119, 57 Atl. 1037, he uses this language: "The complainant is the successor of several companies which have been engaged for many years in the manufacture of silver-plated ware, and which all derive their title from three brothers of the name of Rogers, who were among the first, if not the first, to apply the art of electroplating to its manufacture. They gained a reputation for their products, and the name 'Rogers' has acquired a secondary significance in connection therewith."

That finding of fact is, in our judgment, fully warranted by the evidence.

While a personal name may not constitute a technical trademark, yet where an article has come to be known by that personal name, one may not use that name, even though it be his own, to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. If he uses his own name, it must be so used as not to deprive others of their rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact: Williams v. Mitchell, 106 Fed. 168, 45 C. C. A. 265; Meyer v. Dr. B. L. Bull V. Medicine Co., 58 Fed. 884, 7 C. C. A. 558; Walter Baker Co. v. Sanders, 80 Fed. 889, 26 C. C. A. 220; Allegretti v. Allegretti C. C. Co., 177 Ill. 129, 52 N. E. 487; Pillsbury v. Pillsbury-Washburn Mills Co., 64 Fed. 841, 12 C. C. A. 432; Allegretti C. C. Co. v. Keller, 85 Fed. 643; Raymond v. Royal Baking Powder Co., 85 Fed. 231, 29 C. C. A. 245; Pillsbury-Washburn Mills Co. v. Eagle, 86 Fed. 608, 30 C. C. A. 306, 41 L. R. A. 162.

937 The normal presumption that the use of one's own name is an honest one may be rebutted by showing a prior fraudulent use of it touching the matter in issue. Such prior fraudulent use of the defendant's name in connection with the manufacture and sale of silverware is established in this case by the testimony herein and the record of the original suit. The burden is therefore on the defendant to show that the use

of his name is not in effect a continuation of such prior fraud. The defendant has not only failed to sustain this burden, but, on the contrary, the testimony in the present case abundantly shows that the defendant has acquired by purchase and is enjoying the results of a business which was built up in fraud of the complainant; it had been established by the corporation which bore his name, and a certain part of its success, at least, was due to the fact that it was getting the benefit of the reputation achieved by the original Rogers people, to the goodwill of whose business the complainant had succeeded. That benefit he must continue to receive while carrying on this same business in his own name, unless the public are enabled to certainly know that the goods which he puts upon the market are not the goods of the complainant or its predecessors.

The defendant contends that he distinguished his goods by stamping on them the words, "W. H. Rogers of Plainfield, N. J." The alleged distinguishing words are "of Plainfield, N. J." But that is no distinguishing mark. As the history of the "Rogers" name in connection with silver-plated ware shows, there are several places where the art was carried on and the "Rogers" mark was lawfully used. Locality has no sufficiently distinguishing force, because locality is not associated in any way with the mark itself. It is the word "Rogers" that is all-controlling, and it is that which should be differentiated in order to effectively distinguish the goods.

In *Walter Baker Co. v. Sanders*, 80 Fed. 889, 895, 29 C. C. A. 245, the defendant (in lieu of more extended changes) was required to affix the statement that "W. H. Baker is distinct from, and has no connection with, the old chocolate manufactory of Walter Baker & Company."

⁹³⁸ In the case of *Allegretti v. Allegretti C. C. Co.*, 177 Ill. 129, 52 N. E. 487, in the supreme court of Illinois, the court enjoined the defendants against the use of the name "Allegretti" except in a manner indicating that the defendants' goods are "Manufactured and sold by B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate-Cream Company."

In cases like the present one, it is elementary that the person to be considered is not the jobber or wholesaler, but the ordinary purchaser at retail. This being so, the marks "Not connected with any other Rogers" which are put upon the boxes, packages and wrappers, and which do not reach the purchaser at the retail shops, afford no means to the retail

purchaser of distinguishing the defendant's product from that of the complainant. Under the circumstances of the present case, it was the duty of the defendant to so distinguish the silverware made by him that it could not be mistaken for the silverware known to the world as the "Rogers" ware.

The words, "Not connected with any other Rogers," even if they reached the retail purchaser, would not suffice for that purpose. Those words merely tend to add to the confusion. They might well be, and usually would be, employed by an original manufacturer seeking to warn the trade when he finds on the market other goods which may be passed off as his. They would be the appropriate announcement of an original maker that he has no connection with other wares of similar appearance, or wares put out under a similar name. These words also afford an unscrupulous retail dealer opportunity to pass off the product as the original "Rogers" goods. In employing such words, so misleading and ambiguous, the defendant is clearly guilty of bad faith.

The defendant having failed in the performance of his duty so to distinguish his silverware that it could not be mistaken for that of the complainant, we think the complainant is entitled to have an injunction restraining the defendant from manufacturing and selling his goods unless he stamps upon them the words, "Not the original Rogers" or "Not connected with the original Rogers." As was said in *Allegretti C. C. Co. v. Keller*, 85 Fed. 643, this ⁹³⁹ "saves the complainant's rights and works no hardship to an honest defendant."

The decree must therefore be reversed and the record remitted to the court of chancery in order that a decree may be made in accordance with this opinion. The complainant is entitled to costs in the court of chancery and in this court.

A Trademark may be Acquired, at Least in a Limited Sense, in the use of one's own name in connection with a business: See the note to Kyle v. Perfection Mattress Co., 85 Am. St. Rep. 102. And one may part with the right to use his own name as a designation or description of a manufactured article, and confer that right exclusively upon another: Russia Cement Co. v. Le Page, 147 Mass. 206, 9 Am. St. Rep. 685; Frazer v. Frazer Lubricator Co., 121 Ill. 147, 2 Am. St. Rep. 73. As to the conflict of rights where there are different persons of the same name, see the note to Kyle v. Perfection Mattress Co., 85 Am. St. Rep. 103-106. If the inventor of a ware assigns the right to manufacture it and to use his proper name as a trade name in connection therewith, and his son, after having been employed by the assignee of the name for a long period, leaves such employment and proceeds to sell the ware himself, using his own name as a trade name, and simulating the assignee's label, advertisements and trade circulars, with intent to deceive the public, he may be enjoined from

so doing irrespective of the question of his fraudulent intent: *Van Stan's Stratena Co. v. Van Stan*, 209 Pa. 564, 103 Am. St. Rep. 1018.

Every Person is Entitled Honestly to Use His Own Name in Business, either alone or associated with others in a partnership or corporation. He may not, however, use his name as an artifice to mislead the public as to the identity of the business or corporation or the article produced, and thereby unfairly divert the business of another, who first lawfully selected the trade name, established a business, and produced an article which is identified by the name. Such a use of one's own name, unaccompanied by a caution or explanation so specific as to prevent confusion, may be enjoined: *Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co.*, 105 Minn. 315, 127 Am. St. Rep. 574.

CASES

IN THE

SUPREME COURT

OF

OKLAHOMA.

GOODWIN v. BICKFORD.

[20 Okl. 91, 93 Pac. 548.]

COURTS—Rules of, Power to Make.—Courts have inherent power to make rules for the regulation of their practice and business, but have no power to make a rule which contravenes a statute or the law of the land. (By the editor.) (p. 730.)

COURTS, Rules of Making Additional Requirements in Matters of Appeal.—Where a statute provides specifically what is to be done on the taking of an appeal, any rule of court requiring additional things to be done by the appellant contravenes the statute, and is invalid. (By the editor.) (p. 734.)

COURTS, Rules of Requiring a Deposit on Appeal.—The district court of the territory of Oklahoma has no power to impose a rule requiring that a party appealing a cause from the probate court to the district court shall deposit with the clerk of the district court five dollars for costs of the clerk, and that a failure to do so within twenty days after the transcript of the trial court is deposited with the clerk shall be ground for dismissal of the appeal. (p. 736.)

APPEAL AND ERROR, Assumption in Support of the Judgment, When cannot be Indulged.—Where the ground upon which an order or judgment of dismissal was made appears as part of the judgment, the appellate court cannot assume that the trial court acted on a different ground. (By the editor.) (p. 736.)

APPEAL AND ERROR, Rules of Court, When a Part of the Record.—The rules of a trial court are part of the record of every cause tried therein. (p. 736.)

APPEAL AND ERROR, Exceptions, When not Necessary.—Errors apparent upon the judgment-roll or record of a cause will be considered by this court, although no exceptions were taken thereto in the trial court. (p. 736.)

(Syllabi by the court except when stated to be by the editor.)

Two proceedings in the probate court seeking letters of administration, in which an appeal was taken from the judgment of such court to the district court. The appeal was there dismissed for noncompliance with a rule of court. Thereupon a petition in error was presented to the supreme court.

M. D. Libby, for the plaintiffs in error.

George S. Pearl and J. G. Lowe, for the defendant in error.

⁹² HAYES, J. Only one question is presented by the petition in error and argued by counsel for plaintiffs in error in their brief, and that is: Did the court err in dismissing the appeal for the failure of the plaintiffs in error to comply with rule 14 of that court, by making a deposit of five dollars to apply on the cost of the clerk of the district court, within the time prescribed by said rule? The portion of rule 14 affecting this case is: "That in all cases appealed from a lower court to the district court of this district, the appellant shall, within twenty days from the time the papers in such case shall have reached ⁹³ the office of the clerk of this court, deposit with such clerk the sum of five dollars, to apply on costs of clerk in the district court, and the appellee shall, prior to the first day of the next term of the district court of the county in which such appeal arose, deposit with the clerk for costs the sum of three dollars. No appeal shall be placed on the docket of this court until the appellant shall have made the deposit herein provided for. Should the appellant fail to make deposit for the costs as herein required, the appellee may pay the costs made in the district court on such appeal, together with the costs of docketing and dismissal, and such appeal shall, on motion of the appellee, be dismissed for failure to prosecute."

On August 25, 1903, appellee in the district court filed his motion to dismiss the appeal for failure of appellants to make the deposit as required by said rule 14. On the seventh day of December following, after the expiration of the twenty days provided for in rule 14, appellant deposited with the clerk of the district court five dollars. Plaintiffs in error in their brief assign as reasons why the action of the district court should be reversed that the dismissal of the appeal by the court was an abuse of legal discretion, and that the court had no power to prescribe said rule 14 requiring said deposit for costs, and that on failure to comply with it, the appeal should be dismissed.

We shall consider the second reason assigned first; for, if it is well founded, it will not be necessary to consider the first reason assigned. It is a well-settled principle of law that courts, independent of any statutory provision, have the inherent power to make rules for the regulation of their practice and business, but they can make no rule that contravenes a statute or the law of the land: *Prindeville v. State*, 42 Ill. 217; *Fisher v. National Bank of Commerce*, 73 Ill. 34; *Purcell v.*

Hannibal & St. Joseph R. R. Co., 50 Mo. 504; *United States v. The James G. Swan* (D. C.), 77 Fed. 473. It cannot be said that, in imposing costs and prescribing rules governing their collection, in the practice of a court a different rule from the one announced above applies, or that a court ⁹⁴ has control over the same superior to the legislative department of the government, and that a court may make a rule governing the same in conflict with the statute, because courts had no power at common law to impose costs, and such power exists only when authorized by statute, and a court in prescribing rules relative to the costs authorized by statute to be imposed by it cannot, in doing so, contravene a statute: *Bradford v. Southern R. R. Co.*, 195 U. S. 243, 25 Sup. Ct. Rep. 55, 49 L. ed. 178. The legislature of the territory of Oklahoma has provided a procedure governing an appeal from the judgment, decree, or order of the probate court to the district court. Chapter 18 of the statutes of 1893, being the chapter on "Probate Procedure," contains the following provisions:

"1483. An appeal may be taken to the district court from a judgment, decree, or order of the probate court: First, granting or refusing, or revoking letters testamentary, or of administration, or of guardianship."

"1487. The appeal must be made: First—by filing a written notice thereof with the judge of the probate court and, second—by executing and filing within the time limited, such bond as is required in the following sections. It shall not be necessary to notify or summon the appellee or respondent to appear in the district court, but such respondent shall be taken and held to have notice of such appeal in the same manner as he had notice of the pendency of the proceedings in the probate court."

"1495. The judge of the probate court must, within ten days from the filing of the notice of appeal, and the giving of the required bond, cause a certified copy thereof and of the judgment, decree or order, or specific part thereof appealed from to be transmitted to the clerk of the district court of the county or judicial subdivision, to be filed in his office, and the appeal may be heard and determined at any day thereafter by said court, at any general, special or adjourned term; and if the appellant make no appearance when the case is called for trial, or otherwise fail to prosecute his appeal, the respondent may, on motion, have the appeal dismissed."

"1500. Such appellate court may award to the successful ⁹⁵ parties the cost of the appeal, or it may direct that such

cost abide the event of a new hearing, or of the subsequent proceedings in the probate court. In either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court, or, if no such direction be given, as directed by the probate court."

By these provisions and other sections of the chapter quoted from the legislature of the territory of Oklahoma has provided a complete procedure for perfecting an appeal from the probate court to the district court, and has prescribed in detail the things necessary to be done. These provisions of the statute were, on March 3, 1891 (26 Stats. 989, c. 543, sec. 17), ratified by Congress (1 Supp. Rev. Stats., 2d ed., p. 929): *Wetz v. Elliott*, 4 Okl. 618, 51 Pac. 657; *Decker v. Cahill*, 10 Okl. 251, 61 Pac. 1101. But, aside from any virtue or power these provisions may have received from the act of Congress approving them, they are valid enactments of the territorial legislature. Congress, in establishing a government for the territory of Oklahoma, divided the government into three branches—executive, legislative and judicial. In defining the powers of these different branches of the government it provided: "That the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

It is true that Congress granted, by the organic act, some legislative powers to the supreme court; but the subjects upon which it could legislate are clearly defined and limited, and matters therein specified as subjects upon which the court can legislate do not include the subjects of the provisions of the statutes cited, *supra*. It has been the practice of Congress, in establishing governments for territories, to commit to the territorial assembly the matter of providing for the manner of taking and perfecting appeals: *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 648, 21 L. ed. 966. In this case Mr. Justice Bradley, in speaking for the court, says: ⁹⁶ "Whenever Congress has proceeded to organize a government for any of the territories it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdictions of the several courts. . . . From a review of the entire past legislation of Congress on the subject under consideration, our conclusion is that the practice, pleadings, and forms and modes of proceedings of territorial courts, as well as their respective

jurisdictions, subject, as before said, to a few expressed or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves."

The legislature of the territory of Oklahoma had power to enact laws regulating the procedure in the courts of the territory and prescribing the manner of taking and perfecting appeals from the inferior courts to the superior courts: *Territory v. Stroud*, 6 Okl. 106, 50 Pac. 265; *Bailey v. Territory*, 9 Okl. 461, 60 Pac. 117.

The plaintiffs in error and the defendant in error have cited the cases of *Dooley v. Foster*, 5 Kan. 269, and *Coleman v. Newby*, 7 Kan. 83. Defendant in error insists that the decisions in these cases support the theory of his case. A close examination of *Dooley v. Foster*, 5 Kan. 269, will disclose that the court in that case did not decide whether the district court had power to make the rule in question or not. That case was determined upon the theory that the appellee had waived the requirements of the rule in controversy. Justice Valentine, in rendering the opinion in the case, said that he announced the opinion of the court without considering whether the rule in question was valid or invalid. In the case of *Coleman v. Newby*, 7 Kan. 83, no opinion of the majority of the court was given except a statement made by Justice Brewer affirming the action of the trial court. We cannot infer otherwise than that the majority of the court in that case reached its opinion by deciding ⁹⁷ that the rule in controversy was not in conflict with the statute of Kansas governing appeals from justices of the peace to the district court. For the court to have held that the district court had power to make a rule contravening the statute would have been against the great weight of authorities.

In the case at bar the legislature of the territory of Oklahoma has, by statute, prescribed in detail how an appeal shall be taken from the probate court to the district court and perfected. It has said that a written notice thereof and a bond must be filed with the probate judge; that within ten days thereafter a certified copy of certain documents must be transmitted by the probate judge to the clerk of the district court to be filed in his office, and that it shall not be necessary to notify or summon the appellee in the case; that the case may be heard at any time during the next general or special term of the court after the appeal has been transmitted to the clerk's office to be filed; and that, if the appellant make no

appearance when the case is called, the appeal may be dismissed. We could hardly conceive of a statute that could prescribe more specifically the detailed requirements necessary to perfect an appeal, and how the same shall be disposed of; but it does not require that any deposit for costs shall be made in order to perfect the appeal. On the contrary, it is specifically provided that after the appeal has been transmitted by the probate judge to the district clerk, to be filed in his office, without even a summons or notice to defendant in error, the case may be heard at any day of any general or special term of the court, and that if, when the case is called, appellant does not appear, the same may be dismissed on motion of the appellee. There is nothing in this statute that will permit the construction that anything else than what is mentioned therein is required to be done, or may be required to be done, by the court before the appeal is perfected; and under the language of the statute, when the appeal has been perfected, it may be heard at any general or special term of the court. Any rule of the court requiring additional⁹⁸ things to be done by the appellant than those prescribed by the statute herein quoted would contravene the statute and would be invalid.

The case of *Cunningham v. Quinn*, 12 Colo. 473, 21 Pac. 488, was a petition to the supreme court of Colorado for a writ of mandamus to compel the respondent (Quinn), who was the county judge and acting county clerk, to accept and file a certain bond and notice of appeal upon the relator's paying the legal fees therefor. Under the rule of the county court, which was as follows: "The clerk of this court may require a party appealing from the judgment or order of this court to the district court, or supreme court, that he or she or they pay all accrued costs before taking any further steps in the case," respondent Quinn refused to file the appeal bond and notices unless all accrued costs were first paid by relator. Notwithstanding the statute of Colorado contained a provision that gave the officers of the court the right to collect their legal fees in advance, the court, in awarding the writ of mandamus, said: "The right of appeal from the county courts to this court is also a statutory right, and that statute provides the manner in which such appeal may be perfected, and no rule of court can deprive a party of this right, or impose additional burdens as conditions precedent to its exercise. Under the statute a party praying for an appeal is required to file a bond 'in a reasonable sum sufficient to cover the amount of the judgment appealed from and

costs, conditioned for the payment of judgment, costs, interest, and damages in case the judgment shall be affirmed'; but we know of no statute by which he may be required to pay the accrued cost in the case at the time of perfecting the appeal, and in the absence of such statutory authority, the right of the clerk to impose such a condition cannot be maintained."

The case of *Wescott v. Eccles*, 3 Utah, 258, 2 Pac. 525, is a case commenced in a justice court in the territory of Utah. From a judgment against the appellant he appealed to the district court. After appellant had complied with all the requirements of the statute for perfecting his appeal the justice before whom the ⁹⁹ case was tried deposited the files of the case with the clerk of the district court, but the appellant failed to file the transcript from the justice's docket and all papers accompanying the appeal with the clerk of the district court within thirty days before the commencement of the term of court, and to perfect the appeal within the first two days of the term as was required by rule of the court. The district court, on motion of the appellee, dismissed the appeal because of appellant's failure to comply with said rule of the court. The supreme court of the territory, in reversing the judgment of the district court, said: "When the appellant has complied with the statutory requirements, it then becomes the duty of the justice to transmit the papers to the clerk of the district court, and when they are received by him, they are filed whether he ever indorses the filing on them or not. 'A paper is said to be filed when it is delivered to the proper officer': *Bouvier's Law Dictionary*, tit. 'File.' We do not propose to discuss the power of the district court to make rules for its government. It is not necessary to the decision of this case. It is proper, however, to state that no court can by rule deprive a party of a right which is given to him by statute. . . . The decision of this court is placed upon the ground that the appellant having fulfilled all the requirements of the law in order to perfect his appeal, his right to a trial in the district court, so far at least as concerns this motion, had become absolute, a right given by the statute of which he could not be deprived by rule of court."

The same doctrine is announced by the court in the case of *City of Pekin v. Dunkleburg*, 40 Ill. App. 184.

The supreme court of Utah, in the case of *Salt Lake City v. Redwine*, 6 Utah, 335, 23 Pac. 756, held that the district court had power to prescribe a rule such as was held in

the case of *Wescott v. Eccles*, 3 Utah, 258, 2 Pac. 525, could not be prescribed by the district court; but the court in the case of *Salt Lake City v. Redwine*, 6 Utah, 335, 23 Pac. 756, distinguishes very clearly that case from the case of *Wescott v. Eccles*, 3 Utah, 258, 2 Pac. 525, by saying that, in holding that the court had such power, its opinion was based on the fact that the court derived such power from a general statute of Utah, which had not been enacted at the time the ¹⁰⁰ opinion was rendered in the case of *Wescott v. Eccles*. The court clearly held that its power in that case to prescribe such a rule was derived from a statute.

If the district court of Oklahoma had been vested with such power by act of Congress, it then probably could be contended that the legislature was without power to enact such statute; but we have not been able to find any such act of Congress, and from the opinion cited, *supra*, it is seen that the legislature of the territory of Oklahoma had power to prescribe by statute procedure in the courts of the territory of Oklahoma. It is therefore our opinion that the district court of Canadian county in dismissing the appeal of plaintiffs in error committed error.

But defendant in error insists that this appeal should be dismissed, for the reason that no exception was taken by the plaintiffs in error to the order of the district court in dismissing their appeal. The transcript of the record contains the order of the district court dismissing the appeal and rule 14 of that court. In the order of dismissal it is specifically stated by the court that the appeal was dismissed "for failure of the plaintiff to properly perfect his appeal by a compliance with rule 14 of this court." The ground upon which the order or judgment of dismissal was made having been made a part of the judgment of the district court, this court cannot assume that the trial court may have acted upon a different ground: *Holland v. Great Northern Ry. Co.*, 93 Minn. 373, 101 N. W. 608. Rule 14 was certified by the lower court as a part of the record, and properly so, for the rule of a trial court is a part of the record in every case tried therein: *Walla Walla Printing & Publishing Co. v. Budd*, 2 Wash. Ter. 336, 5 Pac. 602.

It has been repeatedly held by the supreme court of the territory of Oklahoma that it would review and correct errors that were apparent upon the judgment-roll or record of the case, although no exceptions had been taken thereto: *Territory v. Caffrey*, 8 Okl. 193, 57 Pac. 204; *Caffrey v.*

Overholser, 8 Okl. 202, ¹⁰¹ 57 Pac. 206; Kellogg v. School District No. 10, 13 Okl. 285, 74 Pac. 110.

It is therefore the judgment of this court that this cause be reversed and remanded, with instructions that the order of the trial court dismissing the appeal be set aside, and the appeal reinstated.

All the justices concur.

The Decision in the Principal Case was regarded as controlling in Nelson v. Lollar, 20 Okl. 291, 94 Pac. 176, wherein a rule of the district court requiring the appellant on an appeal from a justice's court to deposit five dollars for costs of the clerk, and that the failure to do so should be ground for the dismissal of the appeal, was declared invalid.

Authority to Enact Rules of Court is the subject of a note to State v. Gideon, 41 Am. St. Rep. 639. It is well understood that such rules must be subordinated to the law, and to the extent that they may be in conflict therewith they are void: Suckley's Admr. v. Rotchford, 12 Gratt. 60, 65 Am. Dec. 240; State v. Posey, 17 La. Ann. 252, 87 Am. Dec. 525; State v. Gideon, 119 Mo. 94, 41 Am. St. Rep. 634.

COCKRELL v. SCHMITT.

[20 Okl. 207, 94 Pac. 521.]

PLEADING—Separating and Numbering Causes of Action.—Where it is not obvious that the petition states more than one cause of action, it is not error to overrule a motion to require plaintiff to separately state and number the several causes of action, when the motion is a general one and fails to specify wherein the petition states more than one cause of action. (p. 739.)

PLEADING—General Demurrer to a Complaint Some of the Paragraphs of Which are Good.—Where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, a demurrer should be overruled. (p. 740.)

IN REPLEVIN Plaintiff must Recover on the Strength of His Own Title. (By the editor.) (p. 740.)

PRACTICE, Verdict, When Should be Directed.—If there is not sufficient evidence of a fact essential to the plaintiff's cause or the defendant's affirmative defense, a verdict should be directed. (By the editor.) (p. 740.)

EXECUTION, Justification Under, What Necessary to.—One justifying on an alleged execution must assume the burden of proving a valid judgment existing when the writ issued. (By the editor.) (p. 742.)

TRANSFER, Attack upon as Fraudulent—Evidence to Prove.—An officer seeking to impeach a title as fraudulent as against creditors must show a valid judgment and execution. (By the editor.) (p. 742.)

JUDGMENT NOT ENTERED, Whether may be Proved to Support Levy Under a Writ.—Where the sheriff seeks, in an action of replevin, to justify the seizure of property under an execution issued

in another case, he must prove a valid and subsisting judgment in that case before he can attack a transfer of the property levied on as made in fraud of creditors. Where said judgment has been rendered but not entered upon the journal as required by law, it is not error to exclude secondary evidence offered in proof thereof. (p. 742.)

EVIDENCE, Recital in a Chattel Mortgage as Proof of Ownership.—As the law presumes that all acts are done in good faith until there is evidence to the contrary, a chattel mortgage in evidence containing the statement that the "mortgaged property is owned entirely by and is now in possession of said party of the first part at his home in Lincoln townsite, Blaine county, Oklahoma," fairly tends to prove the same, and will be regarded as prima facie evidence of the truth of the statement, in the absence of evidence to the contrary. (Hayes, J., dissents.) (p. 745.)

PRACTICE—Directing a Verdict.—If the evidence on behalf of plaintiff is sufficient to prove his cause of action, and there is no substantial evidence offered by defendant upon any material issue in the case, it is not error for the trial court to instruct the jury to return a verdict for the plaintiff. (p. 745.)

(Syllabi by the court except when stated to be by the editor.)

Stephens & Myers, for the plaintiffs in error.

Hotchkiss & Emery, for the defendant in error.

208 TURNER, J. On March 12, 1902, Maggie Schmitt, defendant in error, plaintiff below, brought this, a suit in replevin, against A. S. Bridgford, sheriff of Blaine county, plaintiff in error, defendant below, in the probate court of that county to recover, as owner, eight head of cows, two two year old heifers, eight head of short yearling cattle, and one three year old bull, and for one span of mules, one span of bay mares, and two brood sows with ten suckling pigs. in which she claimed a special ownership by virtue of a chattel mortgage made and delivered to her by her husband, Martin Schmitt, on February 26, 1901, to secure a \$500 note of that date payable to her by him in three years, which had been levied on by the sheriff as the property of said Schmitt under an execution issuing out of the probate court of Blaine county in the case of E. B. Cockrell and W. S. Bradley against said Schmitt, dated November 26, 1901. On the same day, March 12, 1902, an order of delivery issued and placed her in possession of said property, which she has since retained.

On April 14, 1902, plaintiffs in error, E. B. Cockrell and W. **209** S. Bradley, were made parties defendant and entered their appearance.

On August 28, 1902, the case went to trial and resulted in a judgment, in part, for plaintiff, from which she appealed to the district court. On March 20, 1905, trial was had in the district court, and at the close of the testimony on both sides the court directed the jury to return a verdict for plain-

tiff, which was done and exceptions noted. There was final judgment, motion for a new trial by defendants filed and overruled, and exceptions noted, a petition in error and case-made duly filed in this court, and the case is before us on appeal.

In her second amended petition defendant in error, hereafter called "plaintiff," included in the same cause of action the property in controversy of which she claimed to be owner, and the property in which she claimed special ownership by virtue of a certain chattel mortgage filed with her petition and marked exhibit "A," and the first assignment of error made by plaintiffs in error, hereafter called "defendants," is: "That the court erred in overruling the motion to require plaintiff below to separately state and number the several causes of action in the second amended petition."

As it is not obvious to us that the petition states more than one cause of action, and as the motion is so general as not to inform us, and as no authority is cited in support of the motion in defendant's brief, we cannot see wherein the court erred in overruling the motion: *Ambrose v. Parrott*, 28 Kan. 693, citing *Gilmore v. Norton*, 10 Kan. 491; *Kerr v. Reece*, 27 Kan. 338. In *Grimes v. Cullison*, 3 Okl. 268, 41 Pac. 355, the court said: "That in the motion to make more definite and certain the defendants below failed to point out wherein the petition ²¹⁰ was indefinite and uncertain, and we do not think, in the absence of such matter in a motion, that the court below committed any error in overruling the same. If the petition be indefinite or uncertain, it is the duty of counsel, in moving to have the same made more definite and certain, to specifically set out wherein they desire relief at the hands of the court; if they fail to so set out in their motion, it is not error to overrule the same."

The next assignment of error is that "the court erred in overruling the demurrer of defendants below to petition of said plaintiff below." It is urged that "the petition is fatally defective for the reason that it fails to charge anywhere that at the time of the execution of the mortgage Smith was the owner of the property described therein, or that he had any right to mortgage the same." The chattel mortgage is attached to the petition as an exhibit, in which is stated, among other things, that the mortgaged "property is owned entirely by and now in possession of said party of the first part at his home in Lincoln township, Blaine county, Oklahoma." Without passing upon the question as to whether or not the allegations contained in the exhibit should be considered as a part

of the petition, in passing upon this demurrer we think it sufficient to say that it is a well-established rule of this court that where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, the demurrer should be overruled: *Hurst v. Sawyer*, 2 Okl. 470, 37 Pac. 817; *City of Guthrie v. Harvey Lumber Co.*, 5 Okl. 774, 50 Pac. 84. There can be no doubt that the petition states a cause of action for the property set forth in that paragraph in which the plaintiff claims a general ownership, and for that reason there was no error in overruling the demurrer.

The next error assigned which we think necessary to notice is: Did the court err in directing the jury to find a verdict for the plaintiff? The record discloses that plaintiff claimed the right of possession to a part of the property in controversy as owner, and as to the other part of special ownership by virtue of a chattel ²¹¹ mortgage from her husband. Defendants pleaded a general denial, directed their proof toward establishing title to the property levied on in *Martin Schmitt*, plaintiff's husband, that it had been conveyed by him to plaintiff in fraud of creditors, and sought to justify the levy under an execution issued against the property of *Martin Schmitt*. In passing upon this question, it is well to remember "that plaintiff must recover on the strength of his own title": *Wells on Replevin*, p. 54; citing *Easter v. Fleming*, 78 Ind. 116; *Gallick v. Bordeaux*, 31 Mont. 328, 78 Pac. 583; *Hall v. Southern Pac. Co.*, 6 Ariz. 378, 57 Pac. 617; *Bardwell v. Stubbett*, 17 Neb. 485, 23 N. W. 344.

It might be well to add: "If the evidence on behalf of plaintiff is sufficient to prove his cause of action, and there is no substantial evidence offered by defendant upon any material issue in the case, it is not error for the trial court to instruct the jury to return a verdict for the plaintiff": *Irwin v. Dole*, 7 Kan. App. 84, 52 Pac. 916.

Otherwise stated, the rule is: "Where there is no sufficient evidence of a fact essential to the plaintiff's case or the defendant's affirmative defense, a verdict should be directed": 6 Am. & Eng. Ency. of Law, 686, and cases cited.

Let us examine the evidence and see whether plaintiff has made a *prima facie* case, and, if so, what evidence defendants, if any, have adduced to rebut it. The testimony tends to prove that plaintiff was married to *Martin Schmitt* in Illinois about December 25, 1890; that up to that time she had worked for wages and had saved some \$187. After her marriage they lived on a farm in that state for about five years, and

then moved to Iowa, taking with them two cows belonging to her, where, with the money she brought with her and claimed as her separate property, she bought five head of cows and five sows. Shortly after they went to Iowa he bought a farm of eighty-six acres near Fremont in that state, taking the title in his own name. The stock owned by plaintiff was kept on this place and was sold from time to time, together with its increase, during the last three years of their residence ²¹² there, plaintiff realizing in all therefrom some \$650 or \$700, which she "put in the place." This farm was sold in 1900, and the money derived from the sale of it was deposited in the name of her husband in the bank at Fremont. The proof shows that she did business in buying and selling stock in her own name while in Iowa. She states, and it is not denied, that there was coming to her from her husband about \$1,300 at the time they arrived in Oklahoma out of the proceeds of the place they sold in Iowa. Her husband brought \$2,240 from Iowa, and deposited from time to time something near \$2,000 in the First National Bank at Geary, which she says she sent and got through him when she needed it. It seems that before they both arrived in Oklahoma Martin Schmitt had gone to Watonga, where, on September 1, 1900, he made, executed and delivered to one H. G. Easton his promissory note of \$250, with interest at the rate of eight per cent per annum, it seems, in a certain land deal not fully set out in the testimony. This note was afterward conveyed to the plaintiffs in error, E. B. Cockrell and W. S. Bradley, who sued Schmitt thereon on the eleventh day of February, 1901, and recovered judgment July 16, 1901. Execution was issued thereon November 26, 1901, and placed in the hands of plaintiff in error, A. S. Bridgford, as sheriff of Blaine county, which said execution was on March 11, 1902, levied on the property in controversy in this suit as the property of Martin Schmitt. Eight hundred dollars of the \$1,300 which her husband owed her as the proceeds of her cattle sold in Iowa were paid her by him in cash, and a certificate of \$500 a short time after they arrived from Iowa. On February 3, 1902, she received \$581 from her father's estate in Illinois, and deposited that amount a few days afterward in the First National Bank of Watonga. She testified, and it is not denied, that in the spring of 1901 she bought a cow and calf from Ben Ice and paid him \$39, and in May following several head from one Husenmeyer and one cow from Reynolds; that in all she bought that spring eight cows, eight head of short yearlings, two head of heifers,

and one bull, ²¹³ all of which were levied on in this cause; that the same was her sole and separate property; that on February 26, 1901, her husband, who owed her \$500 balance due on the \$1,300 aforesaid, made, executed and delivered to her a chattel mortgage covering the property levied on by the officer in this cause, in which she claimed a special interest and introduced a note and mortgage in evidence as proof of her title thereto; that all the property levied on in this cause and claimed by her in this suit was taken under the execution while on their place. There was no controversy over the identity of the property described in the complaint or mortgage and that levied on by the officer in the trial of this cause in the court below, and no such question is raised in the brief of counsel.

The defendants, to maintain the issues on their part, and to justify under the writ, offered to prove the judgment of the probate court of Blaine county from which the execution was issued and levied by A. S. Bridgford, as sheriff of the county on the property in controversy in the cause. The evidence showed, however, that no such judgment had been entered on the journal of said court. On its appearance docket appeared a statement to the effect that judgment had been rendered in favor of the defendants E. B. Cockrell and W. S. Bradley v. Martin Schmitt, and among the papers in the case was found a journal entry signed by the probate judge corresponding to the entry on the appearance docket. Defendants offered in evidence said journal entry and the entry on the appearance docket to prove said judgment. The court sustained an objection to their introduction, which was excepted to and is assigned and urged here as error.

Now, it is evident that, in order to justify under this writ, the burden of proof is upon the defendant to support the execution by proof of a valid judgment existing at the time the execution issued (*Shue v. Ingle*, 87 Ill. App. 522; *Annis v. Bell*, 10 Okl. 647, 64 Pac. 11), and this he must do before he can attack the chattel mortgage in evidence as a fraud upon creditors, ²¹⁴ which defendants attempted to do in this case. Wells on Replevin, page 285, says: "Where property seized on execution is replevined from the officer and he wishes an order for return, he must not only plead the execution and a judgment, but a valid execution and judgment must also be given in evidence to support the plea": *Glasecock v. Nave*, 15 Ind. 457; *Beach v. Botsford*, 1 Doug. (Mich.) 199, 40 Am. Dec. 145; *Clay v. Caperton*, 1 T. B. Mon. (Ky.) 10, 15 Am. Dec. 77; *Sandeford v. Hess*, 2 Head (Tenn.), 680.

Same, page 284, says: "An officer seeking to impeach the plaintiff's title as fraudulent as to creditors must show a valid judgment," and cases cited.

Was the evidence offered to prove the judgment admissible? Wilson's Revised and Annotated Statutes of Oklahoma of 1903, section 4603, provides: "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in (the) action."

It is clear that under this above provision it was the duty of the probate judge or his clerk to have entered the judgment in that case upon the journal of the court. It seems that they did not do so, as the only evidence offered to prove it was the appearance docket and the journal entry aforesaid, and the question presented to us upon this alleged error is, whether said judgment, having been rendered in said court and not entered upon its records, can be proved by the character of evidence offered as above. We must answer the question in the negative. A judgment rendered by the court, although not entered as required by law, is valid as between the parties, but the record entry of the judgment itself must be introduced in evidence when made the basis of a claim in another action.

Black on Judgments, page 115, says: "And again, the record entry of a judgment is indispensable to furnish the evidence of it when it is made the basis of a claim or defense in another court."

1 Greenleaf on Evidence, paragraph 508, says: "And the record itself must be finally completed before the ²¹⁵ copy is admissible in evidence. The minutes from which the judgment is made up, and even a judgment in paper, signed by the master, are not proper evidence of the record": Balm v. Nunn, 63 Iowa, 641, 19 N. W. 810. See, also, Brown v. Hathaway, 10 Minn. (Gil. 238) 303.

"It seems that a subsequent judgment nunc pro tunc will not suffice": Shue v. Ingle, 87 Ill. App. 522.

It follows that defendants, not being judgment creditors, could not attack the sale or conveyance of any of the property in controversy for fraud, that no evidence adduced by them could properly be considered on those issues by the trial court, and that judgment for plaintiff was properly directed, unless the next contention of defendants is true.

Invoking the rule that plaintiff must recover on the strength of her own title, defendants insist that the record discloses no evidence that, at the time of the execution of the mortgage, Martin Schmitt was the owner of the property described

therein or that he had a right to mortgage the same, and that the mere recitation to that effect in the mortgage introduced in evidence was not proof of his ownership of the property at that time. The mortgage states that the "mortgaged property is owned entirely by and now in possession of said party of the first part at his home in Lincoln township, Blaine county, Oklahoma"; but it is urged that this is not sufficient. Let us see. As stated, defendants, having failed to show that they were judgment creditors, were not entitled to attack his conveyance for fraud. Now, in the face of that statement in the mortgage, they would have us presume, in the absence of evidence of fraud, that Martin Schmitt mortgaged something he did not own.

"The law presumes that all acts are done in good faith until there is evidence to the contrary": *McCagg v. Heacock*, 34 Ill. 476, 85 Am. Dec. 327.

What probative force, then, should the court below, in passing upon this motion, have given this chattel mortgage standing ²¹⁶ before it unimpeached and fair on its face? Was it sufficient evidence to prove that at the time of the execution of the mortgage Martin Schmitt was the owner of the property described therein and had a right to convey the same?

Chillingworth v. Eastern Tinware Co., 66 Conn. 306, 33 Atl. 1009, was an action to recover damages for the conversion of personal property to which the plaintiff claimed title under an execution sale. The defense was a general denial. On the trial below the plaintiff claimed that the property described in the complaint was formerly the property of the United States Stamping Company, a corporation organized under the laws of the state of New York, carrying on business in Portland, Connecticut; that in November, 1888, one Samuel H. Smith brought a suit against said stamping company in the superior court for Middlesex county in that state, and attached therein said property in Portland as the property of said corporation; that afterward, in February, 1891, judgment by default was rendered in said suit in favor of Smith for \$30,000; that upon said judgment an execution was levied upon the attached property in March, 1891; and that in April, 1891, said property was duly sold under said execution to the plaintiff. The evidence offered by the plaintiff in support of these claims was mostly documentary. One of the important questions in the case was whether the United States Stamping Company, at the time of the attachment or the levy and sale aforesaid, owned or had any interest in the personal property described in the complaint; and to

prove that it had, the plaintiff, among other matters, put in evidence the fact that the said corporation in July, 1887, made and delivered a chattel mortgage of said property to August Pottier to secure an indebtedness from it to him of nearly \$60,000. This was substantially all the evidence offered by the plaintiff on this point in the case. After the plaintiff had rested his case the defendant moved for judgment as in case of nonsuit, one of the grounds of which was "that the evidence did not show *prima facie* that the stamping company owned or had any ²¹⁷ interest in the property at the time of the attachment or levy and sale under which the plaintiff claimed." The court below rendered judgment as of nonsuit, and refused the motion made for that purpose to set it aside, and the plaintiff appealed to the supreme court of errors. The court said: "The first question is whether the plaintiff's evidence fairly tends to show that the stamping company owned the property at the time in question. As before stated, the plaintiff's case upon this point of it rests chiefly upon the evidence relating to the execution and delivery of the chattel mortgage. We think it must be conceded that the evidence upon this point, if it stood alone and uncontradicted, does fairly tend to prove that the stamping company was the owner of the property in July, 1887, and in the absence of anything to the contrary, the presumption would be that this ownership continued up to the time of the attachment and the levy of the execution."

Accordingly, we hold in this case that, as the mortgage is fair on its face, that of itself fairly tends to prove that at the time of its execution Martin Schmitt was the owner of the property described therein, and that he had a right to mortgage the same.

It follows that the court did not err in directing a verdict for the plaintiff, and that the judgment of the lower court must be affirmed.

Williams, C. J., and Dunn and Kane, JJ., concur.

Hays, J., dissents in part.

The Question of the Necessity of the Entry of a Judgment before it can be received in evidence in support of a proceeding taken under it was considered by the supreme court of Oklahoma and the opinion in the principal case reaffirmed in *Ex parte Stevenson*, 20 Okl. 549, 1 Okl. Cr. 127, 94 Pac. 1071. In support of its decision the court relied upon section 37 of *Freeman on Judgments*, though it seems to us that even the language quoted from that section indicates that our opinion has always been different from that thus announced by the

court of Oklahoma. We are there quoted as saying: "While the entry is not the judgment, its absence tends strongly to indicate that none exists." Such we still affirm, but in the principal case and the other case to which we refer we do not understand that any doubt existed respecting the rendition of the judgment relied upon. The point made and sustained was, that notwithstanding such rendition, writs issued and proceedings taken upon and in reliance on the judgment must fail, because no evidence could be received of the rendition of the judgment other than by its actual entry prior to the issuing of the writ or the taking of the proceeding. That we had long since reached a different conclusion appears in the section succeeding that cited by the court, wherein we used the following language: "In the very nature of things, the act must be perfect before its history can be so; and the imperfection or neglect of its history fails to modify or obliterate the act. That which the court performs judicially, or orders to be performed, is not to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity. It is, therefore, not indispensable to the validity of an execution and a sale made thereunder that the judgment should have been actually entered before the writ issued": Freeman on Judgments, sec. 38. This language is supported by the decision there cited, to wit: Los Angeles Co. Bank v. Raynor, 61 Cal. 145; and by Lowenstein v. Caruth, 59 Ark. 588, 28 S. W. 421; Ex parte Raye, 63 Cal. 491; Estate of Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567; Otto v. Long, 144 Cal. 144, 77 Pac. 885.

Considering the same question in another work we said: "If, however, a judgment is rendered, a writ of execution may issue before its formal entry: Graham v. Lynn, 4 B. Mon. 17, 39 Am. Dec. 493. An execution may be issued in advance of the actual entry of the judgment in two contingencies, namely, the judgment may be entered in its regular order, but, through press of business or from some other cause, not immediately after the rendition of the judgment, or for some reason the judgment entry may not be made in the regular course of business. In the first of these contingencies, as soon as the clerk proceeds to write up his records, the proceedings appear fair on their face, and by a decided weight of authority, the execution, if issued after the rendition of the judgment, cannot be avoided by showing that the judgment had not been in fact entered at the time of such issuing": Lowenstein v. Caruth, 59 Ark. 588, 28 S. W. 421; Los Angeles Co. Bank v. Raynor, 61 Cal. 145; Weigley v. Matson, 125 Ill. 64, 8 Am. St. Rep. 335, 16 N. E. 881.

Replevin Against Public Officers is the subject of a note to Lataillade v. Orena, 25 Am. St. Rep. 256. A ministerial officer cannot defend under process fair upon its face alone, where the object of the action to which he is defendant is, as in replevin, but to recover possession of the goods seized under the process; he must, in all such cases, in addition to the process, show by the production of a valid judgment that the court which issued it had authority to do so: Beach v. Botsford, 1 Doug. 199, 40 Am. Dec. 45. And when an officer attaches

property found in the possession of a stranger claiming title, in an action of replevin by such stranger the officer, to justify his possession, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued: *Williams v. Eikenberry*, 25 Neb. 721, 12 Am. St. Rep. 517.

ARDMORE NATIONAL BANK v. BRIGGS MACHINERY AND SUPPLY COMPANY.

[20 Okl. 427, 94 Pac. 533.]

THE RECEIVER of an Insolvent Corporation stands as the representative both of the creditors and the stockholders. He is not an agent or representative of the corporation exclusively, but is rather a trustee for both the creditors and stockholders. (By the editor.) (p. 754.)

RECEIVERS OF CORPORATIONS, Title of and to What Subject.—The receiver of an insolvent, nongoing corporation takes the property of the company for the creditors, subject to such equities, liens, or encumbrances, whether created by operation of law or by act of the corporation, which existed against the property at the time of his appointment. (p. 754.)

RECEIVER'S TITLE, When Vests.—The receiver's title and right to possession of the property of an insolvent, nongoing corporation vests from the date of the original order for the appointment, although the proceedings may not be perfected until a later date. The receiver's title and right to possession during the interval between such original order and the time of perfecting his appointment are superior to those of a judgment creditor who levies upon the property under his judgment during such interval. (p. 755.)

ELECTION OF REMEDIES.—Where a vendor, after the appointment of a receiver to take charge of the property and affairs of an insolvent, nongoing corporation, files its plea of intervention setting up all the facts in relation to certain reservation of title notes taken by the vendor for sales of machinery to the insolvent corporation, and further alleges that the reservation notes are liens on the property, and prays for their foreclosure, and also prays for general relief, this is not such an election as will preclude the intervener from afterward amending its plea of intervention and asserting title and right to possession of the property described in the reservation notes as against one who claims to have a lien thereon subsequent in time to the reservation notes, where such lien, if it attached to the property at all, came into existence after the property fell into the hands of the receiver, notwithstanding the reservation notes were not filed as chattel mortgages. (p. 757.)

DEEDS, Acknowledgment of, Interest of the Notary, When cannot be Proved to Show His Disqualification.—Where the certificate of the acknowledgment of a conveyance by a notary is fair on its face, no hidden interest of the officer can be proved to impeach its validity. (By the editor.) (p. 757.)

DEEDS, Acknowledgment of by a Corporation Before a Disqualified Officer.—The acknowledgment of a deed of trust, executed by a corporation grantor to secure payment of certain promissory notes, is a ministerial act. Where such an instrument is acknowledged before a notary public, who was at the time a director and treasurer of the grantor corporation, and also indebted for unpaid subscriptions

to its stock, which facts were known to the grantor, but there was nothing on the face of the instrument or acknowledgment indicating such relationship, the deed of trust was entitled to registration, and the registry thereof was notice to subsequent purchasers, encumbrancers or lienors. (pp. 757-761.)

(Syllabi by the court except when stated to be by the editor.)

Ledbetter & Bledsoe, for the appellant.

Stuart & Bell, for the appellees.

428 KANE, J. The appellees. Briggs Machinery and Supply Company, Collins & Dulaney, and Stilwell-Bierce & Smith-Vaile Company, who hereafter will be called the complainants, commenced the proceedings out of which this suit grows by filing their bill in equity alleging that the Tishomingo Oil and Cotton Company, which will hereafter be called the oil company, was indebted to them severally as follows: To the Briggs Machinery and Supply Company, \$7,864.64; to Collins & Dulaney, the sum of \$4,580.88; to the Stilwell-Bierce & Smith-Vaile Company, in the sum of \$5,546.65. All of these sums were evidenced by promissory notes. Contemporaneously with the dates of said notes, and for the purpose of securing their payment, the oil company made, executed and delivered its certain deed of trust to J. C. Weaver, as trustee, whereby it conveyed to said trustee all the physical properties of said oil company situated at Tishomingo, Indian Territory, the same being particularly described in the complaint and said deed of trust exhibited therewith. **429** It was further alleged that the oil company had become insolvent and unable to secure funds to operate its business, and that it was a nongoing concern, and further, that said manufacturing establishment consists of valuable and costly machinery, and the same was liable to waste, and that it was being greatly damaged for the want of care. The complaint concludes with the following prayer: "First, that the court do forthwith appoint a receiver to take charge of the property of said respondent Tishomingo Oil and Cotton Company, and to care for the same, and to hold the same in his custody and possession pending further order of the court; and second, for foreclosure of their trust deed and lien against said property, and that said lien be set up and declared to be a first lien upon the property; and third, that the court will order the sale of said property and estate for the purpose of paying the debts and satisfying the lien of the complainants; fourth, that complainants may have final judgment and a decree of foreclosure and sale in such terms and at such times

as shall best protect their rights and the rights of any of their creditors who may intervene herein; and fifth, that the court do fix a time within which any persons urging claims, debts, or liens against said respondent corporation shall file their interventions herein. Complainants further pray that due and sufficient process may be issued and served with right form of law upon the respondent Tishomingo Oil and Cotton Company, commanding it to be and appear, etc., and all other and further relief, both general and special, to which it may be entitled, complainants pray."

After the complaint was filed a great many of the creditors of the oil company, probably all of them, filed their pleas of intervention, setting up their respective claims and praying for relief. The court below took jurisdiction of the entire matter, and rendered to each creditor the relief the court found he was entitled to, disposed of all the assets of the oil company, and practically wound up its affairs. On the same day the complaint was filed Judge Townsend appointed Kirby Purdom, of Tishomingo, receiver of the oil company, who duly qualified as such receiver. On the 3d of November following Judge Townsend removed Kirby Purdom ⁴³⁰ as receiver, and on the same day appointed B. R. Brundage, who likewise qualified as required by law and took charge of all the assets of the defendant company.

On the twenty-fourth day of November, 1903, the Continental Gin Company filed its original plea of intervention, alleging that the Tishomingo Oil and Cotton Company was indebted to the intervener on certain promissory notes; that the notes were given for the purchase price of machinery purchased by the oil company from the gin company; and that it was recited in said notes that the title, possession, and ownership to said properties do not pass from the intervener until the notes and interest are paid.

There were further allegations to the effect that the oil company was indebted to it upon four promissory notes, all payable to its order at Birmingham, Alabama, or Dallas, Texas, and aggregated the sum of \$4,500, exclusive of interest and attorney's fees, said notes being described specifically as to date and maturity; that all the notes were past due and only \$50 had been paid thereon; that two of the notes, dated January 1, 1902, were executed by the defendant for 6-100 Continental linter feeders and condensers, Inv. No. Br. 559, D. S. P. 239; and that it was recited in said notes that the title, possession and ownership of the property should not pass from the intervener, Continental Gin Company, until the

notes were paid in full, and that the two notes dated July 31, 1902, were executed for one 3-70 Saw Munger Sliding Idler Gin outfit complete, with engine, boiler, pump, feeder, and connections, and it was recited in said notes that the title, possession and ownership should not pass from the intervener, the Continental Gin Company, until said notes were paid in full. Copies of the four notes were attached to the plea of intervention. It was also alleged that in all four of the notes it was provided that the intervener should have full power to declare the same due, and take possession of the property at any time it deemed itself insecure, even before the maturity of the notes, and that the intervener deemed itself insecure, and had exercised the option given in the notes, which matured ⁴³¹ January 1, 1904, and it declared the same due and payable; that it had become necessary for the collection of said notes and the preservation of the intervener's right in said property for suit to be brought; and that thereby the defendant became liable to the intervener in the sum of ten per cent of the amount of the notes for attorneys' fees, and that the intervener had sued on the notes and employed counsel for that purpose. The prayer for relief reads as follows: "Now, this intervener asks that it be given judgment against respondents for the amount due on said notes executed by respondents, and that also an order be entered herein establishing an indebtedness against the property described in said two mortgages executed by said J. D. Ray, who is hereby prayed to be made a party hereto, for the amount still due, including principal, interest, and attorney's fees, on the four notes thereby secured, and that this intervener's lien and claim upon the property described in said four notes executed by respondent, and said mortgage executed by said J. D. Ray, to be superior to the lien and claim of all other persons, firms and corporations upon said property. And intervener further prays that it have final judgment and a decree of foreclosure and sale in such terms and at such times as shall best protect the rights of this intervener and all other creditors holding liens upon said property above described. And this intervener further prays for all other general and special relief to which it may be entitled in the premises in any way."

There is no controversy in relation to the four notes executed to J. D. Ray or the mortgages given to secure their payment above mentioned, so they need not be taken into account in this case.

The gin company also joined the complainants in a motion which was presented to Judge Townsend, wherein it was alleged that: "Complainants in said original bill and intervener, the Continental Gin Company, being the movants herein, are the only creditors holding liens upon the said physical effects, and that any deterioration in the value of said property and any expense incurred in keeping the same will occasion loss and charges that will diminish ⁴³² their security; that they hold valid first liens upon said physical properties, and that they have brought their appropriate bill to foreclose the same; and that said security is likely to be, and will most certainly be, deteriorated and diminished in value if the same is held in charge of the receiver until the end of the litigation. Movants further show the court that it is now a seasonable time to sell said physical property, and that they are advised and believe that the same can be sold to better advantage within the next thirty days than at a later date, and that such sale will prevent the diminution of their security by waste or expenses of keeping. Wherefore movants pray that the court grant an order directing the sale of the physical property of respondent (defendant) as set out in complainants' original bill, and appoint a commissioner to make said sale in accordance with the deed of trust of the complainants, and all the liens and mortgages of the intervener set out in extenso in complainant's original bill, and that the court do fix an upset price for which the property may be sold, and designate the time and place of sale, and for such other and further orders as in the discretion of the court may be necessary or proper to fully protect the movant's rights and equities herein."

On the second day of March, 1904, the gin company filed its second amended plea of intervention, stating the facts as to the reservation notes practically as in its former plea, but stating that without in any way waiving its rights under its reservation of title notes, it was willing to let the court foreclose them as chattel mortgages if it would inure to the benefit of all the creditors of the oil company. The prayer for relief in relation to the reservation notes was as follows:

"Now, this intervener asks that an order be entered herein establishing an indebtedness against the property described in said two mortgages executed by J. D. Ray, who is hereby prayed to be made a party hereto, for the full amount still due, including principal, interest and attorney's fees, on the four notes thereby secured, and if the court should deem it best and equitable to treat the conditional sale evidenced by said four notes as a mortgage, to give this intervener judg-

ment for the amount due on said four notes executed by respondent, including principal and interest, together with a foreclosure of the lien securing said four notes on the property therein described, and if the court should deem it best ⁴³³ not to treat said conditional sale as a mortgage, that this intervener be given judgment establishing its ownership to said property described in said four notes, and ordering the receiver herein to deliver possession of the same to this intervener, and that this intervener's lien upon the property described in said mortgage executed by said J. D. Ray be adjudged superior to the lien and claims of all other persons, firms and corporations upon said property described in said mortgages, and that no other person, firm or corporation be allowed to acquire any right, title, interest, or claim in and to, or lien upon, said property described in said notes executed by respondents until this intervener's claims upon said property and rights to said property shall have been fully protected. And this intervener further prays that it have final judgment, and a decree of foreclosure and sale as to the property described in said mortgages executed by J. D. Ray, and a decree protecting this intervener's rights in and to said property described in said four notes executed by respondent, and that this court enter such orders as will best protect the rights of this intervener and of all other creditors holding claims to or liens upon said property above mentioned. This intervener prays for all other relief, both general and special, to which he may be entitled to in the premises in any way."

On the nineteenth day of February, 1904, the appellant, the Ardmore National Bank, filed its original plea of intervention, claiming a lien on the property in controversy under and by virtue of a judgment against the oil company, and execution issued thereon, and liens established by equitable proceedings in the nature of bills of discovery. On the thirtieth day of March it filed its amended plea of intervention. The judgment of the Ardmore National Bank against the oil company on which it bases its right to a lien was rendered on the thirty-first day of October, 1903, and execution was issued thereon the second day of February, 1904, and returned unsatisfied.

There is no dispute between the parties to this suit in regard to the amounts due from the oil company to the various creditors. Nor is there any dispute as to the execution and delivery of the instruments under which the appellees claim liens, nor that they were prior in time to the judgment and proceedings ⁴³⁴ under which the appellant claims a prior

lien. The appellant contends: First: That the gin company, by its original plea of intervention, and by joining the complainants in their motion to sell the property, had waived its rights under the reservation of title notes; that the gin company treated the notes as chattel mortgages, and attempted to foreclose them as a lien upon the property by its original plea of intervention, and the title and ownership thereto became thereby divested out of the gin company and passed to the oil company; and that the gin company having treated the reservation notes as chattel mortgages in its original plea, it was estopped from reasserting title by amended plea, and the notes being unrecorded, they were not available as prior liens against the liens asserted by the appellant. Second: That the deed of trust attempted to be foreclosed by the complainants was illegal and void, because it was never legally acknowledged and recorded; that the notary who took the acknowledgment was disqualified and incompetent to take such acknowledgment, for the reason that he was beneficially and financially interested in said deed; that at the time he took the acknowledgment he was a stockholder and a director and treasurer of the oil company, the grantor, and owed a considerable sum of money on unpaid stock subscriptions. The foregoing were substantially the issues presented below, and the trial resulted in a judgment in favor of the complainants and the intervener, the gin company, and against the appellant, the Ardmore National Bank.

The general jurisdiction of equity over corporate bodies does not extend to the power of dissolving corporations or winding up their affairs and sequestrating the corporate property and effects, in the absence of express statutory authority. But in most of the states of this country the general jurisdiction of courts of equity has been enlarged to the extent of authorizing the appointment of receivers in behalf of creditors and shareholders. These statutes greatly enlarge the powers of the courts of equity over property and management of insolvent, nongoing corporations. ⁴³⁵ Section 3488 of the Indian Territory Annotated Statutes of 1899, the statute in force in the Indian Territory when this proceeding was commenced, provides as follows: "Whenever, in any case, a receiver shall be appointed for a corporation or the trustees thereof, or any copartnership or joint-stock company, and the order or decree of the court, judge or chancellor shall be that the lands, tenements, goods, chattels, funds, assets, moneys, credits, choses in action, rights and interests of every kind,

and nature, either in law or equity, or any part thereof belonging to the same, shall be placed in the hands of such receiver, he shall from thenceforward, until the further order or decree of the court, judge or chancellor, have full possession, custody and control thereof, and shall be vested with the title, so far as it shall be necessary to collect debts, preserve the assets and property for the benefit of creditors and all persons interested, and may and shall bring and prosecute and defend all suits in his own name that may be necessary for that purpose."

It has been held by the supreme court of Wisconsin, in *Atchison v. Davidson*, 2 Pinn. 48, under a statute similar to the above, that receivers of corporations are appointed for the benefit of the creditors, with power and authority to collect and pay over to them the assets. The choses in action of the corporation are in the possession of the receiver for the creditors, and are to all intents and purposes the property of the creditors. The receiver of an insolvent corporation stands as the representative both of the creditors and the corporation and of its shareholders. He is not therefore the agent or representative of the corporation exclusively, but is regarded rather as a trustee for both creditors and shareholders: *Gillet v. Moody*, 3 N. Y. 479; *Talmage v. Pell*, 7 N. Y. 328; *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202; *Alexander v. Relfe*, 74 Mo. 495; *Angell v. Silsbury*, 19 How. Pr. (N. Y.) 48. The receiver of an insolvent, nongoing corporation takes the property of the company for the creditors, subject to such equities, liens or encumbrances, whether created by operation of law or by act of the corporation, which existed against the property at the time of his appointment.

It is admitted by all the parties to this suit that at the time 436 the receiver was appointed the oil company was an insolvent, nongoing corporation, and that the property described in the reservation notes was the property of the gin company. The appellant concedes this, but insists that after the receiver was appointed the gin company lost its place of vantage by treating its reservation notes as chattel mortgages, and not complying with the registration law governing such instruments. Under the laws of Arkansas an unrecorded chattel mortgage is good between the parties, and, if we are right on the proposition that the possession of the receiver is the possession of the creditors, it must follow that, even treating these reservation notes as chattel mortgages after the property came into the hands of the receiver, would avail the appellant nothing.

"A chattel mortgage, though not filed for record, is a valid security between the parties; and when, by virtue of it, the mortgagee takes possession of the mortgaged property after condition broken, this is an appropriation of it to the debt secured, and his title is good against a creditor of the mortgagor who subsequently attaches the property in his possession": *Applewhite v. Harrell Mill Co.*, 49 Ark. 279, 5 S. W. 292.

The receiver's title and right to possession of the property of an insolvent, nongoing corporation vests from the date of the original order for the appointment, although the proceedings may not be perfected until a later date. The receiver's title and right to possession during the interval between such original order and the time of perfecting his appointment are superior to those of a judgment creditor who levies upon the property under his judgment during such interval: *High on Receivers*, sec. 136; *Rutter v. Tallis*, 5 Sand. (N. Y.) 610; *Steele v. Sturges*, 5 Abb. Pr. 442. We do not believe, however, that the acts of the gin company amounted to a waiver of any of its rights under its reservation notes. It was within the power of the court to grant the gin company the relief it did under its original plea of intervention. In both pleas it stated the facts in substantially the same language, showing to the court the exact circumstances surrounding the transaction. It ⁴³⁷ is true that in the original plea the gin company asked to have its lien under its reservation notes foreclosed. But it also asked for such other and further orders as in the discretion of the court may be necessary and proper to protect its rights and equities, which, in effect, amounted to a prayer of general relief. In its amended plea it expressed a willingness to have the property covered by its notes sold and the notes treated as chattel mortgages, if the court found that it would be to the advantage of all the creditors to do so, and closes its plea with a prayer for general relief. Under a prayer for general relief the court may grant any relief that the facts stated will warrant, although such relief be inconsistent with the special relief prayed for: *Cook v. Bronaugh*, 13 Ark. 183; *Kelly's Heirs v. McGuire*, 15 Ark. 555; *Shields v. Trammell*, 19 Ark. 51; *Chaffe & Bro. v. Oliver*, 39 Ark. 531. In *Cook v. Bronaugh*, 13 Ark. 183, the supreme court of Arkansas says: "Where there is a prayer for specific relief, and also a general prayer for relief, if the state of case as presented by the bill should not be sustained in evidence, or the court should, upon principles of equity, refuse the specific relief, it may, notwithstanding, give

to the complainant under his general prayer any relief warranted by the facts as set forth in his bill."

From an examination of the record it is quite obvious why the gin company and the other lienholders, including the appellant herein, were willing to have the property sold in bulk by the receiver. The following is taken from an agreed statement of facts signed by the attorneys for the complainants, the attorneys for the gin company, and the attorneys for the Ardmore National Bank (this part of the agreement has relation only to the property in dispute between the gin company and the appellant): "Ninth. It is agreed that the property described in said four notes executed by the defendant to the Continental Gin Company was used in the proper operation of an oilmill, and that it is usual and customary for an oilmill to own gins in connection with their business, and that the property of the defendant, taken as a whole, was worth more than would have been the aggregate value of the different portions of said property taken separately. Tenth. ⁴³⁸ It is agreed that all property described in the complainants' amended complaint and in said plea of intervention of the Continental Gin Company has been sold in this case under an order of the court, and that it was purchased by Sam Davidson, and that said property brought more at said sale than it would have brought had the property described in said two notes for \$1,500 each been sold separately, and had the property described in said two \$750 notes been sold separately, and had the other property described in complainant's bill been sold separately, and that it was for the benefit of said defendant that the property described in complainant's complaint and mortgage and in said second amended plea of intervention of Continental Gin Company was sold together and as a whole. . . . Fourteenth. It is agreed that in the sale to Sam Davidson above mentioned the property described in said two notes executed by defendant to the Continental Gin Company for principal sum of \$1,500 each brought \$3,500, and the property described in said two notes for principal sum of \$750 each brought \$2,000, and that in the event the Ardmore National Bank shall prevail in this suit, said sums may be taken as a basis in determining the priority of the liens and rights thereto."

Under the circumstances disclosed by the agreed statement of facts it was natural that all parties who hoped to establish liens against the property should insist on it all being sold together. It cannot be said that the gin company, by agreeing to this arrangement, which would have the effect of being to

the advantage of the other creditors, would work a forfeiture of its own rights. Where a vendor, after the appointment of a receiver to take charge of the property and affairs of an insolvent, nongoing corporation, files its pleas of intervention setting up all the facts in relation to certain reservation of title notes taken by the vendor or sales of machinery to the insolvent corporation, and further alleges that the reservation notes are liens on the property, and prays for their foreclosure, and also prays for general relief, this is not such an election as will preclude the intervener from afterward amending its plea of intervention, and asserting title and right to possession of the property described in the reservation notes as against one who claims to have a lien thereon subsequent in time to the reservation notes, where such lien, if it attached to the property at all, ⁴³⁹ came into existence after the property fell into the hands of the receiver, notwithstanding the reservation notes were not filed as chattel mortgages.

On the question of the illegality of the acknowledgment to the deed of trust we are of the opinion that the acknowledgment of a deed of trust executed by a corporation grantor to secure payment of certain promissory notes is a ministerial act. Where such an instrument is acknowledged before a notary public, who was at the time a director and treasurer of the grantor corporation and also indebted for unpaid subscriptions to its stock, which facts were known to the grantor, but there was nothing on the face of the instrument or acknowledgment indicating such relationship, the deed of trust was entitled to registration, and the registry thereof was notice to subsequent purchasers, encumbrancers, or lienors.

The correct rule is laid down in *National Bank of Fredericksburg v. Conway*, 1 Hughes. 37, Fed. Cas. No. 10,037, where it is held that, where the acknowledgment is regular and fair on its face, no hidden interest of the notary can be proved to impeach its validity. It is against the policy of recording acts to hold an acknowledgment void because of the secret interest of an officer taking and certifying it. The effect should be to prevent rather than allow hidden defects in the evidence of public records.

The same question was involved in *Morrow v. Cole*, 58 N. J. Eq. 203, 42 Atl. 673. In this case (*Morrow v. Cole*) the chancellor in his opinion says: "It is held in a number of cases, that, if it appear on the face of the deed that the officer is either a party thereto, or a cestui que trust named therein, the acknowledgment is void and the record not notice: *Wilson v. Traer*, 20 Iowa, 231; *Bowden v. Parrish*, 86 Va. 67,

19 Am. St. Rep. 873, 9 S. E. 616; *Wasson v. Connor*, 54 Miss. 351. Some dicta go further, and assert that the interest of the acknowledging officer, whether it appear upon the face of the deed or not, will render the acknowledgment a nullity: *Groesbeck v. Seeley*, 13 Mich. 329; *Wills v. Wood*, 28 Kan. 400. These dicta cannot be supported. Aside from the case of a married woman, as to which it is not necessary to express an opinion, it appears to me very plain that if the interest does not appear on the face of the deed the record is notice.

440 "The complainant's contention is that the officer who takes an acknowledgment performs a judicial act, and that as no man can be a judge in his own case, such act, if done by one interested, is void. This contention is unsound. The act is no more judicial than ministerial. A judicial act ordinarily has reference to some controversy. There is nothing suggestive of controversy in an acknowledgment. It is said that the officer must be satisfied that the person who appears before him is the grantor, and that his determination that he is is a judicial act. But the duty of identifying people, of being satisfied that they are what they claim to be, is discharged by all sorts of administrative officers—for example, by a treasurer who pays out money—and not only by officials, but at times by every member of the community. It may as well be predicated of the act, then, that it is ministerial as that it is judicial. Nothing else that the officer does has even the semblance of judicial action. He makes known the contents of the paper. He hears the grantor say that he signs it as his voluntary act and deed, and then he makes a written certificate of the facts.

"If the act of the officer is not judicial, the doing of it is not adjudging one's own case. If the grantor takes his own acknowledgment, it is of no effect, because it is obviously contrary to the provisions of our statute on the subject. If the grantee takes the grantor's acknowledgment, it cannot be said, perhaps, that any express provision of the statute is violated, but the act nevertheless is void, not because we have here an instance of a judge deciding his own case, but because the same public policy which prevents an interested judge from acting, will (with certain reservations) prevent an interested master or commissioner. The distinction is important in this respect. The decisions of judges should always be above suspicion. To insure this result the judges themselves should be absolutely free from the bias of self-interest, and the rule of public policy should be rigidly en-

forced. To apply it as rigidly to the case of commissioners, whose public functions are so different would work little benefit, and would lead to results antagonistic to the policy of the registry laws.

"It may be safely asserted that it would be much more injurious to public interests to hold that extraneous proof of an undisclosed or secret interest (almost always slight) would avoid acknowledgments, and thus render the record of conveyances unreliable, than it would be to hold the contrary. Says Chief Justice Waite in *National Bank of Fredericksburg v. Conway*, 1 Hughes. 37, Fed. Cas. No. 10,037: 441 'It is against the policy of the recording acts to hold an acknowledgment void because of the secret interest of an officer taking and certifying it. The effort should be to prevent rather than allow hidden defects in the evidence of public records.' Accordingly he held the acknowledgment under review in that case to be a ministerial act and the record notice. Such was also the decision in *Lynch v. Livingston*, 6 N. Y. 422, and *Kinball v. Johnson*, 14 Wis. 674. Both reason and authority concur in declaring where the interest of the acknowledging officer does not appear on the face of the deed that the acknowledgment is not void and that the registry of the deed is notice.

"In *Wright v. Wells*, 12 N. J. L. 131, *Marsh v. Mitchell*, 26 N. J. Eq. 497, and *Homeopathic Mutual Life Ins. Co. v. Marshall*, 32 N. J. Eq. 103, the question related to the effect to be given to the declarations contained in the acknowledgment of a married woman—how far they were disputable. In the last of these cases Chancellor Runyon, dissenting in a measure from the view expressed in the previous cases, was of opinion that the act of the officer in ascertaining whether the married woman executed the conveyance of her own free will, without threats and coercion, was a judicial act. Perhaps, with more accuracy it might be designated quasi judicial: *Hitz v. Jenks*, 123 U. S. 302, 8 Sup. Ct. Rep. 143. 31 L. ed. 156. Whether judicial or not, it is manifest that these decisions do not touch the present case. They do not deal with the question of notice. I think the registry of the mortgage was notice, and that therefore it is a lien prior to the judgment."

Another case (*Read v. Toledo Loan Co.*, 68 Ohio St. 280, 96 Am. St. Rep. 663, 67 N. E. 729, 62 L. R. A. 790) to the same effect is probably more in point. In the Ohio case the mortgage was witnessed by two stockholders of the corporation grantee, and acknowledged before a notary public, also

a stockholder of the grantee corporation. The supreme court of Ohio says: "In the case at bar it is admitted that Cary D. Lindsay, the assignor, at the time he acknowledged this mortgage knew of the relation the notary, Grant Williams, sustained to the Toledo Loan Company, and knew that he was then the holder of two shares of stock in said company; and there is in this case no imputation or charge of improper conduct or bad faith or undue advantage arising out of such interest or relationship, nor is there any claim but ⁴¹² that the acknowledgment was freely and fairly made, in the honest belief that it was in all respects authorized and sufficient. To hold, then, under such circumstances, that the mortgage here in controversy was invalid, unless impelled thereto by statutory requirement or the plainest considerations of public policy, would, it seems to us, be a subversion of justice, and would be contrary to the plainest principles of equity and fair dealing."

In the case of *Cooper v. Hamilton P. Building etc. Assn.*, 97 Tenn. 285, 56 Am. St. Rep. 795, 37 S. W. 12, 33 L. R. A. 338, the court says: "There is quite a conflict of authority and diversity of holding in the different states upon the question of whether the act of taking an acknowledgment to a deed or other instrument is a ministerial or judicial act. It has been held to be a ministerial act in the United States courts, and in the courts of Arkansas, Georgia, Illinois, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, New York, Maryland, and Ohio. In these states it is held that an officer may take acknowledgment though related or interested, or a party."

In *Penn v. Garvin*, 56 Ark. 511, 20 S. W. 410, the supreme court of Arkansas holds that the formality of acknowledgments is designed for the protection of grantors, and that relationship to the grantor on the part of the officer taking the acknowledgment of the grantor does not invalidate the acknowledgment.

The case of *Leonhard v. Flood*, 68 Ark. 162, 56 S. W. 781, is quite distinguishable from the case at bar. In the *Flood* case the notary taking the acknowledgment was a surety on the note secured by the mortgage he acknowledged. In such a case the interest of the notary is proximate and obvious, whereas in the case at bar the interest of the notary, if interest he had, was remote and speculative. Besides, the *Flood* case, as authority on this point, is considerably weakened by a strong dissenting opinion by Mr. Chief Justice Bunn, who, after a review of the authorities, says: "The only case I

have been able to find which definitely carries the rule beyond the parties to the instrument is *Wilson v. Traer*, 20 Iowa, 231, and that has little or no support, even from the authorities cited."

443 Finding no substantial error in the proceedings of the court below. its judgment is affirmed.

Dunn, Hayes and Turner, JJ., concur.

Williams, C. J., not sitting.

The Power of Receivers to create liens is the subject of a note to *International Trust Co. v. United Coal Co.*, 83 Am. St. Rep. 72. The relation of receivers to pre-existing liens is the subject of a note to *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 352. Receivers' certificates are discussed in the note to *McCarthy v. Crawford*, 128 Am. St. Rep. 102.

Grounds for the Appointment of a Receiver of a corporation are discussed in the note to *Hall v. Nieukirk*, 118 Am. St. Rep. 198. And the question of when it is proper to appoint a receiver is discussed generally in the note to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 29.

The Effect of an Acknowledgment of an Instrument before a notary who is a stockholder or officer in a corporation that is a party to the obligation is discussed in *First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925; *Read v. Toledo Loan Co.*, 68 Ohio St. 280, 96 Am. St. Rep. 663; *Ogden Building etc. Assn. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330.

Certificates of Acknowledgment are discussed as to their conclusiveness in the note to *American Freehold etc. Co. v. Thornton*, 54 Am. St. Rep. 150. The interest of a notary which will disqualify him from taking an acknowledgment is discussed in the notes to *Cooper v. Hamilton*, 56 Am. St. Rep. 798; *Havemeyer v. Dahn*, 58 Am. St. Rep. 707. And the defects in certificates of acknowledgment which are fatal are discussed in the note to *Trerise v. Bottego*, 108 Am. St. Rep. 525.

SULLIVAN v. MERCANTILE TOWN MUTUAL INSURANCE COMPANY.

[20 Okl. 460, 94 Pac. 676.]

INSURANCE—Waiver by Agent of the Conditions of a Policy. In an action arising on an insurance policy issued in the Indian Territory and pending in the United States court of appeals of the Indian Territory at the time of the admission of the state into the Union, an insurance company cannot be deemed to have waived a condition in a policy of fire insurance to the effect that the entire policy, and each and every part thereof, shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage, because the agent who countersigned and delivered said policy had notice or knowledge at that time of the existence of a mortgage on the property, where such policy provides that no offi-

cer, agent, or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto, and as to such provisions or conditions no officer, agent or representative shall have power or be deemed or held to have waived such provision or condition unless such waiver, if any, be written upon or attached thereto. (p. 766.)

INSURANCE—Waiver of Forfeiture Arising from Encumbrance.—Where an insurance policy contains the provision aforesaid, an insurance company issuing the same cannot be deemed to have waived a condition in said policy rendering it void in case the subject of insurance be personal property and be or become encumbered by mortgage, because the agent who countersigned and delivered said policy, with notice of the existence of a mortgage upon a portion of said property, collected a portion of the premium thereon after the property covered by said policy had been destroyed by fire, or because an adjuster of such company, with knowledge of the existence of such mortgage, stated to the insured that the claim would be adjusted. (p. 767.)

INSURANCE—Forfeiture Clause, When Divisible.—Under a stipulation that the entire policy, and each and every part thereof, shall become void if the subject of insurance be personalty, and be or become encumbered, a forfeiture cannot be claimed because one item of personal property insured by said policy, separately set out and separately valued therein, was encumbered by mortgage, where the subject of insurance was partly real and partly personal property. (p. 772.)

(Syllabi by the court.)

Cruce, Cruce & Bleakmore, for the appellant.

Barclay & Fauntleroy and E. A. Walker, for the appellee.

⁴⁶¹ **HAYES, J.** This is an action brought by C. F. Sullivan, appellant, who for convenience will hereinafter be called plaintiff, against the Mercantile Town Mutual Insurance Company, who for convenience will hereinafter be called defendant, upon a policy of fire insurance executed by the defendant on the second day of November, 1903, for a consideration and premium in the sum of \$25.20, by which policy the defendant undertook to insure the plaintiff's one-story plank-roof boxed shed used for storage, size twenty-four by thirty, in the sum of \$150, and his one J. L. Case threshing-machine in the sum of \$500, and his one Advance threshing-machine in the sum of \$250. On the twentieth day of November, 1903, all of said property insured by said policy was destroyed by fire.

Defendant filed its answer to the plaintiff's amended complaint, and attached as an exhibit thereto a copy of the policy issued by it to the plaintiff. One of the conditions of said policy is: "This entire policy, and each and every part thereof, unless otherwise provided by agreement indorsed

hereon, or added hereto, shall be void if the insured now has or hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, . . . or if the hazard be increased by any means within the control or knowledge of the insured, . . . or if the interest of the insured be other than unconditional and sole ownership, or if the subject ⁴⁶² of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage."

And said policy contains this further stipulation: "This policy is made and accepted, subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power to be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Defendant alleges in its answer that plaintiff, before the twentieth day of November, 1903, to wit, on the second day of November, 1903, made, executed and delivered to the City National Bank of Ardmore a chattel mortgage to secure the payment of \$300 upon a portion of the property which is mentioned in and covered by said contract and policy of insurance; that said chattel mortgage continued to be a mortgage, lien and encumbrance upon said property up to and at the time of said fire; and that by reason of said facts said policy at the time of said fire was void. Evidence was introduced by plaintiff in support of his cause of action, and the defendant moved the court to instruct the jury to return a verdict in favor of the defendant, which motion was by the court sustained.

The plaintiff thereupon took the case by writ of error to the United States court of appeals of the Indian Territory. Plaintiff makes the following assignments of error:

"First. The court erred in charging the jury to return a verdict for the defendant, and refusing to submit the question of facts, as raised by the testimony, to the jury. Sec-

ond. Because ⁴⁶³ of the error of the court in holding that the mortgage given upon the J. I. Case threshing-machine invalidated the insurance upon the building and the Advance threshing-machine, neither of which was under mortgage, and both of which items were insured separate and distinct from the J. I. Case machine. Third. Because of the error of the court in holding that the defendant company had not waived the provisions of said policy in accepting and retaining the premium upon the policy after it was apprised of the mortgage that existed upon the J. I. Case threshing-machine. Fourth. Because the court erred in refusing to allow the witness Sullivan to answer the question as to whether or not the agent who wrote the policy and the defendant company knew at the time said policy was written and delivered that said J. I. Case threshing-machine was under mortgage, which said questions were as follows: 'Q. Do you know whether the agent knew at the time? Mr. Walker: Objected to. (Objection sustained.) Q. Do you know whether or not defendant company knew at the time said policy was written that the property was mortgaged? Mr. Walker: Objected to. (Objection sustained.)' Fifth. Because the court erred in refusing to allow the witness Sullivan to testify as to what he told the agent of the company and the adjuster sent there to adjust the loss as to the mortgage upon this property and the lien existing thereon, and refused to let said witness testify after the adjuster of said mortgage had adjusted the loss, promised to pay same, and delivered the premium for said policy. Sixth. Because the court erred in refusing to let the witness Sullivan testify as to whether or not he paid the premium upon said policy after the loss upon the faith and representation of the adjuster that said loss would be paid, and in holding that said testimony was immaterial, and in holding that the only way the company could waive the forfeiture of said policy was by indorsing the same upon the policy in writing, and that, too, notwithstanding the waiver set up and relied upon, if made at all, was made after the loss had occurred. Seventh. Because of the error of the court in holding, and so stating in the presence of the jury, that the testimony of J. W. Kemp, the agent of the company, did not prove anything that was material or immaterial, and holding that it did not have anything to do with any waiver of any conditions of the policy."

By express terms of the policy it is provided that no officer, agent or other representative of the company shall have

⁴⁶⁴ power to waive any provision or condition of the policy except such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto, and that as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provision or condition unless such waiver, if any, shall be written upon or attached thereto. The effect of this provision in fire insurance policies has been repeatedly passed upon by the courts. Many of the courts have held that as to such restrictions upon the power of the agent to waive any condition unless done in a particular manner, inserted in the contract, cannot be deemed to apply to those conditions which relate to the inception of the contract, where it appears that the agent has delivered the policy and received the premium, with full knowledge of the actual situation: *Wood v. American Fire Ins. Co. of Philadelphia*, 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; *Continental Fire Ins. Co. v. Brooks*, 131 Ala. 614, 30 South. 876; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 67 Am. St. Rep. 900, 44 S. W. 464, 39 L. R. A. 789; *Robbins v. Springfield Fire & Marine Ins. Co.*, 149 N. Y. 447, 44 N. E. 159.

A different rule, however, was announced by the supreme court of the United States in the case of *Northern Assur. Co. v. Grand View Building Assn.*, 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. ed. 213. The court in that case held that such condition in the policy could not be waived by any officer or agent of the company except in the manner provided in the policy, and that knowledge of the existence of the forfeiture of said policy by reason of the violation of any condition thereof on the part of the agent of the insurance company at the time he delivered the policy and received the premium did not operate as a waiver of the conditions of said policy, or estop the company from setting up such forfeiture as a defense against an action upon the policy; and further held that oral testimony was not admissible to show knowledge of the agent of the company of such facts existing in violation of the conditions of said policy at ⁴⁶⁵ the time of the execution and delivery of the same. This rule laid down by the supreme court of the United States in *Northern Assur. Co. v. Grand View Building Assn.*, 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. ed. 213, was a controlling decision upon the trial court in the case at bar; and, while we do not wish to be understood as saying that it is our opinion that the doctrine announced in that case is in harmony with the weight of authorities upon this question,

or that it is supported by the better reasoning, yet on account of the fact that the rule announced in said case was the law controlling the courts in the Indian Territory at the time of the trial of the case at bar, we are constrained to follow in this case the rule announced therein, and hold that the trial court did not err in refusing to permit the introduction of oral testimony to show the knowledge of the agent of the company of the existence of said mortgage at the time of the execution and delivery of the policy, and that said court did not err in holding that the forfeiture of said policy, if any had occurred, was not waived, and that the defendant company was not estopped from pleading the same as a defense by reason of the fact that the agent of the company who countersigned and delivered said policy had knowledge at the time of the existence of said mortgage. In applying the rule of law adopted by the supreme court of the United States in said case to the case at bar, and in following the same, we do not wish to be understood as laying down a rule by which this court shall be governed in the future in passing upon this same question arising in cases originating since the admission of the state of Oklahoma into the Union.

Plaintiff's attorney offered to prove by plaintiff that after the property insured by the policy had been destroyed by fire the agent who countersigned and delivered the policy to plaintiff and an adjuster sent by the company to adjust the loss visited the plaintiff, and that the agent of said company at that time, after having knowledge of the existence of said mortgage, collected a portion of the premium on said policy, and that the adjuster, with knowledge of the existence of said mortgage, told the plaintiff that ⁴⁶⁶ the loss would be adjusted, and that therefore the company waived the condition of said policy that the same should be void if the subject of insurance be personal property and be or become encumbered by mortgage. Defendant objected to the introduction of this testimony, and the objection was sustained by the court, and this action of the court is assigned as error in plaintiff's fifth and sixth assignments of error. Where the power of the agents or officers of a company is limited by the terms and provisions of the policy, and these limitations are brought to the knowledge of the insured, the courts have generally held that such limitations on the power of agents with respect to waivers of conditions of the policy made subsequent to the execution and delivery of the policy are valid: *Northern Assur. Co. v. Grand View Building Assn.*, 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. ed. 213; *Lippman v.*

Aetna Ins. Co., 108 Ga. 391, 75 Am. St. Rep. 62, 33 S. E. 897; O'Leary v. Merchants' & Bankers' Mutual Ins. Co., 100 Iowa, 173, 62 Am. St. Rep. 555, 66 N. W. 175, 69 N. W. 420; Cleaver v. Traders' Ins. Co., 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; Cook v. Standard Life & Accident Ins. Co., 84 Mich. 12, 47 N. W. 568; Jander v. Mutual Life Ins. Co., 16 Ohio C. C. 536.

In this policy it will be borne in mind that the power of agents or officers or other representatives of the company to waive any provision or condition of the policy is limited by the terms of the policy to the waiving of only such provisions and conditions of the policy as by the terms of the policy may be subject of agreement indorsed thereon, and that said agents and officers of the company are limited in making such waivers to making them only in the manner that is specified in the policy, which is by written indorsement upon the policy, or in writing attached thereto. Plaintiff accepted this policy containing these terms and conditions, and by doing so he became bound by them under the law applicable to his rights thereunder; and, while a great many of the state courts have held that such a restriction in the policy upon the power of the agent has no reference to conditions in a policy avoiding it at its inception, the decided weight of authority ⁴⁶⁷ is that such limitations upon the power of agents with respect to waivers are valid and binding on the insured as to actions of the agent subsequent to the inception of the contract, and that the insured cannot rely on a waiver by an agent when such authority is expressly withheld from such agent, or when the policy requires waivers by agents to be indorsed on the policy in writing if such waivers in the latter case are not made in writing upon the policy: Meigs v. London Assur. Co. (C. C.), 126 Fed. 781; German Ins. Co. v. Heiduk, 30 Neb. 288, 27 Am. St. Rep. 402, 46 N. W. 481; Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5; Carey v. German-American Ins. Co., 84 Wis. 80, 36 Am. St. Rep. 907, 54 N. W. 18, 20 L. R. A. 267; Northwestern National Ins. Co. v. Mize (Tex. Civ. App.), 34 S. W. 670.

It does not become necessary for us to pass upon the question whether the officers of the defendant company under the clause in this policy providing the manner in which waivers should be made could make a waiver other than as therein provided; but under the authorities here quoted the agent who countersigned the policy in question and delivered same and the adjuster sent to adjust the loss could not, prior to

the settlement of said loss ratified by the company, waive any condition of said policy other than in the manner prescribed by said policy.

We are now brought to the consideration of the question presented by the second assignment of error, to wit: Do the facts in this case bring this case within the clause under which the defendant claims plaintiff has forfeited his right under the policy? The policy of insurance executed by defendant to plaintiff insured plaintiff against direct loss or damage by fire to an amount not to exceed \$900 on the following described property: \$150 on one one-story plank-roof boxed shed used for storage; \$500 on one J. I. Case threshing-machine and attachments; \$250 on one Advance threshing-machine. It is not controverted that on November 2, 1903, the plaintiff executed to the City National Bank of Ardmore a mortgage to secure the payment of a note for \$300 on the J. I. Case threshing-machine described in said ⁴⁶⁸ policy of insurance. There is no contention, however, that any of the other property insured by said policy was included in said mortgage, or that any of the conditions of said policy as to the remainder of said property had been violated.

Plaintiff contends that the court erred in holding that the mortgage on the one item of said property covered by said policy rendered said policy void as to all the items of property covered by same, and further contends that the policy in controversy is a divisible contract, and that, if it is void as to the J. I. Case threshing-machine on which the mortgage was given, it is valid as to the other items of property insured under the policy. On the other hand, it is the contention of defendant that this policy is an entire contract, and, if void in any of its parts, it is void in all of its parts, and that said policy is void for the reason that a portion of the property insured thereby had become mortgaged prior to the destruction of same by fire without the written consent of the defendant company to such mortgage indorsed in writing upon the policy.

We shall not enter into any lengthy discussion of the rules that have governed courts in determining whether a policy of insurance that covers different classes of property, such as realty or personalty, or different items or different articles of personal property, and the different classes or kinds of articles are separately valued therein or insured for separate amounts, is an entire contract or a divisible contract. There is much division among the authorities on this question. De-

fendant insists that this policy is an entire contract and indivisible, for the reason that only one premium was specified in the policy. We think that the policy in controversy is an entire and indivisible contract, but not for the reason that the consideration of said policy was one premium. We are aware of the fact that some of the courts have held that, where a gross sum is paid as the premium for insurance against fire, this fact is a controlling circumstance, and renders the policy an entire indivisible contract, although the amount for which the policy is issued is proportioned to distinct items. But ⁴⁶⁹ this rule, in our opinion, is supported neither by the weight of authorities nor by the better reasoning. The policy involved in this action, however, contains language which, in our opinion, independent of any other reason, determines it to be an indivisible contract. After omitting the phrases that have no bearing upon this case, the policy contains the following language: "This entire policy, and each and every part thereof, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void. . . . if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage."

The courts have by no means been uniform in their holding as to the effect of a clause used in the more recent forms of policies of insurance to the effect that upon breach of a warranty or condition of the policy "this entire policy shall be void." In the following cases it was held that the effect of such a clause, although there was a separate valuation of the items of property insured in the policy, rendered the contract indivisible: *Germania Fire Ins. Co. v. Schild*, 69 Ohio St. 136, 100 Am. St. Rep. 663, 68 N. E. 706; *Home Ins. Co. v. Connely*, 104 Tenn. 93, 56 S. W. 828; *German Ins. Co. v. Reed*, 9 Ky. Law Rep. 929; *Dumas v. Northwestern National Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 51 Am. St. Rep. 457, 33 Atl. 429, 30 L. R. A. 633; *McWilliams v. Cascade Fire & Marine Ins. Co.*, 7 Wash. 48, 34 Pac. 140. On the other hand, some courts have held that such a clause does not render a policy indivisible when separate classes of property insured by the policy are separately valued: *Knowles v. American Ins. Co.*, 66 Hun, 220, 21 N. Y. Supp. 50; *Mott v. Citizens' Ins. Co.*, 69 Hun, 501, 23 N. Y. Supp. 400; *Kiernan v. Dutchess County Mutual Ins. Co.*, 150 N. Y. 190, 44 N. E. 698; *Adler v. Germania Fire Ins. Co. (Supp.)*, 39 N. Y.

Supp. 1070; Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; Kansas Farmers' Fire Ins. Co. v. Saindon, 53 Kan. 623, 36 Pac. 983.

In *Miller v. Delaware Ins. Co.*, 14 Okl. 81, 75 Pac. 1121, 65 L. R. A. 173, the court held that, notwithstanding the policy ⁴⁷⁰ of insurance contained the clause "this entire policy shall become null and void," the contract is a divisible contract when the insurance policy is issued on different classes of property, each class being separated from the other and insured for a specific amount, and the breach of the conditions of the contract occurring only as to one class of the property insured, provided the contract is not affected by any question of fraud, unlawful acts condemned by public policy, or any increase in the risk of the company on the whole property insured, because of the breach; but the rules laid down in this case and the other cases, *supra*, and the reasoning of the courts therein, can be of but little assistance to the court in the case at bar, for the reason that the clause used in the policy in the case at bar contains, in addition to the usual words contained in the policies in the cases, *supra*, the following words, "and each and every part thereof." The language in those policies which, it is contended, renders them entire contracts, and indivisible in nearly every instance, reads, "This entire policy shall become void," whereas in the policy involved in this action the clause reads: "This entire policy and each and every part thereof shall become void."

Mr. Justice Harlan, in the case of *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. Rep. 247, 48 L. ed. 385, in speaking of the rules governing the construction of any insurance policy, says: "Of course, in every case the fundamental inquiry must be as to the intention of the parties to be gathered from the words of the policy; always, however, interpreting the policy most favorably for the insured, where it is reasonably susceptible of two constructions." But the addition of the words "and each and every part thereof" in this policy to the words "this entire policy" renders the meaning of said phrase susceptible of but one construction. When the meaning of the language of a policy or of any other contract is plain, clear and unmistakable, no construction of such language is necessary; but the words used therein should be given the evident meaning with which they were used. The unquestioned meaning and effect of the words "each and every part thereof" in ⁴⁷¹ the policy in controversy is to render the policy an indivisible contract; and, if any part

of same shall become void, then each and every part thereof shall be void.

It remains for us to consider whether the facts in this case present such a breach of warranty or condition as to bring defendant's claim of forfeiture within the clause of the contract under which he claims a forfeiture. The condition of this policy charged by defendant to have been violated by the plaintiff is: "This entire policy, and each and every part thereof, shall be void, . . . if the subject of insurance be personal property, and be or become encumbered by chattel mortgage."

It is admitted that the item designated as J. I. Case threshing-machine insured and separately valued in the policy was encumbered by plaintiff on the day the policy of insurance was issued by the defendant. Did the mortgaging of said item of property bring the case within the clause under which defendant claims a forfeiture? To answer this question it is necessary for us to ascertain the meaning of the clause, "if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage." Plaintiff insists that the entire subject of insurance must be personal property, and all of the same must be or become encumbered by a chattel mortgage in order to bring the facts of the case within the forfeiture clause. On the other hand, defendant contends that, if any part of the subject of insurance be personal property and be or become encumbered, the entire policy becomes void. What is the subject of insurance in the policy in the case at bar? It is not the J. I. Case threshing-machine alone, nor is it the Advance threshing-machine, nor is it the one-story box shed, but the subject of insurance in this policy is composed of all these items of property, of the real estate item, and of the two items of personal property. To bring the facts of this case within this clause of forfeiture, we should necessarily have to construe this clause to read, "If the subject of insurance or any part thereof be personal property, and if the same or any part thereof be or become encumbered by a chattel mortgage"; but this clause is ⁴⁷² just as susceptible of the construction, and there is as much reason to construe it to read, "If the entire subject of insurance be personal property, and if the entire property insured be or become encumbered," as there is to give it the former construction. The language used in the policy is the language of the insurer, the defendant, and, if it is susceptible of two constructions, that con-

struction should be given to it which is favorable to the plaintiff.

"When a clause in a contract is capable of two constructions, one of which will support, and the other defeat, the principal obligation, the former will be preferred. Forfeitures are not favored, and the party claiming a forfeiture will not be permitted upon equivocal or doubtful clauses or words contained in his own contract, to deprive the other party of the benefit of the right or indemnity for which he contracted": *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570.

Defendant, in preparing this clause of forfeiture, has left nothing to be construed as to whether the policy should be considered as an entire contract or a divisible contract, but with precise language says the entire policy, and each and every part thereof, shall become void. Again, in the next clause following the clause under discussion the following language is used: "Or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed." In this latter clause the insurer has put beyond question the meaning of its language by saying that if notice be given of sale of any of the property. If such specific language had been used in the clause under consideration, and under which defendant claims its forfeiture, no doubt of the meaning of the same could arise, and since the contract is the language of the defendant, and it has selected the words in which to express the terms and conditions upon which the forfeiture could be enforced, it must abide the effect of such language subject to be construed under the established rules of construction. The policy in controversy covered three items of property—one item of real estate, and two items of personal property. The subject of insurance in this policy was ⁴⁷³ not personal property, but was both personal property and real estate, and the subject of insurance in this policy did not become encumbered, but only a part of the same became encumbered. Therefore, the mortgage given by defendant on the J. I. Case threshing-machine does not work a forfeiture of said policy: *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 47 Am. St. Rep. 121, 29 S. W. 1063, 29 L. R. A. 706; *North British Mer. Ins. Co. v. Freeman* (Tex. Civ. App.), 33 S. W. 1091; *Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.), 41 S. W. 513; *Hartford Fire Ins. Co. v. Walker* (Tex. Civ. App.), 60 S. W. 820.

The action of the trial court in holding that the plaintiff forfeited said policy of insurance and all of his rights thereunder by reason of the execution and delivery of the mortgage on the J. I. Case threshing-machine, and in instructing the jury to return a verdict for the defendant, was error, and because of such error this cause is reversed and remanded.

Dunn and Kane, JJ., concur.

Williams, C. J., and Turner, J., concur in conclusion reached.

Where Property Insured is so Situated that the Risk on One Item cannot be affected without affecting the risk on the other items, the policy is usually regarded as entire and indivisible; but where the property is so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one item does not affect the risk on the others, the policy is usually regarded as severable and divisible: Phenix Ins. Co. v. Pickel, 119 Ind. 155, 12 Am. St. Rep. 393; Louis v. Rockford Ins. Co., 77 Wis. 87, 20 Am. St. Rep. 96; Manchester etc. Assur. Co. v. Glenn, 13 Ind. App. 365, 55 Am. St. Rep. 225. As to whether the fact that the premium is entire is conclusive of the indivisibility of a policy, see Taylor v. Anchor Mut. Fire Ins. Co., 116 Iowa, 625, 93 Am. St. Rep. 261; Republic County Mut. Fire Ins. Co. v. Johnson, 69 Kan. 146, 105 Am. St. Rep. 157. Where the property insured is so placed that the risk on each item is separate and distinct, so that what affects the risk on one does not affect the risk on the others, the policy is divisible: Goorberg v. Western Assur. Co., 150 Cal. 510, 119 Am. St. Rep. 246.

The Waiver of Conditions in Insurance Policies by agents of the company is the subject of a note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 99. Agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the insurers themselves. This rule includes all persons empowered to conclude contracts of insurance without first referring negotiations to their principals: Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 119 Am. St. Rep. 234. See, also, Industrial Mut. etc. Co. v. Thompson, 83 Ark. 575, 119 Am. St. Rep. 149; Richard v. Springfield etc. Ins. Co., 114 La. 794, 108 Am. St. Rep. 359; Foreman v. German Alliance Ins. Assn., 104 Va. 694, 113 Am. St. Rep. 1071. As to whether the knowledge on the part of the agent of condition broken will estop the insurer to urge that defense, see Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 110 Am. St. Rep. 118; Queen Ins. Co. v. Straughan, 70 Kan. 186, 109 Am. St. Rep. 421.

That the Payment of the Premium is not absolutely essential to a valid contract of insurance, and that payment may be waived by a representative of the insurance company, see Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 128 Am. St. Rep. 989, and cases cited in the cross-reference note thereto.

MCLEOD v. SPENCER.

[21 Okl. 165, 95 Pac. 754.]

HOMESTEAD on the Public Lands, Injuries to.—A homesteader upon public land, proceeding lawfully to perfect his title, is entitled to compensation for injury done to the premises, but the measure of damages is not the same as if he owned the land in fee simple. (p. 774.)

HOMESTEAD on the Public Lands, Measure of Damages.—In such a case it is error for the court to instruct the jury that the measure of damages is just the same as if the plaintiff owned the land in fee. The court ought to have defined the rights of the settler in the homestead, and left the question to the jury to determine his interest, and from such interest the liability of the defendant. (p. 775.)

(Syllabi by the court.)

Stevens & Meyers, for the plaintiff in error.

¹⁶⁵ KANE, J. This was an action by defendant in error, plaintiff below, for the alleged wrongful filling up by the plaintiff in error, defendant below, of a natural waterway, by reason of which the waters were turned over and upon the portions of plaintiff's homestead, so overflowing and damaging same as to render such portions worthless. The answer of defendant was a general denial. The petition of plaintiff alleged that the land was a homestead, and that he was occupying it as a homestead entryman under the homestead laws of the United States, and upon the trial it was admitted by the parties that such was the case. The trial was had before a jury, and resulted in a verdict and judgment for the ¹⁶⁶ plaintiff in the sum of one hundred dollars, from which judgment the defendant appealed to this court.

There are several grounds of error argued by counsel for plaintiff in error in his brief, only one of which, however, we believe has merit. Instruction No. 5, given by the court, to which exception was duly saved, is to the effect that the proper measure of damages is the difference in value of the land immediately before and immediately after the act complained of. We believe it was error for the court below to give this instruction. It is admitted that the plaintiff's interest in the land was that of a homestead entryman. While it is true that a homesteader who proceeds lawfully to perfect his title to land entered is entitled to compensation for injury done to the premises, yet we believe the measure of damages is not the same as though he owned the land in fee simple.

Mr. Justice Johnston, in *Burlington etc. R. R. Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125, speaking of the nature of a homesteader's title to land occupied under the homestead law, says: "The interest which the settler has may be appropriated for a right of way by adversary proceedings, as we have already seen that Congress has provided for the condemnation of a right of way through a homestead, as well as for its purchase from the settler. Of course the settler does not part with the same interest or value that he would if he had the legal title, and he should only receive compensation for the interest taken from him."

In the case of *Ellisworth etc. R. R. Co. v. Gates*, 41 Kan. 574, 21 Pac. 632, Clogston, C., who wrote the opinion, uses the following language: "In this case the court instructed the jury and gave the rule for the measure of damages just as it would have given it had the plaintiff, instead of having a homestead right, owned the fee. This was error. The court ought to have defined the rights of the settler in such homestead, and left the question to the jury to determine his interest, and from such interest the liability of the company. Just what that interest would be is a question of fact in each case, to be determined by the jury, and depends upon the ¹⁶⁷ improved condition and the length of time the homestead has existed, and all other facts that go to make up its value. Its value may be much less than if the settler owned the fee of the land, or it may be substantially the same or a little less than its actual value including the fee. We are, therefore, of the opinion that the instructions of the court are erroneous, and recommend that the cause be reversed and a new trial ordered."

The above case seems to be in point here, and is to our mind supported by sound reason. It is therefore ordered that the judgment of the court below be reversed, and the cause remanded for a new trial.

All the justices concur.

An Entryman Under the Federal Homestead Laws may bring an action for injury to his land, although he has not yet made final proof: *Wendel v. Spokane County*, 27 Wash. 121, 91 Am. St. Rep. 825. For further authorities on the general nature of an entryman's interest or title before the issuance of a patent, see *Thompson v. Basler*, 148 Cal. 646, 113 Am. St. Rep. 321; *Waisner v. Waisner*, 15 Wyo. 420, 123 Am. St. Rep. 1081.

PLOTNER v. CHILLSON.

[21 Okl. 224, 95 Pac. 775.]

PRACTICE.—A demurrer to the evidence admits the facts as proved to be true and also such further facts as may be reasonably inferred from those proved. (By the editor.) (p. 777.)

BROKERS, Forfeiture of Commissions by, for Acting as Agents of the Adverse Party.—It is a condition precedent to the right of an agent to the compensation agreed to be paid him that he shall faithfully perform the services he undertook to render, and if he, when employed to buy, unknown to his principal, accepts compensation from the vendor by dividing commission with his agent in the transaction, he cannot recover compensation agreed to be paid him by his principal. (p. 779.)

BROKERS, Counterclaims Against for Receiving Commissions from the Adverse Party, When Sufficiently Proved.—In an action by a principal against his agent to recover in part certain commission alleged to have been erroneously paid, where upon answer and counterclaim for the balance of said commission the original action is dismissed and the cause is tried to the court upon the counterclaim and answer thereto, and where the evidence adduced on the part of the plaintiff shows that defendants, while acting as his agent in the purchase of certain lands, at the same time and unknown to him, received a commission on the sale from the agents of the vendor, sufficiently proves a defense to the action on the counterclaim, and a demurrer to such evidence was improperly sustained. (p. 781.)

(Syllabi by the court except where stated to be by the editor.)

W. W. Wallace, for the plaintiff in error.

Joseph G. Love and J. W. Clark, for the defendants in error.

224 TURNER, J. On October 18, 1905, A. A. Plotner, plaintiff in error, plaintiff below, sued M. D. Chillson and Charles Chillson, partners as Chillson & Chillson, defendants in error, defendants below, in the district court of Canadian county, to recover, among other things, \$7,500 alleged to have been paid them as commission on the purchase of certain lands in Matagorda county, Texas, as agents for plaintiff, and which is alleged to have been forfeited, for the reason **225** that while acting as agents for plaintiff they were, unknown to him, at the same time acting as agents for and received a commission from the vendors in that transaction.

Defendants for answer in effect admit the contract of agency, and that they acted as such for plaintiff in the purchase of the land, but deny that they acted as agents for the vendors or received a compensation or commission from them; that in order to close up said deal and settle the twenty-five per cent commission thereon, together with the salaries stipulated for in said contract of agency, plaintiff agreed to pay

them \$7,500 in full, but that in fact had only paid \$5,000 of that amount on September 1, 1903; that the remaining \$2,500 is due them with interest from that date, and on said \$7,500 from May 19, 1902, to September 1, 1903, at seven per cent per annum, for which they pray judgment.

Plaintiff for answer to defendants' counterclaim pleads, in substance, a general denial, and alleges that if the \$2,500 was due at all, it was as the share of Charles Chillson, of the firm of Chillson & Chillson, in said commission, and that he had since released the same to plaintiff, and restates the charge that defendants acted as agents for both buyer and seller of the land in question without the knowledge of plaintiff, and received from the seller a commission on the sale of said lands to plaintiff in the sum of \$5,466, by which conduct he alleges they forfeited the right to recover said \$2,500 as commission from him, or any other amount.

On May 24, 1906, plaintiff dismissed his cause of action, and the cause came on for hearing to the court by agreement of parties upon the "setoff and the counterclaim set forth in defendants' answer." It being agreed that the burden was upon the plaintiff, he proceeded to offer testimony in support of the issues on his part, and after having rested his case, defendants demurred to the evidence, which was sustained by the court and exceptions saved, and judgment rendered in favor of defendants and against the plaintiff for \$2,968.20 and the costs of the suit, from which judgment plaintiff has appealed to this court.

226 The only alleged error necessary for us to consider is that the court erred in sustaining defendants' demurrer to plaintiff's evidence. In considering this assignment of error, it will be remembered that the rule of law is that: "A demurrer to the evidence not only admits the facts as proved to be true, but admits such facts as may be reasonably and rationally inferred from the facts proved. If there is evidence fairly tending to show each material averment of the petition, it is error to sustain a demurrer to plaintiff's evidence": *Myers v. Presbyterian Church of Perry*, 11 Okl. 551, 69 Pac. 876; *Jaffray v. Wolf*, 1 Okl. 312, 33 Pac. 945; *Edmisson v. Drumm-Flato Commission Co.*, 13 Okl. 440, 73 Pac. 958; *Johnson v. Hayes*, 6 Okl. 582, 55 Pac. 1068.

Let us, then, determine whether plaintiff has adduced sufficient proof to establish his allegation that defendants, while acting as his agents in the purchase of the land in question, were acting, unknown to him, as the agent of the vendors, and that they received from them a commission as such. The

testimony discloses that plaintiff was an elderly man, retired from business, living at Dayton, Ohio; that defendants, father and son, were living in Canadian county, Oklahoma, and were the brother in law and nephew of plaintiff; that in the early 70's defendant M. D. Chillson, being then at work on a small salary, asked and obtained leave of the plaintiff to go to Nebraska and there act as plaintiff's agent in the care and management of some six thousand acres of land owned by the plaintiff. In the course of years Chillson continued to do business for plaintiff, and it seems of recent years came to Canadian county, Oklahoma, where he continued to buy and sell land as his agent. Their dealings were never satisfactory to plaintiff. Plaintiff found upon investigation of Chillson's books, through his bookkeeper, sent to Chillson for the purpose, that Chillson had sold some desirable farms belonging to plaintiff and had reinvested ²²⁷ the money in less desirable farms and had the deeds made out in his own name; that when he wrote to Chillson about deeding them back to him, under date of September 27, 1900, plaintiff soon thereafter received a reply that "The farms mentioned cost \$13,840. I consider it equitable if I retain them and a few thousand dollars besides." Negotiations followed, resulting in the following contract between them:

"Dayton, Ohio, Jan. 4, 1901.

"Dear Merriek:

"Yours of the 19th containing deeds as mentioned reached me in due time. In order to avoid any further or future misunderstanding as to remuneration, I will here repeat the proposition that I made to Charles while here; i. e., that you receive \$10,000 in full for services up to July 4, 1900, and from that date you are to draw a remuneration of \$1,200 per year, and 2 per cent. on sales of land, and in addition to that Charles will receive \$800 per year and 1 per cent. on sales of land, and in case any speculative transactions are made Chillson & Chillson will receive 25 per cent. of the net profits on the same.

"[Signed] AMBROSE."

Acting under this contract, M. D. Chillson, in the spring of 1902, went to Bay City, Texas, and negotiated for plaintiff a purchase of some twenty-three thousand acres of land of W. E. Austin & Co., as agents for one Kuykendall and others. In the course of the negotiations Chillson told W. E. Austin & Co. that he was a land agent himself, and from extensive experience he knew that divisions of commissions were frequently made, and that as a matter of professional

courtesy this had been conceded to him in all purchases he had made, and he had come to require it and would not make a purchase without it, which W. E. Austin & Co. agreed to give him, for the reason, as they stated, that "half a loaf was better than no bread." Accordingly the land was bought and deeded to plaintiff, and one Stoddard, in consideration of something like \$330,000, the exact amount not being material, which he paid, Chillson receiving on a division of commissions with W. E. Austin & Co. something like \$5,000, the exact amount being unknown ²²⁸ and immaterial. Sometime during the summer of that year plaintiff and defendants had a settlement of this matter. Plaintiff, not wishing to be annoyed with any twenty-five per cent of net profits to be paid defendants on this deal, proposed, and defendants agreed to accept, \$7,500 as their commission, \$5,000 of which was to be paid to M. D. Chillson, the remaining \$2,500 to his son, Charles Chillson. Accordingly, on August 29, 1903, at the request of M. D. Chillson, plaintiff sent to the First National Bank of Springfield, Ohio, and paid \$5,000, and took up a note for that amount due from M. D. Chillson to the bank, and received the following receipt:

"Received from A. A. Plotner the sum of seventy-five hundred dollars (\$7500.00) as commission in full for 25 per cent net profit on lands purchased for his account in Matagorda county, Tex.

"[Signed] CHILLSON & CHILLSON,
"By M. D. CHILLSON."

The remaining \$2,500 was never paid Charles Chillson, for the reason that in February, 1904, he came to Dayton to see plaintiff, and there stated that at the time of the payment of the \$5,000 to his father he thought it was all right, but since that time had concluded not to accept the \$2,500 for his share, as he did not think it was right and he would not have it. This led plaintiff to investigate, which he did, and about the middle of March following ascertained positively for the first time that Chillson & Chillson had acted as agents of the vendors in the transaction, he having suspected as much September 1, 1903, at which time he had discharged them from his service.

The question then presents itself under this state of facts, which are undisputed, Are defendants entitled to recover in this cause? We think not. Defendants were under obligation to plaintiff to buy this land for the lowest price consistent with honesty. W. E. Austin & Co. were under obligations to the vendors to get for it the best price fairly obtain-

able. In making this agreement with W. E. Austin & Co. to divide their commission with ²²⁹ defendants before they would buy defendants very well knew that the more they gave for the land the greater amount of money they would get on such division of commission with W. E. Austin & Co. This was a palpable fraud on the plaintiff, a violation of the contract of agency, a betrayal of trust, was against public policy, and forfeited defendants' right to commission from plaintiff in the transaction. This is well settled by the authorities.

In *McKinley v. Williams*, 74 Fed. 95, 20 C. C. A. 313, the court said: "To permit the agent of a vendor to become interested as the purchaser or as the agent of a purchaser in the subject matter of the agency inaugurates so dangerous a conflict between duty and self-interest that the law wisely and peremptorily prohibits it. An agent of a vendor, who speculates in the subject matter of his agency, or intentionally becomes interested in it as a purchaser or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission as agent, and becomes indebted to his principal for the profits he gains by his breach of duty": Citing numerous authorities.

The same is unquestionably true as to the agent of the vendee. In *Campbell v. Baxter*, 41 Neb. 735, 60 N. W. 91, the court, quoting approvingly from a number of cases, said:

"In *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459, . . . it was held: 'A broker acting for both parties in effecting an exchange of property can recover compensation from neither, unless his double employment was known and assented to by both': *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168. In *Bolham v. Loomis*, 41 Conn. 581, it was held: 'The policy of the law forbids that a person acting as the friend and confidential adviser of a purchaser should at the same time be secretly receiving compensation from the seller for effecting the sale, and a contract for such compensation is void.' In *Meyer v. Hanchett*, 43 Wis. 246, it was held: 'One cannot act as agent for both seller and purchaser, unless both know of and assent to his undertaking such agency and receiving commissions from both': *Holcomb v. Weaver*, 136 Mass. 265; *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541."

²³⁰ In *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. Rep. 303, 34 L. ed. 984, the court in its syllabus said: "It is a condition precedent to the right of an agent to the compen-

sation agreed to be paid to him that he shall faithfully perform the services he undertook to render; and if he abuses the confidence reposed in him, and withholds from his principal facts which ought, in good faith, to be communicated to the latter, he will lose his right to any compensation under the agreement, being no more entitled to it than a broker would be entitled to commissions who, having undertaken to sell a particular property for the best price that could be fairly obtained for it, becomes, without the knowledge of the principal, the agent of another, to get it for him at the lowest possible price."

In *Bell v. McConnell*, 37 Ohio St. 399, 41 Am. Rep. 528, the court said: "Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment and discretion. The agent cannot divide this duty and give part to another. Therefore, by engaging with the second he forfeits his right to compensation from the one who first employed him": See, also, *Chapman v. Currie*, 51 Mo. App. 40; *Tinsley v. Penniman*, 12 Tex. Civ. App. 591, 34 S. W. 365; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Collins v. McClurg*, 1 Colo. App. 348, 29 Pac. 299; *Hunter Realty Co. v. Spencer*, 21 Okl. 155, 95 Pac. 757, 17 L. R. A., N. S., 622.

The law thus announced is conceded by defendants, but it is urged that the same is not applicable; that this "is not a question of commission on the sale or purchase of land that is involved in the controversy, but it is what was the amount agreed upon as 'net profits' on the 'speculative transaction' in the purchase of the Matagorda, Texas, land." It, in effect, is contended that defendants were not so much agents working on a commission derived from the purchase of this land as they were "partners" buying land and deriving their compensation in "net profits" after purchase and sale. The usefulness of this distinction fails to appear. In either event they would be agents of plaintiff, receiving a compensation from him, and owing to him in return ²³¹ unswerving loyalty to his interests in the transaction. Anything short of that violated the contract existing between them and forfeited their right to compensation, whether the same was to be paid as commission when the land was bought or "net profits" when the land was sold. But this record discloses that before a resale of the land, and therefore before any "net profits" had accrued to defendants, and before their disloyalty to the trust had been discovered, they agreed to take the lump sum of \$7,500 "as commission in full of twenty-five per cent net profit" on these lands, and \$5,000 was paid. It is clear that

it was paid "as commission," and that the remaining \$2,500 sued for is also commission which has been forfeited as a result of defendants' misconduct, and cannot be recovered in this action.

It follows that the court erred in sustaining the demurrer to plaintiff's evidence, and for that reason the case is reversed and remanded, with instructions to enter judgment in favor of the plaintiff.

All the justices concur.

The Rule that an Agent for the sale of property cannot at the same time act as agent for the purchase thereof, or to so interest himself as to be entitled to compensation from both vendor and vendee, is a distinctly recognized rule of public policy, and generally is rigidly enforced: Rice v. Davis, 136 Pa. 439, 20 Am. St. Rep. 931. See, however, McDonald v. Maltz, 94 Mich. 172, 34 Am. St. Rep. 331. As to the validity of an agreement whereby a broker shares commissions with the opposing broker, see Levy v. Spencer, 18 Colo. 532, 36 Am. St. Rep. 303.

ARKANSAS VALLEY & WESTERN RAILWAY COMPANY v. FARMERS' AND MERCHANTS' BANK.

[21 Okl. 322, 96 Pac. 765.]

BANKING CORPORATIONS, Contract of, When Ultra Vires. A note or contract executed by a bank, organized and existing under and by virtue of the laws of the territory of Oklahoma, as a subscription to secure the construction and operation of a railroad, is ultra vires and void, and the courts will not enforce it. (p. 787.)

(Syllabus by the court.)

James B. Diggs and Russell G. Lowe, for the plaintiff in error.

Harris & Wilson, for the defendant in error.

323 DUNN, J. On the 5th of May, 1904, plaintiff in error, plaintiff below, filed its petition in the district court of Noble county, Oklahoma Territory, against the above-named defendant in error on a certain note or contract in writing, as follows:

"1,000.

Perry, Oklahoma, May 12, 1902.

"For value received and for benefits accruing to me from the construction of a railroad from some point on the St. Louis & San Francisco Railroad between Sapulpa and Tulsa, I. T., through the city of Perry, in Noble county, to connect

with the Blackwell, Enid & Southwestern Railway, I, the undersigned, agree to pay to the order of the Arkansas Valley & Western Railway Company at the — Bank, Perry, Oklahoma, the sum of one thousand dollars. The said amount to become due and payable when said railroad shall be constructed to and into the city of Perry, Oklahoma. It is also provided that if said road is not constructed before January 1, 1904, this obligation shall be void.

“FARMERS’ & MERCHANTS’ BANK,

“By H. L. BOYES, Pt.”

The petition, after setting out the obligating features of the contract, makes the following averment in reference thereto: “That it has performed all the conditions precedent on its part; that said railroad was duly constructed from Tulsa, Indian Territory, a point on the St. Louis and San Francisco Railroad, through the city of Perry, Noble county, Oklahoma, to Enid, Oklahoma, where it connects with the Blackwell, Enid and Southwestern Railway; that said railroad was constructed to and into the city of Perry, Oklahoma, in October, 1903, and regular train service was inaugurated on said railroad on the twenty-eighth day of December, A. D. 1903; that by reason of said construction of said railroad and the inauguration of regular train service, said note became due and payable on and prior to December 28, 1903.”

The defendant filed a demurrer, on the ground that the petition did not state facts sufficient to constitute a cause of action, ³²⁴ which was by the court sustained, and the case is before this court by virtue of proceedings in error begun in the supreme court of the territory of Oklahoma.

From the argument of counsel in their briefs it is gathered that the demurrer was sustained by the trial court on the ground that the note in question was a bonus note, given by the defendant to the plaintiff in consideration of its constructing a line of railroad, as set forth therein. In answer to this it is argued in the brief of plaintiff that the note provided by its terms, “for value received and for benefits accruing,” etc., which phrase was followed by the language providing for the consideration growing out of the construction of the railway, and that there was nothing in the note to indicate that the value received was merely that accruing to it from the railway being built; and we are asked to say that the note is susceptible of this construction. We believe that a reading of the note itself reasonably shows that the sole consideration for it was that which followed the language “for value received”;

that this phrase was part of the entire phrase and sentence which set up the real consideration of the note. But if this were not true, all doubt in our judgment is removed when, in connection with the language of the note, the pleading in question is considered. That part of the petition which is quoted clearly shows that the company relied solely upon the fact "that it has performed all the conditions precedent on its part," and that the railroad has been duly constructed. This being true, that portion of the plaintiff's brief and argument dealing with the right of a bank, in due course of business, to execute notes will be eliminated from this discussion, and the court's attention will be directed to the other feature involved in this case, which may be stated generally to be: Can a bank, organized under the statutes of the territory of Oklahoma, ³²⁵ legally make a contribution for the purpose of inducing the construction of a railroad?

The petition avers that the defendant "is a banking corporation, duly organized and existing under and by virtue of the laws of the territory of Oklahoma," and section 1, chapter 8, paragraph 242, Wilson's Revised and Annotated Statutes of Oklahoma of 1903, sets out the business which a bank may be permitted to lawfully conduct, and enumerates the same as follows: "Any three or more persons, a majority of whom shall be residents of this territory, may organize themselves into a banking association and be incorporated as a bank, and shall be permitted to carry on the business of receiving money on deposit, either with or without interest, and of buying and selling exchange, gold, silver, coin, bullion, uncurrent money, bonds of the United States or of this territory, or any of the cities, counties and school districts therein, and territorial, county, city, township and school district, or other municipal indebtedness, and loaning money on chattel and personal security and to own a suitable building, furniture and fixtures for the transaction of its business, the value of which shall not exceed one-third of the capital of such bank fully paid: Provided, that nothing in this section shall prohibit such bank from holding and disposing of such real estate as it may acquire through the collection of debts due to it; and, provided, that all banking institutions now organized as corporations doing business in this territory, are hereby permitted to continue said business as at present incorporated, but in all other respects their business and the manner of conducting the same, and the operation of said bank shall be carried on subject to the provisions of this act and in accordance therewith;

and provided further, that no bank shall engage in any business other than such as is authorized by this act."

The defendant contends that the giving of this note, for the purposes set out, was other than such as it was authorized to do. The plaintiff's contention is that the giving of such a note was lawful, and not against public policy, and hence that the bank could make it for this reason. The reliance of the defendant is that the note is *ultra vires* and hence void. The bank was a corporation, organized for the purpose of doing a specific business, ³²⁶ and the fact that such a note as this was not illegal in itself, or illegal because it violated the public policy of the territory, did not necessarily make of it a business such as the bank could have entered into.

In discussing this same proposition, Chief Justice Comstock, in the case of *Bissell v. Michigan Southern & Northern Indiana R. R. Cas.*, 22 N. Y. 258, says: "The words '*ultra vires*' and '*illegality*' represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other; for example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority of the board of directors, and under the corporate seal, for the building of a church, or college, of an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*; but no wrong would be committed and no public interest violated. So, a manufacturing corporation may purchase ground for a schoolhouse or a place of worship for the intellectual, religious and moral improvements of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside the charter: but, so far from being illegal or wrong, they are, in themselves, benevolent and praiseworthy. So a church corporation may deal in exchange. This, though *ultra vires*, is not illegal, because dealing in exchange is in itself a lawful business, and there is no state policy in restraint of that business."

So that from this it will be seen that the enterprise involved in this transaction may have been an entirely legal and laudable one, and yet not such a one as a corporation could engage in, by reason of the fact that it was without the scope and purpose of its creation. An individual, generally speaking, may do those things which the law does not prohibit, while under the same rule a corporation can do those things only

which the charter of its creation or the law will permit it to do; and, while this obligation might have been enforceable against an individual, because not illegal, or against the policy of the law, still it is not an enforceable ³²⁷ obligation of a banking corporation, for the sufficient reason that the power to do it was not contained within its specific grant, nor within the implied powers necessary to carry out the terms of such grant. When we look at the statute above cited to ascertain the things which the defendant could do in pursuit of its business, we find them specifically enumerated to be those of receiving money on deposit, buying and selling exchange or bonds of the United States or of other municipalities, or loaning money, and that it might own a suitable building, etc., and weigh in these terms the conditions of this obligation, it is seen at a glance that the investing in a railroad is not among them. Neither can it be said that a grant or donation of its funds to such a corporation could rationally be claimed to come within the scope of such business. The legislature was not satisfied to leave the construction of this grant or its limit to the application of the usual rule adopted by the courts, but placed the specific limitation upon banking corporations that "no bank shall engage in any business other than such as is authorized by this act." The business involved in this transaction was clearly beyond the specific terms of the act and not within the implied scope of the powers conferred; hence the court in sustaining the demurrer did not commit error. In support of this doctrine, attention is called to the following authorities: *California Nat. Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. Rep. 831, 42 L. ed. 198; *First Nat. Bank of Concord v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. Rep. 739, 43 L. ed. 1007; *McCrory v. Chambers*, 48 Ill. App. 445. The bank, in entering into this obligation, unquestionably believed that the construction and operation of the line of railroad would be of benefit to it by increasing the population within the territory from which it drew business. It was this consideration, no doubt, which induced the president, acting for it, to execute the contract.

The case of *McCrory v. Chambers*, 48 Ill. App. 445, is an instructive one on the proposition involved. In that case the bank made a contribution of its assets in the sum of five hundred dollars to retain a manufacturing company in the town where it was located. On ³²⁸ exception being taken to this action by some of the shareholders, it was, as is said by the court, "argued with much earnestness that the donation, viewed simply from a business standpoint, may have been

decidedly advantageous to the financial interests of the bank." But the court held that this was not sufficient argument to overcome the plain provision of the law that "corporations have such powers as are expressly given them by the law which authorizes their creation, and such other powers as are necessarily incidental to the proper exercise of such express powers. The express powers are readily ascertained from the statute or the charter of the corporation. The right to make donations of money is not among them. The directors [of a national bank] can use the funds and property of the bank only for proper banking purposes, and for the strict furtherance of the business objects and financial prosperity of the corporation. They cannot use any portion of the money for objects of usefulness or charity or the like, however worthy of encouragement or aid. They cannot make gifts from the corporate fund. All their transactions must be strictly matter of business": 1 Morse on Banks and Banking, pp. 258, 259, sec. 127. The incidental powers are such as are necessary to the efficient exercise of the express powers. A donation of the funds of a bank is *prima facie* unauthorized. Such power is not expressly given, nor is it apparent, in the absence of proof of special circumstances, that it is necessary to the proper and successful exercise of any express power." The foregoing, in our judgment, is a correct expression of the rule, not only for national banks, but for state banks as well.

The judgment of the trial court is affirmed.

All the justices concur.

The Doctrine of Ultra Vires in relation to contracts of private corporations is the subject of a note to *In re Assignment Mut. etc. Ins. Co.*, 70 Am. St. Rep. 156. Donations by a corporation for political purposes are beyond its power, unless such purposes appear in the enumeration of the purposes for which the corporation was created: *McConnell v. Combination Min. etc. Co.*, 30 Mont. 239, 104 Am. St. Rep. 703. A railroad corporation has no authority to engage directly in the construction and operation of a summer hotel, or to lend its credit to any corporation engaged therein: *West Maryland R. R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 111 Am. St. Rep. 362. It is a familiar rule that corporations can exercise only such powers as are given them expressly or by necessary implication: *People v. Illinois Cent. R. R. Co.*, 233 Ill. 378, 122 Am. St. Rep. 181; *Southern Electric etc. Co. v. State*, 91 Miss. 195, 124 Am. St. Rep. 638.

FUNK v. BAKER.

[21 Okl. 402, 96 Pac. 608.]

PROBATE HOMESTEAD, Collateral Attack upon.—An order of a probate court, setting apart a homestead to the use of the wife and family of the deceased husband, in the absence of facts showing a want of jurisdiction in said court to make such order, is not open to collateral attack. (pp. 790, 792.)

PROBATE HOMESTEAD, Effect of.—The homestead of a decedent set aside to the surviving spouse and the minor children under the laws of Oklahoma does not pass into the hands of the administrator, nor is it subject to distribution as long as the homestead character is preserved and it is occupied and used by the family of the decedent as a home. (By the editor.) (p. 793.)

PROBATE HOMESTEAD, Continuance of.—When a homestead is set aside to a surviving spouse in proceedings in probate, it does not cease to be such homestead on the settlement of the estate, but continues its homestead character as long as the property is occupied as a home by the family. (By the editor.) (p. 794.)

PARTITION of Probate Homestead.—Where a wife occupies as a home the homestead set apart by order of the probate court for the use of herself and the family of her deceased husband, the same is not liable to partition at the suit of the assignee of some of the adult heirs. (p. 794.)

(Syllabi by the court except where stated to be by the editor.)

F. L. Boynton, for the plaintiff in error.

Spencer E. Sanders, for the defendants in error.

402 HAYES, J. C. R. Funk, plaintiff in error (plaintiff in the court below), brought this action in the district court of Kingfisher county against Lucy Baker, Christina Wright (nee Baker), Griffith Baker, Joseph Baker, Isaac Baker and Esau Baker, defendants in error (defendants below). In his petition filed in that court on the twenty-fifth day of September, 1905, plaintiff alleges: That on May 31, 1899, one Edward Baker died intestate in Kingfisher county, owning at the time and residing on as his home and exempt homestead the southwest quarter of section 15, township 18 north, ⁴⁰³ range 5; that the said deceased at his death left surviving him a widow, Lucy Baker, and his six children, Joseph Baker, Christina Baker, Griffith Baker, Edward Baker, Jr., Esau Baker, and Isaac Baker, all of lawful age; that the said Lucy Baker, by reason of being the widow of deceased, Edward Baker, became at the death of Edward Baker the owner of an undivided one-third interest in the above-described land, and each of said children became the owner of an undivided one-ninth interest in said lands; that on October 17, 1901, Lucy Baker applied for appointment as

administratrix of the estate of her deceased husband, and after fixing the date for the hearing thereof, the notice in due form being given, the probate court of Kingfisher county duly appointed her administratrix of said estate; that on November 18, 1901, the probate court ordered notice to creditors in due form to present their claims, and on August 4, 1902, the probate court entered a finding and decree that due notice had been given; that no claims were filed or presented, and the estate was not indebted; that on August 4, 1902, Lucy Baker filed her petition to set apart personal property for her use; "that on the same date a petition and application of the said Lucy Baker was filed to have set apart 'the homestead to her for her occupancy and that of her grown son, Joseph Baker,' who supported her, and on the same date an order was made that the said land 'be set apart for the use of the family of the said Edward Baker, deceased, and that the same be not subject to administration.' "

Plaintiff alleges that on August 15, and August 17, 1903, he purchased and became the owner of the interest of Griffith Baker, Edward Baker, Jr., and Esau Baker in said land, and that at the time of filing this suit defendant Lucy Baker was the owner of an undivided one-third interest, while the defendants Christina Wright, Joseph Baker and Isaac Baker each had an undivided one-ninth interest, and that plaintiff was the owner of an undivided one-third interest in said lands. Plaintiff alleges that he repeatedly, but in vain, attempted to obtain an amicable division or purchase of the lands; that it was the purpose of the defendant Lucy Baker to ⁴⁰⁴ occupy the said lands as long as possible, regardless of the rights of this plaintiff or of the law, and plaintiff prayed for an adjudication of the rights of the parties to the action in the lands and for the partition thereof.

Defendants demurred to petition of plaintiff upon four grounds, but only one ground of the demurrer is presented to this court for consideration, which ground is that the petition did not state facts sufficient to constitute a cause of action. The trial court sustained defendants' demurrer to plaintiff's petition, and defendants refused to plead further. Whereupon the court rendered judgment dismissing plaintiff's petition.

The sole question presented by the appeal in this case is the action of the court in sustaining the demurrer to plaintiff's petition, and in holding that the plaintiff's petition did not state facts sufficient to constitute a cause of action.

The contention of the parties to this action may be briefly stated as follows: Defendant's contention is that, under the allegations of plaintiff's petition, plaintiff admits that defendant Lucy Baker, the widow of the deceased, Edward Baker, occupies the land in controversy under an order of the probate court setting apart said lands as a homestead for the use of the family of the deceased Baker, and they allege that said land cannot be partitioned as long as said homestead rights exist in favor of the family of the deceased, Edward Baker. Plaintiff contends: First, that the order of the probate court setting apart said real estate for the use of the family of the deceased, Edward Baker, as a homestead, and ordering that the same be not subjected to administration, was made without notice, and is therefore void; and, secondly, that if such order is not void, and if the said Lucy Baker, as the widow of deceased, Edward Baker, is entitled to occupy said lands as the homestead of the family of the deceased Baker, the court should ⁴⁰⁵ decree a partition of the same subject to the said homestead rights of Lucy Baker as the widow of the deceased, Edward Baker. We have quoted verbatim the language of plaintiff's petition relative to the order of the probate court setting apart said lands for the use of the family of deceased, Edward Baker, as a homestead. At the time this order was made, plaintiff had acquired no rights in the land in controversy. There is no allegation in the petition that notice of the application of Lucy Baker for such order was not given to the heirs of Edward Baker, nor is it alleged in the petition that such heirs were not present at the time of the making of such order.

It is contended by plaintiff in his brief that Lucy Baker was not at the time the order of the probate court was made, and is not now, the head of a family, and therefore was not entitled to have said lands set apart to her as a homestead; but the question whether the facts were such that, under the law, the probate court should set apart said premises for the use of the family of the deceased as a homestead, was for the consideration of the probate court at the time the application for such order was made, and the court having found her entitled to have the same set apart to her as a homestead, for the use of the family of the deceased, Edward Baker, the same cannot be attacked in this proceeding unless it be shown that the probate court was without jurisdiction to make such order. It is a well-settled rule that the setting apart of a homestead is generally conclusive upon the parties in interest unless appealed from, and that the order of a court having competent jurisdiction setting apart a homestead upon application is not subject

to collateral attack unless the court making the same was without jurisdiction: 21 Cyc. 590, 591, and authorities cited.

The contention of plaintiff that the order of the probate court is void for the reason that no notice was given to plaintiff or the heirs whose interest he has acquired cannot be considered by this court, for the reason that his petition does not contain facts sufficient to present this issue. There is no allegation in the petition that the order was made without notice, or that there having ⁴⁰⁶ been no notice that the parties interested were not present at the time of the making of the order by the probate court. This court, in the absence of allegations to that effect, will not presume irregularities. Under the order of the probate court, the status of the land in controversy was fixed as that of the homestead of the family of the deceased, Edward Baker, not subject to administration, and the rights of the widow, Lucy Baker, under the order of the court, and under section 1607 of Wilson's Revised and Annotated Statutes of Oklahoma for 1903, are that she "may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law." There is no allegation in the petition that anything has transpired since the order of the probate court setting apart the homestead to the family of the deceased Baker that operates in law to defeat the rights of Lucy Baker to continue to occupy said lands as the homestead of the family. There is no allegation of abandonment or of any act on the part of the widow which would entail a forfeiture of her rights to occupy the land as a homestead.

It is insisted by plaintiff in his brief: That Lucy Baker is not the head of a family; that she lives upon said lands with her adult son, Joseph Baker, who supports her; and that, since she is not the head of a family, under section 1607 of Wilson's Revised and Annotated Statutes of Oklahoma of 1903, as construed in *Betts v. Mills*, 8 Okl. 351, 58 Pac. 957, she has no homestead rights in said land. The record in this case does not warrant us in passing upon this contention. There is no allegation in plaintiff's petition setting up the facts aforesaid upon which plaintiff in his brief bases this contention.

Section 1607, Wilson's Revised and Annotated Statutes of 1903, provides that: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age."

Whether, under this section, Lucy Baker, as the widow of the ⁴⁰⁷ deceased, Edward Baker, was entitled to have set apart to the family of the deceased Baker the lands in question, to be used as a homestead of the family, must have been passed upon by the probate court at the time it made the order setting apart the land in controversy for such purpose. That order was not appealed from, and, without allegations in plaintiff's petition setting up the facts that would constitute a forfeiture of the rights of Lucy Baker, the widow of the deceased Baker, to occupy the lands as a homestead, this court will not consider, as contended for by plaintiff, whether it is necessary that Lucy Baker be the head of a family in order to entitle her to occupy such lands as a homestead.

Section 6895, Wilson's Revised and Annotated Statutes of 1903, provides that: "When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed unless otherwise expressly provided in this code and the chapter on probate court, subject to the payment of his debts, in the following manner."

It then provides that the surviving wife or husband shall take from the deceased husband or wife certain portions of the property of the husband or wife, the portion being determined by the number of heirs, but in no instance the surviving wife or husband has less than one-third interest in the property of the deceased husband or wife.

Section 1601, Wilson's Revised and Annotated Statutes of Oklahoma of 1903, provides that: "The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate, except the realty and improvements thereon properly belonging to the homestead."

Section 1608 provides that: "In addition to the property mentioned in the preceding section, there shall also be allowed and set apart to the surviving wife or husband, or the minor child or children of the decedent, all such personal property or money as is exempt by law from levy and sale on execution or other final process from any court, to be, with the homestead, possessed and used by them."

⁴⁰⁸ Section 1609 provides that: "If no homestead has been selected, marked out, platted and recorded, as provided by the homestead law, the judge of the probate court must cause the same to be done according to the provisions of said law."

Section 1610 provides that: "The homestead is not subject to the payment of any debt or liability contracted by or exist-

ing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the law relating to homesteads."

Section 1641 provides that: "All the property of a decedent, except as otherwise provided for the homestead and personal property set apart for the surviving wife or husband and minor child or children, shall be chargeable with the payment of the debts of the deceased, the expenses of the administration and the allowance to the family."

It thus appears from these various sections of the statute that it is contemplated and intended that the possession of the homestead of the family upon the decease of either husband or wife, or of both, when there are children, shall not pass into the hands of the administrator, nor be distributed, as long as the homestead character of the same is preserved and is occupied and used by the family of the deceased as a home.

It is contended by plaintiff that the occupancy and possession by the surviving wife or husband of the whole homestead contemplated in section 1607, *supra*, is a temporary one, and meant to continue only until the administration of the estate is completed, or until the homestead is "otherwise disposed of according to law," and our attention in support of this contention is called to section 1602; but section 1602 must be read in connection with section 1601, and, when so done, it clearly appears that the property which, by section 1602, is required to be delivered to the heirs at law or devisees at the expiration of ten months from the first publication by the administrator of notice to the creditors, refers to ⁴⁰⁹ the property described in section 1601, which does not include the homestead and the improvements thereon.

The language of section 1607, *supra*, occurs in the statute of North Dakota, and has been construed by the supreme court of that state in *Fore v. Fore*, 2 N. D. 260, 50 N. W. 712, in which case the court held that the right of the survivor to occupy the homestead did not cease when the estate is settled, and that, while the same is occupied as a home of the family of the deceased and the homestead character of the same is maintained, a suit for partition will not lie. It is contended by plaintiff that the construction of the supreme court of North Dakota should not be binding or persuasive upon this court, for the reason that by the statute of North Dakota a surviving wife or husband, without children, constitutes a family within the meaning of the homestead laws, and that under the rule of the supreme court of the territory of Oklahoma announced in *Betts v. Mills*, 8 Okl. 351, 53 Pac. 957,

our statute giving to the surviving wife or husband the right to continue to possess and occupy the whole homestead has been construed to grant such right only when the survivor is the head of a family; but we are not called upon in the case at bar to approve or disapprove the doctrine announced in that case, for the reason that the right of the surviving wife in this case to have set apart the land in controversy as the homestead of the decedent's family was determined by the probate court, and there is nothing in the pleadings in this case that works a forfeiture of such right, and whether the surviving wife alone constitutes a family, or whether she must have others depending upon her, is not material to the proposition under consideration, which presents alone the question whether the homestead may be partitioned while occupied by the family of the deceased as a home. The language of our statute contained in section 1607, *supra*, has also been construed in *Nicholas v. Purcell*, 21 Iowa, 265, 89 Am. Dec. 572, and there it was held that a suit for partition would not lie until the termination of the homestead character of the property. The rule announced by the supreme courts of North Dakota and Iowa is ⁴¹⁰ the prevailing rule under the various homestead statutes of the different states: 21 Cyc. 594; 15 Am. & Eng. Ency. of Law, 699.

Our attention has been called to *Robinson v. Baker*, 47 Mich. 619, 11 N. W. 410, and to *Schaefer v. Kienzel*, 123 Ill. 430, 15 N. E. 164. In each of those cases it is held by the court that a partition of the homestead would lie subject to the right of the family to use and occupy the same; but the opinions in those cases were rendered under statutes the language of which is different from the language of the statute controlling in the case at bar.

The judgment of the trial court is affirmed.

All the justices concur.

An Order of Court Setting Apart a Probate Homestead to a Widow out of community property, there being no minor children, vests title thereto absolutely in her. Hence she may convey or mortgage it at pleasure, just as she may any other property in which she has the absolute title. But when there are minor children, one-half of the property vests in them in equal shares as a part of their respective estates to be cared for by their several guardians, and the other half in the widow. Even then it is competent for her to alien or mortgage her interest, and likewise it is competent for the guardian of the children, under proper judicial proceedings, to sell or mortgage their interests, or for a child himself to do so upon attaining majority. However, a grantee of the widow, or a purchaser at the foreclosure of a mortgage executed by her, cannot disturb the possession of the minor children; neither can their grantee, whether the conveyance is

made before or after their majority, disturb her possession. No act of any member of the family can prejudice the rights of the others to occupy the homestead as a place of abode. The homestead right of the minor children cannot be extinguished by the widow or by one of their own number on his becoming of age; neither can the homestead right of the widow be destroyed by the children, either before or after majority. The homestead remains intact as a place of abode, and the right therein continues in favor of any member of the family as long as he remains in a position to assert it, unprejudiced by the acts of his cotenants. When the children reach majority, their interest in the property, as a homestead, ceases, and whatever property rights they thereafter may have in the land are in the nature of those of remaindermen or reversioners; but the homestead right of the widow continues so long as she desires to assert it, secure from interference from the adult children or their grantees. During the minority of any of the children, a partition of the property will not be decreed, unless their best interests will thereby be promoted. When all the children become of age, they and the mother may have partition or sell the property free from its homestead character: 1 Ross on Probate Law and Practice, 493.

MYERS v. FEAR.

[21 Okl. 498, 96 Pac. 642.]

LANDLORD AND TENANT—Recoupment for Misrepresentation—Setoff.—A lessee upon discovering fraudulent representations by the lessor of a material fact is not compelled to give up the premises and rescind the lease, but may offset any damage caused by the misrepresentation against the rent upon suit being brought for its recovery. (p. 798.)

JURY TRIAL—Effect of Disregarding the Instructions.—When the court properly instructs the jury as to the measure of damages and they bring in a verdict contrary to such instructions, the verdict should be set aside and a new trial granted. (p. 798.)

APPEAL AND ERROR—Verdict, When Should be Set Aside. If the amount of a verdict cannot be justified by any hypothesis established by the evidence, the appellate court should set it aside. (By the editor.) (p. 799.)

(Syllabi by the court except where stated to be by the editor.)

II. R. Winn, for the plaintiff in error.

G. A. Paul and M. Fulton, for the defendants in error.

⁴⁹⁸ KANE, J. This was a suit brought by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, upon two promissory notes, and to foreclose a chattel mortgage given to secure their payment. The notes were given for rent of about one hundred and thirty-seven acres of land situated on the south side of the Canadian river, in the county of Oklahoma.

⁴⁹⁹ The answer of the defendants admits the execution of the lease, notes, and chattel mortgage, but alleges several defenses by way of setoff or counterclaim. The two defenses the defendants entirely rely on are stated by counsel in his brief as follows:

“First. The plaintiff, by positive statements and declarations made to defendants, assured them, told them, that the farm was not subject to overflow, and so induced defendants to execute the notes and sign the lease. The plaintiff well knew at the time that the farm was subject to overflow, also knew that defendants were strangers in the country, and were ignorant as to the actual conditions, and knew that the defendants were relying on his statements as to conditions. The plaintiff made the false statements with intent to deceive, mislead, and defraud defendants. Second. After the defendants had moved on the place, as had been understood and agreed upon between plaintiff and defendants at the time of making the lease and notes sued on, the plaintiff employed defendants to build the dam and plow the ditch heretofore mentioned. The defendants objected to this, not being certain from want of knowledge of the country as to what the result might be, but plaintiff proceeded with the work, promising defendants to build a bridge across the ditch to allow defendants to cross and recross should occasion demand it. That, when the high water came that washed out the dam and cut the new channel for the river and changed its course, as before stated, then the plaintiff refused to fix a crossing or build a bridge over this cut-off or new channel. Defendants were compelled to wade the river, and swim their stock and procure and cross in a boat to get to and from the farming lands and the pasture; at many times were kept out of the fields and from work in crops, the amount of water running in this new channel making it dangerous to attempt to cross over. The result was that defendants could not cultivate the lands that were not under water. In consequence no crops could be or were raised for want of cultivation on the lands that were not in the overflow, by which means they were damaged to an amount equal to the amount of the notes sued on.”

To the answer of the defendants the plaintiff filed a reply, and on the issues thus joined the cause was tried to a jury, who ⁵⁰⁰ returned a general verdict for the defendants, upon which verdict a judgment for costs was rendered by the court against the plaintiff. From this judgment the plaintiff appealed to the supreme court of the territory of Oklahoma, and the case was transferred to this court under the terms of the

enabling act (Act June 16, 1906, c. 3335, 34 Stats. 257) and schedule to the constitution.

We are convinced that the second statement of facts, as detailed by counsel, is not sufficient to constitute a defense to plaintiff's action for rent, and that it was error to permit evidence to sustain this paragraph of defendants' answer to go to the jury, and to refuse to set aside a verdict obviously based on such evidence. The lease under which the defendants were holding gave them absolute control over the premises, and the work the defendants did upon the land was presumably for their own benefit, and the fact that it may have turned out to their disadvantage would not make the plaintiff liable for the injury or constitute a proper setoff to the suit for rent. These facts constituted no part of the alleged misrepresentations that induced the defendants to execute the lease, and were not a proper defense against the covenants to pay rent contained therein.

The court below submitted the case to the jury upon the following instruction:

"Gentlemen of the jury, in this case the court instructs you as follows: This is an action commenced by the plaintiff against the defendants to recover on certain promissory notes, evidenced by a certain chattel mortgage which has been read here, executed and delivered by the defendants to the plaintiff in payment of certain rents for certain lands, the price of which was agreed on between the plaintiff and defendants. To the petition in this case the defendants have filed an answer which is a general denial, and then allege that the plaintiff obtained the notes and mortgages through false representations made by the plaintiff to the defendants, in that the land leased by the plaintiff to the defendants was subject to overflow, and that the plaintiff represented to the defendants that it was not subject to overflow except as to four or five acres. The burden is upon the plaintiff in the first instance to establish his right to recover by a preponderance ⁵⁰¹ of the evidence, and by a preponderance of the evidence is meant that evidence which, in the light of all the facts and circumstances appearing upon the trial, is entitled to the more weight and credit. On the other hand, gentlemen, as to the question of misrepresentation by the plaintiff to the defendants, the burden is upon the defendants to establish that, prior to the entering into the contract or lease the plaintiff made false representations as contended by the defendants, and the burden is upon the defendants to establish this fact by a clear preponderance of the evidence. If,

however, you find that the defendants have established, by a preponderance of the evidence, that the plaintiff represented to them, before they leased the land in question, that it was not subject to overflow, except three or four acres, when in truth and in fact a large portion of it was subject to overflow, then the defendants would be entitled to an offset to the amount of the damages which they actually sustained by reason of such overflow, if you further find that had it not been for such false representations they would not have entered into the contract of lease."

A lessee, after accepting a lease and entering into possession of the premises, upon discovering a fraudulent representation by the lessor of a material fact, is not compelled to give up the premises and rescind the lease, but he may bring an action against the lessor for deceit: there being nothing in the relation of landlord and tenant, or in the rules of law which control that relation, to preclude him from so doing. Aside from the common-law rule, which bound parties who solemnly contracted by deed to the presumption of full consideration, there would seem to be no reason why a reduction of damages for partial failure of consideration or recoupment should not be allowed. And where, by statute, a seal is no longer of its former conclusive force, a suit on a contract for rent, like ordinary parol agreements, should be subject to that course of defense, as it avoids circuity of action: *Jones on Landlord and Tenant*, sec. 674; *Dennison v. Grove*, 52 N. J. L. 144, 19 Atl. 186; *Lord v. Brookfield*, 37 N. J. L. 552. But the jury went beyond the instructions of the court, and must have taken into consideration other elements of injury than those embraced therein in arriving at their verdict, as the amount ⁵⁰² of recovery they found in favor of the defendants was in excess of any amount which could possibly be based or predicated upon damages caused by the false representations of the plaintiff. While the jury failed to state in their verdict the amount of damage they found for the defendants, yet it in effect amounts to a recovery in their favor in the sum of four hundred and fifty-seven dollars, as that was the amount due the plaintiff on the promissory notes sued on. There is no evidence to support a verdict for anything like this sum upon any theory of the case consistent with the instructions of the court. It is a well-settled rule that, when the verdict of the jury is contrary to the instructions of the court, it should be set aside: *Farley v. Budd*, 14 Iowa, 289; *Sullivan v. Otis*, 39 Iowa, 328; *Morss v. Johnson*, 38 Iowa,

430; Hayward v. Ormsbee, 7 Wis. 111; Dent v. Bryce, 16 S. C. 1; Thompson v. Lee, 19 S. C. 489; Emerson v. Santa Clara County, 40 Cal. 543; Howard Express Co. v. Wile, 64 Pa. 201. It is also held that where a court lays down the proper rule for measurement of damages, which instruction is disregarded by the jury, a new trial will be granted: Hoffman v. Bosch, 18 Nev. 360, 4 Pac. 703.

Upon a careful review of the evidence, we are convinced that the amount of recovery fixed by the verdict of the jury cannot be justified upon any hypothesis established by the evidence introduced upon the correct theory of the case. Under such circumstances, the verdict ought to be set aside: St. Louis Brewery Co. v. Bodemann, 12 Mo. App. 573; Roeder v. Studt, 12 Mo. App. 566; Todd v. Boone County, 8 Mo. 431; Ellsworth v. Central R. R. Co., 34 N. J. L. 93.

The judgment of the court below is reversed and remanded, with instructions to grant a new trial.

All the justices concur.

That a Tenant may Set Off or Recoup Damages for the lessor's breach of covenant in an action by the latter to recover rent, see McCoy v. Oldham, 1 Ind. App. 372, 50 Am. St. Rep. 208; Keating v. Springer, 146 Ill. 481, 37 Am. St. Rep. 175.

GARRISON v. STREET & HARPER FURNITURE AND CARPET COMPANY.

[21 Okl. 643, 97 Pac. 978.]

MORTGAGE, When not Restricted to the Present Interest of the Mortgagor.—An agreement to place a lien on after-acquired property is not restricted to the interest of the mortgagor in the property itself, and if the property is already mortgaged, the additional mortgage is not restricted to the mere equity of the mortgagor over and above the first mortgage. (By the editor.) (p. 802.)

CHATTEL MORTGAGE, Effect of Possession Taken Under an Imperfect.—A chattel mortgage, good only between the parties because not filed of record, is, after condition broken and delivery by mortgagor to mortgagee of the mortgaged chattels, good as to all others. (p. 806.)

CHATTEL MORTGAGES, Priority Acquired by First Taking Possession.—In a case where W. executes and delivers to G., on November 29, 1904, a chattel mortgage, which is not filed for record until December 31, 1904, and without knowledge thereof, and for value, S. on December 15, 1904, accepts a mortgage on the same goods, which is not filed until January 3, 1905, and after W. had delivered possession of the chattels to G., after condition broken in

his mortgage, G. will, by virtue of such possession, take title thereto free from the lien of S.'s mortgage. (p. 807.)

(Syllabi by the court except where stated to be by the editor.)

Grant & McAdams, for the plaintiffs in error.

R. N. McConnell, Sam Hooker and Chambers & Taylor, for the defendant in error.

643 DUNN, J. Plaintiff in error in his brief makes a statement of facts in this case which, for the purpose of this appeal, is by the defendant in error conceded to be correct. From it we glean the following facts upon which this opinion is predicated: November 20, 1904, the plaintiff in error, G. W. Garrison, sold and transferred to his codefendant in the court below, Mrs. M. J. Wade, all of his right, title, and interest in and to a certain lease on a building known as the "Illinois Hotel" in Oklahoma City, together with all of the 644 office fixtures and furniture and hotel equipment, taking from her notes in the sum of four thousand one hundred and sixteen dollars and sixty-five cents, and a chattel mortgage to secure the same on the personalty sold. The mortgage also contained the stipulation that it was to cover "all other furniture or supplies bought and placed in said hotel by the party of the first part [Mrs. M. J. Wade], and all furniture, fixtures, and supplies of every description now in said hotel and this day sold by the said G. W. Garrison to the party of the first part; also all furniture, fixtures, bedding and all other personal property of whatsoever kind or description hereinafter bought by the party of the first part." This mortgage was not filed for record until more than a month had elapsed from its execution, to wit, on December 31, 1904, when it was filed in the office of the register of deeds of Oklahoma county, wherein was located the said chattels.

On December 15, 1904, defendant in error, the Street & Harper Furniture and Carpet Company, sold to Mrs. M. J. Wade certain personal property consisting of beds, dressers, springs, etc., which were delivered to her in the hotel for the purpose of furnishing certain rooms therein, the amount of the same being twelve hundred and seventy-four dollars and forty-five cents, to secure the payment of which the said Street & Harper Furniture and Carpet Company took a chattel mortgage, which was signed by Mrs. M. J. Wade, and delivered to them on the fifteenth day of December, 1904. This chattel mortgage was not filed for record at the time it was taken, but was held by said company until the afternoon of January 3, 1905, at which time it was filed in the office of

the register of deeds of Oklahoma county. Quoting from the brief of plaintiff in error: "The conditions of the mortgage executed to plaintiff in error by the said Mrs. M. J. Wade having been broken, on the third day of January, 1905, about 9 o'clock in the forenoon, and about four hours before defendant in error filed its said mortgage for record, the said Mrs. M. J. Wade freely and voluntarily delivered all of said property to the plaintiff in error, through his attorney, E. G. McAdams, an attorney of record of this territory, and authorized the said attorney to foreclose said mortgage by a sale of said ⁶⁴⁵ property, and apply the proceeds thereof to the payment of said notes due plaintiff in error."

That in keeping with the purposes for which possession was given, plaintiff in error advertised the said property for sale. Whereupon, the conditions of the mortgage given by the said Mrs. M. J. Wade to the defendant in error having been broken on the fifteenth day of January, 1905, by virtue of the fact that the first note, which was due in thirty days, was unpaid, defendant in error began its suit of replevin against G. W. Garrison and Mrs. M. J. Wade to recover the property sold her on December 15, 1904. Issues were framed, based on the facts above set out. A trial was had in the district court before a jury, evidence being introduced by both parties, and on motion of both parties, the court took the case from the jury, rendering judgment in favor of plaintiff, giving it possession of the property in question. Motion for new trial was filed and overruled and exception saved, and the case is before us by virtue of proceedings in error taken in the supreme court of the territory of Oklahoma.

From the statement of facts it will be observed that Garrison's mortgage, which was given on November 29th, was not filed for record until December 31, 1904; that the Street & Harper Furniture and Carpet Company's mortgage, which was given December 15, 1904, and which, it is conceded, was taken without notice of the prior unrecorded mortgage, was not filed for record until January 3, 1905, it being filed four days after the filing of Garrison's mortgage, and about four hours after the possession of the property had been delivered to Garrison. The sole question before the court is, Who, under these circumstances, is entitled to these goods? We confess that this is a question upon which the authorities are not entirely in accord, and upon which counsel for either party have cited us to ⁶⁴⁶ no authority of any court bearing precisely upon this point. From the facts stated, it will be

observed that the mortgage provided that it should cover all the after-acquired personal property of the mortgagor.

Section 8, chapter 50, paragraph 3445, Wilson's Revised and Annotated Statutes of Oklahoma of 1903, provides: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest."

Section 18, chapter 53, paragraph 3578, Wilson's Revised and Annotated Statutes of Oklahoma of 1903, provides: "A mortgage of personal property is void as against creditors of the mortgagor, subsequent purchasers, and encumbrancers of the property in good faith, for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated; and a mortgage of personal property situated in portions of this territory attached to an organized county thereof for judicial purposes, shall be void against creditors of the mortgagor, subsequent purchaser, or encumbrancers of the property in good faith for value, unless the original or an authenticated copy thereof be deposited and filed in the office of the register of deeds of the county to which the territory in which such property is situated is attached for judicial purposes."

The foregoing statutes are the ones embodying the law involved, and under them defendant in error takes the position that an agreement to place a lien upon after-acquired property applies only to the interest which the mortgagor had in the property itself, and that in this instance the property sold to Mrs. M. J. Wade was subject to a mortgage for a portion of the purchase price when sold, and that the only interest Mrs. Wade had therein that could be subjected to the mortgage lien of Garrison was the equity over and above the mortgage lien of defendant in error. No authorities are cited in support of this proposition, and in our judgment ⁶⁴⁷ it is not tenable. Mrs. M. J. Wade purchased the goods from defendant in error. She paid for them with her notes. She secured title to them, and on the title she had in them she gave her vendors a lien, by executing and delivering a chattel mortgage. The goods sold to Mrs. M. J. Wade at the time of the sale had no mortgage upon them, and before a mortgage could be placed on them by her it was essential that title to them vest in her. As soon as this title vested, as

between herself and Garrison, at least, Garrison's mortgage reached it, and the property immediately became subject to the same. As between herself and Garrison, it was unnecessary for either of them to take further step, or do any further act, to make effective his lien: *Grand Forks Nat. Bank v. Minneapolis & Northern Elevator Co.*, 6 Dak. 357, 43 N. W. 806. But whether or not Garrison secured any lien on these goods as against the Street & Harper Furniture and Carpet Company presents altogether another question, and one which will be considered in discussing the subsequent doing of these parties in reference to their respective chattel mortgages and the property. It must be conceded that, as against the mortgage of defendant in error, Garrison's mortgage was void on the fifteenth day of December, 1904, when Mrs. M. J. Wade executed and delivered her mortgage on this property in question to defendant in error. Upon what theory the defendant in error was given judgment in the court below we are not advised, except as is stated in counsel's brief that the decision of the lower court was right, under the construction given to our statute in the case of *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, found in 9 Okl. at page 353, and 60 Pac., at page 249. In addition thereto we are cited to three other authorities: *Bank of Farmington v. Ellis*, 30 Minn. 270, 15 N. W. 243, *De Courcey v. Collins*, 21 N. J. Eq. 357, and *Jones on Chattel Mortgages*, sec. 246. The section from *Jones on Chattel Mortgages* finds its support in two cases, which are here cited with it.

The Minnesota statute on which the case of *Bank of Farmington v. Ellis*, 30 Minn. 270, 15 N. W. 243, is based, reads as follows: "Every mortgage on personal property which is not accompanied ⁶⁴⁸ by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless it appears that such mortgage was executed in good faith, and not for the purpose of defrauding any creditor, and unless the mortgage or a true copy thereof is filed as hereinafter provided."

The facts in the case were that Ellis executed and delivered a mortgage to the bank on August 18, 1881. He executed and delivered a mortgage on the same property to Barclay, August 17, 1881. The bank filed its mortgage August 20, 1881, and Barclay filed his mortgage August 18, 1881. Ellis retained possession of the property until the bank brought foreclosure proceedings on its mortgage, and the question was

which, as between these two mortgages, had preference by reason of the time of execution and delivery and filing of record, and the court held: "Under the statute in relation to chattel mortgages (Gen. Stats. 1878, c. 39, sec. 1), where the possession is not delivered, a prior mortgage will be postponed to a subsequent bona fide mortgage, if not duly filed when the latter is executed, although the former may be subsequently filed prior to the filing of the second mortgage."

The case of *De Courcey v. Collins*, 21 N. J. Eq. 357, was also, as Chief Justice Beasley said, "a struggle for priority between the holders, severally, of two chattel mortgages." The question involved related entirely to the matter of record and the priority thereof, and the court, holding on this, said: "A first chattel mortgage unregistered is absolutely void against a second mortgage taken in good faith; and such second mortgage need not be recorded at all to give it priority over such first mortgage."

It will be observed that, in both the cases cited to support the judgment, the element upon which the plaintiff in error in this case relies, to wit, possession on the part of the first mortgagee, did not obtain, and was not considered by the court, and hence these authorities are not applicable to the case.

649 The other authority relied upon, the case of *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353, 60 Pac. 249, and which doubtless was the controlling authority in the mind of the court rendering judgment herein, has recently had the consideration of this court in *Frick Co. v. Oats*, 20 Okl. 473, 94 Pac. 682, and the portion of that opinion bearing upon the question involved in this case was specifically overruled in the following syllabus: "In an action of replevin the right of a creditor to the possession of the property in controversy, who holds a chattel mortgage on his debtor's property, good as between the parties, but void as to the other creditors, because not filed as required by law, but who has taken possession of the mortgaged property, after condition broken, as security for the debt, with the consent of the mortgagor, is superior, under section 3578, Wilson's Revised and Annotated Statutes of Oklahoma of 1903, to that of a subsequent execution creditor who has levied upon the same: *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353, 60 Pac. 249, is overruled."

The court, through Mr. Justice Turner, speaks as follows: "At common law the mortgagee held possession of the property as well as the legal title. If the mortgagor was permitted

to retain possession, the conveyance was presumptively fraudulent. The rule at common law has been changed by nearly all of the western states, so that the legal title to the property remains in the mortgagor, and, where the mortgage or statute so provides, the mortgagor may remain in possession, and, as a general rule, if the mortgagor remains in possession, the mortgage must be filed, or the mortgagee will not be protected against the creditors of the mortgagor; but if the mortgagee is in possession of the property, the most of the states protect his rights under his mortgage against the mortgagor's creditors.' Cobbey on Chattel Mortgages, speaking of unfiled chattel mortgages (volume 1, section 498), says: 'If the mortgagee takes possession of the mortgaged property before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties'—and authorities cited. Again, in the same section, we find: 'Where a creditor, who holds a mortgage of his debtor's property, which is void as to other creditors of the debtor because it was not filed, takes possession of the mortgaged property, with the consent of the debtor, as ⁶⁵⁰ security for the debt, he may still, as against other creditors, hold the property as pledgee. . . . If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged and recorded or the record be ineffectual by reason of some irregularity. The subsequent delivery cures all such defects, and the mortgagee's right of possession is good against the world'; citing numerous authorities: *First Nat. Bank v. Damm*, 63 Wis. 249, 23 N. W. 497; *Hammon on Chattel Mortgages*, p. 82."

A leading case on this subject is *Cameron v. Marvin*, 26 Kan. 612. In this case Patterson, a merchant, executed a number of chattel mortgages upon certain goods and merchandise, delivering the same for value to Cameron, Hull & Co. These mortgages were not filed of record. Goodnow & Co., after these mortgages were executed, sold and delivered Patterson a car of flour upon the strength and credit of his apparent unencumbered, visible assets. Patterson gave possession of the mortgaged goods to the mortgagees nine days prior to the levy of an attachment by Goodnow; suit being brought and the ground taken that the mortgages were fraudulent and void as to him, because not recorded, and by reason of the fact that he was a subsequent creditor for value and without notice. *Cameron, Hull & Co. replevied*. The su-

preme court of the state of Kansas, in the syllabus of the reported case, say: "In an action of replevin, where the plaintiff claims the property by virtue of four chattel mortgages, and the defendant claims the property by virtue of an attachment issued against the plaintiff's mortgagor, and levied upon the property in controversy, and where the chattel mortgages were never recorded, and the mortgagee did not immediately take possession of the property, but did, a long time after the execution of the mortgages, and nine days prior to the levy of the attachment upon the property, take the possession of the same under the mortgages, by and with the consent of the mortgagor, held, that the mortgages, from the time the mortgagee took possession of the mortgaged property, must be considered valid."

⁶⁵¹ In the consideration of the case, Justice Valentine, who wrote the opinion, says: "We shall assume, for the purpose of this case, that all the mortgages were void as against F. Goodnow & Co., and as against all other creditors of Patterson, and subsequent purchasers, up to the time when the plaintiffs took possession of the property, and shall simply discuss the question whether they continued to be void after that time. Indeed, such mortgages, not being recorded, and being of property not delivered, are made void by section 9 of the mortgage act. . . . Did the mortgages become valid when the plaintiffs took possession of the property under them? We think we must answer this question in the affirmative: *Dayton v. People's Sav. Bank*, 23 Kan. 421; *Parsons Sav. Bank v. Sargent*, 20 Kan. 576; *Nash v. Norment*, 5 Mo. App. 545; *Eastman v. St. Anthony Falls Water Power Co.*, 24 Minn. 437; *Read v. Wilson*, 22 Ill. 377, 74 Am. Dec. 159; *Frank v. Miner*, 50 Ill. 444; *Chipron v. Feikert*, 63 Ill. 284; *McTaggart v. Rose*, 14 Ind. 230; *Brown v. Platt*, 8 Bosw. (N. Y.) 324; *Brown v. Webb*, 20 Ohio, 389; *Chapman v. Weimer*, 4 Ohio St. 481; *Field v. Baker*, 12 Blatchf. 438, Fed. Cas. No. 4762. . . . If the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mortgagor, or takes possession of the property with the consent of the mortgagor, his mortgage then has the force and effect of a mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint action of both the parties, and hence

must be held to be valid from that time on, as against all persons."

While this holding of the Kansas court, in reference to the effect of the filing of the mortgage, is apparently in conflict with the authorities cited by defendant in error, the effect given to the possession of the mortgaged chattels taken with the consent of the mortgagor is practically the uniform holding of all the states. Nor is it inequitable to the junior mortgagee that this should be so, for the force of the statute on which he relies to give validity to his mortgage over the prior unrecorded mortgage also renders his unrecorded mortgage liable likewise to be held void as to ⁶⁵² subsequent encumbrancers or purchasers in good faith and without notice. This construction placed upon the statute will make it uniform in its operation as to all. The conditions of Garrison's mortgage were broken. Garrison, under the terms of his contract with his mortgagor, had a right to the possession of the chattels, so that he might make his debt out of them, and when he did, his title was then not only good as against Mrs. Wade, but as to all others.

In the case of *Hixon v. Hubbell*, 4 Okl. 224, 44 Pac. 222, the supreme court of the territory held: "A chattel mortgage in Oklahoma does not entitle the mortgagee to possession until after condition broken, but creates a lien in favor of the mortgagee, while the title remains in the mortgagor. On condition broken the mortgagor may deliver possession to the mortgagee, and pass the title of the mortgaged chattels to him."

In the case at bar the conditions of Garrison's mortgage were broken, the mortgagor delivered possession of the mortgaged chattels to him, and whatever may have been the extent of his claim upon them prior to the delivery, after delivery he had title, and the effect of the failure of recording his mortgage as to the defendant in error was cured.

The judgment of the lower court is reversed, and the case is remanded to the district court of Oklahoma county, with instructions to set aside the judgment heretofore rendered herein, and to enter one in accordance with this opinion.

All the justices concur.

A Mortgage of Chattels, in order to be valid against subsequent creditors, must be recorded or the property must be delivered to and retained by the mortgagee: *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 460; *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 114 Am. St. Rep. 1004; *Westinghouse Co. v. McGrath*, 131 Iowa, 226, 117 Am. St. Rep. 421; *Folsom v. Peru Plow etc. Co.*, 69 Neb. 316, 111 Am. St. Rep. 537. As to whether the failure to record a chattel mortgage is cured by the mortgagee taking possession of the property, see *See*

ond Nat. Bank v. Gilbert, 174 Ill. 485, 66 Am. St. Rep. 306; Stephens v. Meriden Britannia Co., 160 N. Y. 178, 73 Am. St. Rep. 678; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302; as to whether other defects in the mortgage are cured by the mortgagee taking possession, see Rathbun v. Berry, 49 Kan. 735, 33 Am. St. Rep. 389; Chaffee v. Atlas Lumber Co., 43 Neb. 224, 47 Am. St. Rep. 753; Francisco v. Ryan, 54 Ohio St. 307, 56 Am. St. Rep. 711; Thompson v. Fairbanks, 75 Vt. 361, 104 Am. St. Rep. 899.

ARKANSAS INSURANCE COMPANY v. COX.

[21 Okl. 873, 98 Pac. 552.]

INSURANCE, When Divisible.—Where an insurance policy is issued and different classes of property insured, each class being separated from the others and insured for a specific amount, and there is a breach of the condition of the contract as to one class of the property insured, the contract should be considered not as one entire in itself, but as one which is separable and in which the separate amounts specified may be distinguished, and a recovery had for one or more without regard to the other items, provided the contract is not affected by any question of fraud, act condemned by public policy, or any increase in the risk of the property insured. (p. 812.)

INSURANCE, Unconditional Sole Ownership, What Amounts to.—A vendee of land occupying the same under an executory contract of purchase, on which he has paid a portion of the purchase price, is an unconditional and sole owner" in fee simple of the equitable title within the condition of a policy providing that it shall be void if the interest of the insured is other than unconditional and sole ownership of the fee simple title. (p. 815.)

INSURANCE, Estoppel by Knowledge of the Facts.—Where it is shown that the insured truthfully and correctly stated the nature and condition of his title in making the application for insurance, he will not be precluded from recovering in case of loss on account of a contrary title stated in the policy by the underwriter. (p. 814.)

INSURANCE, Waiver of Defects in Proof.—Where an insurance company did not object, within a reasonable time, that proofs of loss furnished it by the insured were defective (as that the notary public before whom the same were sworn to did not designate his official title nor attach his seal), it must be held that the company waived all defects therein. (p. 816.)

INSURANCE, Premium Notes, Effect of Nonpayment of.—Where two notes are given in payment of the premium on a fire insurance policy, and no reference is made to them in the policy, nor the validity of the policy is in any way made contingent upon the payment of the notes, the policy is not invalidated by nonpayment of the notes at their maturity. (p. 817.)

(Syllabi by the court.)

H. F. George, for the appellant.

Campbell & Wright, for the appellee.

⁸⁷⁴ HAYES, J. Appellee, who was plaintiff below, sued appellant, who was defendant below, on a policy of insurance issued by defendant to plaintiff in the sum of six hundred dollars, dated December 1, 1905, and expiring December 1, 1906. This suit was originally brought in the United States court for the central district of the Indian territory at McAlester. Plaintiff recovered judgment for the sum of four hundred and eighty-six dollars and eighty-six cents, from which judgment appeal was taken to the United States court of appeals of the Indian Territory, and it is before this court for final disposition under the provisions of the enabling act.

⁸⁷⁵ Plaintiff in his complaint alleges the issuance of the policy, and attaches a copy of same to his complaint as an exhibit, and alleges that a portion of the property insured by said policy was, on the eighth day of December, 1905, destroyed by fire. Defendant in its answer admitted the execution of the policy for the amount and on the date stated in the complaint, but sought to avoid the policy upon the ground that misrepresentations were made in the application of plaintiff therefor, which application was, by the terms thereof and by the terms of the policy, made a part of the policy.

Numerous assignments of error were made by appellant, but its counsel in his brief states that all propositions raised by the various assignments of error, in so far as this appeal is concerned, are abandoned except three. It is contended that the policy was void, and plaintiff was not entitled to recover: First, because of misrepresentations made by him in the application; second, for failure to furnish proper proof of loss; third, for failure on the part of plaintiff to pay the premium notes given by him in settlement of the premium for the policy. These propositions are raised by appellant by different assignments of error, some of which go to instructions given by the court and excepted to, some to instructions requested by the appellant and refused by the court, and others to the admission of testimony; but we shall not discuss in detail the various assignments of error by which these three different propositions are presented, for all the assignments of error not waived by appellant, taken collectively, present these three propositions of law. If appellant is correct in his contention as to any of them, then the case should be reversed; otherwise, the case should be affirmed.

The policy sued upon was issued by defendant at the office of its general agent at South McAlester, upon a written application ⁸⁷⁶ of plaintiff which was procured by Foster & Dalton, agents of defendant residing at Stigler, Indian Terri-

tory. The application was made upon a printed form furnished by the agents of the company. The property to be insured, the valuation and amount of insurance on each item thereof, is stated and described in the application as follows:

	Valuation.	Sum to be insured.
On dwelling-house	\$450.00	\$300.00
On household furniture therein...	150.00	100.00
On bed and bedding therein.....	150.00	100.00
On wagons, buggies and harness in barn and shed.....	150.00	100.00

The policy issued upon the application was for an amount not exceeding six hundred dollars on property described in the policy as follows:

“\$300.00 on one story frame building with shingle roof and communicating additions, including foundations, on water, gas and steam-pipes and fixtures, on electric wires and annunciators, while occupied as a dwelling-house or —, and situated town of Garland, I. T.

“\$100.00 on household and kitchen furniture, useful and not ornamental, beds, bedding, linen, stoves, provisions, and family wearing apparel in good condition.

“None on sewing-machine, all while contained in the above described building. None on piano or organ all while contained in the above described building.

“Barn and Contents.

“\$100.00 on one story frame barn with shingle roof building including foundations and stalls, situated in the rear of the above described building.

“Miscellaneous.

“\$100.00 on wagons, buggies and harness in barn or shed.

“\$600.00 total concurrent insurance permitted, including this policy.”

The first alleged misrepresentation in the application for which defendant seeks to avoid the policy is that the policy covers one buggy which was not owned by plaintiff at the time of the issuance of the policy, but that plaintiff by the terms of the application ⁸⁷⁷ and policy represented that he owned same. By the terms of the application plaintiff's answers therein were made his warranties, and the policy contained the following clause: “This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insur-

ance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

By virtue of this clause of the policy it is contended by defendant that the policy is void and of no effect because of plaintiff's misrepresentations as to his interest in the buggy. There is no specific reference in the application or in the policy as to any buggy or buggies, except as has been set out hereinbefore in the clauses quoted from the application and from the policy. Upon receipt of the policy by plaintiff he read the clause "one hundred dollars on wagons, buggies and harness in barn or shed," and thereupon called the attention of defendant's agents, through whom the application for insurance was made, to the fact that he owned no buggy. It appears that plaintiff inferred from the language of said clause in the policy that it was intended to insure a buggy—and he had owned, prior to the giving of the application for insurance, a buggy, but he had sold the same some sixty days before that time. There is no explanation of how the clause in the application and in the policy came to include the word "buggies." The agents were unable to remember that any request for insurance upon buggies was made or any representation by plaintiff that he owned any buggy at the time the application was given, and there is nothing in the policy or in the application that indicates that any such representation was made other than the clause quoted. Plaintiff owned a wagon which, however, was not destroyed by fire. He also owned some harness which was still in the barn and shed covered by the policy. There is no evidence whatever that the policy was made to cover buggies through any ⁸⁷⁸ fraudulent act or procurement of plaintiff, nor was it shown that the risk of the company was increased by reason of the policy having included buggies when the insured owned no buggy. In order to forfeit this policy, the insurance company insists that these clauses in the application and policy should be construed to insure a buggy which plaintiff had at one time owned, but which he did not own at the time he made his application or at the time of the issuance of the policy, and that he represented that he owned the same. There was no evidence that plaintiff owned or represented that he owned any buggy, or that there were any buggies at the time of the issuance of the policy kept by him in said barn and shed. There was no insurance on any buggy thus located, for none existed.

The construction which the insurance company insists upon in this case is for the purpose of incurring a forfeiture of this policy. Forfeitures are not favored by the law. The reasoning that would support the construction that by virtue of said clauses plaintiff represented he had one buggy and that one buggy was insured would also support the construction that he had more than one buggy, for the language of the clause is "buggies," not "buggy." The application and the policy were written upon printed forms of the company, and no doubt for the purpose of convenience to itself and agents. A mere failure of the company or of the applicant to strike from the application and from the policy the word "buggies," in the absence of any other showing by the terms of the application or of the policy or of representations made by the insured that the insured owned a buggy, that the same was to be included in the policy and was included in the policy, should not be construed as a representation that he did own a buggy. Plaintiff owned a wagon and harness, and it is not shown that the value of the same was not sufficient to entitle him to all the insurance he obtained thereon by virtue of this clause in the policy; but if the policy and application were construed, as contended for by the insurance company, as including representations of plaintiff that he owned a buggy and that the policy insured the same, still this would not be sufficient ⁸⁷⁹ to avoid the entire policy. Items of property insured by the policy were separately valued and insured in separate amounts, and under the rule adopted by the supreme court of the territory of Oklahoma in *Miller v. Delaware Ins. Co.*, 14 Okl. 81, 75 Pac. 1121, 65 L. R. A. 173, a breach of the policy as to one item insured therein would not avoid the policy if the same was not affected by any question of fraud, act condemned by public policy, or any increase in the property insured, and this is true notwithstanding the policy contained a provision that "this entire policy shall be void if the insured has concealed."

There is not an absence of authorities holding to the contrary, and this court, in *Sullivan v. Mercantile Town Mutual Ins. Co.*, 20 Okl. 460, ante, p. 761, 94 Pac. 676, had occasion to cite some of the authorities holding on both sides of this proposition: but we were not called upon in that case to decide which rule this court would adopt, and did not do so. The authorities supporting the doctrine announced by the court in *Miller v. Delaware Ins. Co.*, 14 Okl. 81, 75 Pac. 1121, 65 L. R. A. 173, are well collected by the court in that opinion, and we think that the rule adopted by the court in that case

is the rule supported by the greater weight of authorities, and should not be overturned by this court, but should be adopted and followed.

Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287, presents a state of facts similar to those in the case at bar. The policy in that case insured a piano for the sum of two hundred dollars, but the insured did not at the time of the fire or at the time the policy was issued own any piano whatever. The record did not disclose how the piano came to be included in the policy of insurance. The court held that where a policy of insurance is issued covering different classes of property, and each class is insured for a specific sum, a breach of the contract of insurance as to one or more of the items does not avoid the policy as to the other items not affected by the breach, in the absence of fraud, act condemned by public policy, or increase of risk to the property insured by reason of the breach as to the part. Plaintiff in ⁸⁸⁰ the case at bar waives any claim for loss of property included in the clause of the policy covering wagons, buggies, etc.

The second alleged misrepresentation for which it is sought to avoid the policy is that in the application the following questions and answers were made: "Q. Is your ownership of property to be insured absolute, unqualified and undivided? A. Yes. Q. In whose name is the land on which property to be insured is located? A. R. L. Folsom. I have a contract for the land these buildings are on with a Choctaw Indian and have paid him for it."

It was agreed that, at the time of the application and of the loss, plaintiff occupied the land upon which said improvements were located under a contract with R. L. Folsom to give him, the plaintiff, a deed to said land when said Folsom received his patent; that the entire consideration to be paid for the land was five hundred dollars; that, at the time the application was made by plaintiff, plaintiff had paid four hundred and twenty-five dollars on the consideration, and the remaining seventy-five dollars was by the terms of the contract not to be paid until Folsom should deliver to plaintiff a deed to the land. The policy contained the following clause: "This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void, . . . if the interest of the insured be other than unconditional and sole ownership, both legal and equitable, or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage."

Defendant insists that the answers of plaintiff in his application as to his interest in the dwelling-house and barn insured and the land on which the same was situated were false, and that he did not have the unconditional and sole ownership, both legal and equitable, of the property, and that he was not the owner of the fee simple title to the land on which said buildings were situated, and that by reason of such facts the policy, under the provision thereof quoted supra, was void. There was no misrepresentation by plaintiff in his application as to who owned the legal ⁸⁸¹ title to the land on which the property was situated. His answer to the questions in the application disclose that the same was held in the name of R. L. Folsom. This fact was known to the insurance company by the written application of plaintiff, containing such answer, being before the company at the time it issued the policy sued on; and the company, having with full knowledge issued the policy to plaintiff, cannot now insist upon the clause in the policy requiring the insured to be the unconditional and sole owner of the legal title, but will be held to have waived such condition. The law will not permit it, with full knowledge of the condition of the legal title to the land on which the insured's property was located, to accept the application and the premium note given by the insured in payment of the premium on the policy, and to insert in the policy a provision contrary to the conditions of the title as represented by the application by which it may defeat the right of recovery in case of loss: *German-American Ins. Co. v. Paul*, 5 Ind. Ter. 703, 83 S. W. 60; *Allen v. Phoenix Assur. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A., N. S., 903.

Was plaintiff the unconditional and sole owner of the equitable title to the land on which the property insured was located? There is no denial that Folsom held the legal title to the land in controversy, or that the contract of sale between him and the plaintiff is valid, and since the burden of proof is upon defendant to establish such facts as were necessary to avoid the policy, in the absence of any attack upon the validity of the contract between Folsom and plaintiff, it will be assumed that it was valid and passed the interest in the land in controversy purported to have been passed by such contract. As to what interest in property answers the requirement of the provision of a standard fire insurance policy to the effect that "the entire policy shall be void if the interest of the insured be other than the sole and unconditional ownership or if the subject of insurance be located on ground not owned by the insured in fee sim-

ple," has often received ⁸⁸² the consideration of and been determined by the courts. The authorities hold, almost without exception, that a vendee of land who occupies the same under an executory contract of purchase is the unconditional and sole owner of the same and of the fee simple title thereto within the provision of policies of insurance above quoted, and that this is true although the entire purchase price has not been paid.

This question was ably discussed in *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 57 Am. St. Rep. 17, 20 South. 419, 33 L. R. A. 258, in which case the court holds the rule herein announced, and supports the same with citations from numerous authorities. Other cases in which the same doctrine is announced are: *Franklin Fire Ins. Co. v. Crockett*, 7 Lea (Tenn.), 725; *Mathews v. Capital Fire Ins. Co.*, 115 Wis. 272, 91 N. W. 675; *Tuck v. Hartford Fire Ins. Co.*, 56 N. H. 326; *Knop v. National Fire Ins. Co.*, 101 Mich. 359, 59 N. W. 653; *Baker v. State Ins. Co.*, 31 Or. 41, 65 Am. St. Rep. 807, 48 Pac. 699; *Imperial Ins. Co. v. Dunham*, 117 Pa. 460, 2 Am. St. Rep. 686, 12 Atl. 668.

In *Phenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569, it was held that the interest of a purchaser of property, which the purchaser has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is a sole and unconditional ownership within the true meaning of the ordinary clause on that subject in insurance policies, because the vendor may compel the vendee to pay for the property and suffer any loss that may occur.

Plaintiff at the time of the issuance of the policy, occupied the lands upon which the property insured was located, and he had placed thereon the buildings insured under the policy, and he had occupied the land under the contract of purchase, on which he had paid all the purchase price except seventy-five dollars. He was the unconditional and sole owner in fee simple of the equitable title to said land, and had such an interest therein as was required by the conditions of the policy relied upon for a forfeiture, except that he did not own the legal title, but that portion of the condition ⁸⁸³ of the policy was waived by defendant. Nor did the assured make any misrepresentations as to his interest in the property, although he stated that he had paid the person from whom he had contracted the land therefor. The fact that he owed a balance of seventy-five dollars to Folsom on the contract of purchase in no way affected his title to the

land, or his unconditional and sole ownership thereof within the meaning of the condition in the policy, and this was true although the vendor had a lien upon plaintiff's interest in the land for the balance of the purchase price. A lien created or a mortgage executed by the insured upon his property does not affect his title to the property, or his insurable interest thereon, and, unless required to do so by the application for insurance or the conditions of the policy, the insured need not disclose the existence of such lien or mortgage: 13 Am. & Eng. Ency. of Law, 168-170, and authorities there cited; *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 57 Am. St. Rep. 17, 20 South. 419, 33 L. R. A. 258.

One of the provisions of the policy required the insured in case of loss by fire to render proof of loss to the company, signed and sworn to by him, within sixty days after the fire. Plaintiff, within eight or ten days after the fire, made out a statement of his loss, subscribed and swore to the same, and forwarded it to the company, but the notary public before whom plaintiff swore to the proof of loss omitted to indicate his official title and to attach his seal. The company made no response to plaintiff's proofs of loss. Plaintiff after a time, and before the expiration of sixty days, wrote the company inquiring why they gave no attention to his claim. To this letter he received no response. Shortly after the expiration of sixty days after the fire the company, through its agents, began an investigation of the loss, but no objection was ever made to the proofs of loss submitted until this action was brought, and defendant cannot avail itself of the defect therein now. If the proofs of loss given by plaintiff were defective, and not in compliance with the policy, and not satisfactory to defendant, defendant should have notified plaintiff of such facts within a reasonable time, and pointed out to him the specific defects in ⁸⁸⁴ order that plaintiff might remedy the same, and, having failed to do so, the defendant waived its right to have the proofs of loss submitted in the exact form and manner prescribed by the policy: 4 *Joyce on Insurance*, sec. 3362; *Hanover Ins. Co. v. Lewis*, 28 Fla. 209, 10 South. 297; 16 Ency. of Law, p. 959.

Plaintiff executed two promissory notes in payment of the premium on the policy. These notes were past due and unpaid at the time of the institution of this suit, and defendant contends for forfeiture of the policy for the nonpayment of said notes, but neither the notes nor the policy make the validity of the policy contingent upon the payment of the notes. These notes were given by plaintiff and accepted by

defendant in payment of the premium just as so much cash, and plaintiff is liable thereon for the amount of the same. Plaintiff in fact has tendered payment of the same to the company, which was refused. In the absence of stipulation in the note or in the policy of insurance that failure to pay the notes given in payment of the premium should operate as forfeiture of the policy or a suspension of the risk, the policy will continue in force after the maturity of the notes, although the same are not paid: 2 Joyce on Insurance, sec. 1212.

Finding no error in the matters complained of by appellant in its assignments of error relied upon, the judgment of the trial court is affirmed.

All the justices concur.

Where the Property Insured is so placed that the risk on each item is separate and distinct, so that what affects the risk on one does not affect the risk on the others, the policy is divisible. The mere fact that the premium paid for insuring distinct articles of property is entire does not conclusively establish that the contract of insurance is not severable: Goorberg v. Western Assur. Co., 150 Cal. 510, 119 Am. St. Rep. 246, and see cases cited in the cross-reference note thereto.

A Vendee in Possession of Premises under an executory contract of purchase has an interest of sufficient dignity to satisfy the calls of an insurance policy as to the interest of the insured being entire, unconditional, and sole ownership: Evans v. Crawford County etc. Ins. Co., 130 Wis. 189, 118 Am. St. Rep. 1009; Insurance Co. v. Pitts, 88 Miss. 587, 117 Am. St. Rep. 756; Baker v. State Ins. Co., 31 Or. 41, 65 Am. St. Rep. 807.

When an Insurance Agent has Knowledge of the condition of the title to the property about to be insured, this, according to the better rule, is notice to the insurance company: Johnson v. Aetna Ins. Co., 123 Ga. 404, 107 Am. St. Rep. 92; Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295; State Mutual Ins. Co. v. Latourette, 71 Ark. 242, 100 Am. St. Rep. 63; Virginia Fire etc. Ins. Co. v. Richmond Mica Co., 102 Va. 429, 102 Am. St. Rep. 846; Lewis v. Guardian Fire etc. Assur. Co., 181 N. Y. 392, 106 Am. St. Rep. 557; Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 110 Am. St. Rep. 118; Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 117 Am. St. Rep. 382.

The Waiver by an Insurance Agent of conditions in policies is the subject of a note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 99.

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ABBOTT v. TERRITORY.

[1 Okl. Cr. 1, 20 Okl. 119, 94 Pac. 179.]

CRIMINAL PROSECUTION—Reasonable Doubt, Instruction Concerning, When Erroneous.—An instruction which states "by the term 'reasonable doubt' is meant a doubt that has a reason for it; it is a doubt you can give a reason for," was erroneous, and is cause for reversal of the judgment. (p. 823.)

(Syllabus by the court.)

Doyle & Cress and Keys, Rummons & Cline, for the plaintiff in error.

Charles West, attorney general, and G. A. Henshaw, assistant attorney general, for the territory.

¹ WILLIAMS, C. J. Plaintiff in error was indicted, tried and convicted of the crime of shooting with intent to kill, and sentenced to serve a term of eighteen months in the territorial prison. From this judgment he appeals. At the conclusion of the evidence the court gave the following instruction on reasonable doubt: "By the term 'reasonable doubt,' as used generally in these instructions, is meant a doubt that has a reason for it; it is a doubt you can give a reason for. It is that state of the case which, after a full consideration of all the evidence, leaves your minds in that condition that you cannot say that you feel an abiding conviction of the guilt of the defendant. You should not go beyond the evidence to hunt for doubt, or entertain doubt from mere caprice or conjecture. Such doubt should arise only from an impartial and candid consideration of all the testimony and all the facts and circumstances presented upon the trial. If doubt does so arise, and by reason of it you cannot say that you are satisfied to a moral ² certainty of the guilt of the defendant, you should return your verdict herein of not guilty."

To this instruction the defendant at the time duly excepted, and now assigns error thereon.

Elementary writers, in discussing the measure of proof necessary to require a conviction in a criminal case, have often stated that, "in cases of doubt, it is safer to acquit than to convict or condemn": Best on Evidence, secs. 49, 95, 440. "In some cases presumptive evidences go far to prove guilt though there may be no express proof of the fact to be com-

mitted by him, but then it must be very warily pressed, for it is better five guilty persons escape unpunished than one innocent person should die": 2 Hale's Pleas of the Crown, p. 289. Mr. Best, in his excellent work on Evidence (section 95), in speaking of these statements which have become under the common law crystallized into maxims, says, they "are often perverted to justify acquittal." He further states that such other maxims as, "It is to the interest of the commonwealth that malefactors do not go unpunished," and "he threatens the innocent who spares the guilty," are not to be lost sight of. The foregoing maxims declare safe and humane rules for the guidance of both courts and juries. For him, however, who executes the laws, the moving course should be: Neither shall an innocent person be punished nor shall a guilty one go free.

Whilst this should be the purpose of the administrator of the law, yet quite a different rule is laid down for triors of facts, the jury. "The presumption of innocence is not a mere phrase without meaning; it is in the nature of evidence for the defendant; it is as irresistible as the Heavens until overcome; it hovers over the prisoner as a guardian angel throughout the trial; it goes with ³ every part and parcel of the evidence." Neither the law nor the exigencies of human government require the punishment of the doubtfully guilty. Doubts are to be resolved in favor of the prisoner. There should be no conviction until guilt is proved by competent evidence to the exclusion of all reasonable doubt. This is the mandate of the law, and the birthright of every English and American citizen. But in criminal trials it is not every species of doubt that would justify an acquittal. Such a doubt as to be a basis for an acquittal must be actual and substantial, not mere speculation or possibility. It must be a reasonable doubt; "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jury in that condition that they cannot say they have an abiding conviction, to a moral certainty, of the charge." There are degrees of doubt; moral certainty, excluding all reasonable doubt, is the required measure of proof in criminal cases.

It is contended by the plaintiff in error that this instruction, in effect, directs the jury to find the defendant guilty of the crime charged, unless they entertain a reasonable doubt arising out of the evidence, for which the jury are able to give

some reason. We are of the opinion, after careful consideration, that this contention is well taken. After considerable research among the authorities, it seems that this instruction, or one given in substantially the same language, has been uniformly disapproved by the courts. The vice of this instruction is in the use of the language "by the term 'reasonable doubt' is meant a doubt that has a reason for it; it is a doubt you can give a reason for."

In *Cowan v. State*, 22 Neb. 519, 35 N. W. 405, the supreme court of Nebraska, speaking by Chief Justice Maxwell, in passing upon this question, has held that an instruction which contained the following words: "It is a doubt for having which the jury can give a reason based upon the testimony," was calculated to mislead, and no doubt did mislead, the jury. And in *Childs v. State*, 34 Nev. 236, 51 N. W. 837, the same court decided that in a prosecution for grand larceny, where the court instructed the jury: "On the question of reasonable doubt the court instructs ⁴ the jury that the term 'reasonable doubt,' as used in these instructions, means a doubt which has some good reason for it arising out of the evidence in the case; such a doubt as you are able to find a reason in the evidence for," etc.—such instruction was erroneous, and cause for reversal of the judgment. This instruction is practically in the identical language of the instruction we now have under consideration. It appears that the instruction that was given by the court was taken substantially from Sackett in his *Instructions to Juries*, second edition, page 646, and, from an examination of the authorities cited by the author, we are clearly of the opinion that they do not support the text.

In *Greenleaf on Evidence*, eighth edition, volume 3, section 29, the learned author says: "A distinction is to be noted between civil and criminal cases in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases their duty is to weigh the evidence carefully, and find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt. But in criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is therefore a rule of criminal law that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient for the purpose, unless it

generate full belief of the fact, to the exclusion of all reasonable doubt."

The other authority cited by Sackett is the case of *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, which is the celebrated Webster case in which Chief Justice Shaw, in defining the degree of proof, uses the following language: "Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence, ⁵ and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether."

This instruction by Chief Justice Shaw has been approved by the supreme court of Oklahoma Territory in the case of *Patswald v. United States*, 7 Okl. 232, 54 Pac. 458, and by all the leading courts of the country.

This same question has been before the supreme court of Iowa. An instruction in almost the identical language was disapproved in the case of *State v. Cohen*, 108 Iowa, 208, 75 Am. St. Rep. 213, 78 N. W. 857, where it was held that: "An instruction defining a reasonable doubt as one that the jury are able to give a reason for is erroneous, as in effect placing the burden on defendant to furnish reasons for acquittal." And where it was also further held that: "An instruction defining a reasonable doubt as one that the jury are able to give a reason for is erroneous, as requiring jurors to give

reasons for their conclusions.” And in this case the court, speaking by Mr. Justice Ladd, uses the following language: “Nor can we approve the fifth instruction as a safe definition of ‘reasonable doubt.’ ‘By a “reasonable doubt” as herein instructed is meant a doubt such as a reasonable man might entertain, after a careful review of all the evidence in the case, as to the guilt of the defendant. In a legal sense, a reasonable doubt is one which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for.’ The last clause is the one to which exception is taken. Who shall determine ⁶ whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of finding reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.”

In *Siberry v. State*, 133 Ind. 677, 33 N. E. 681, the supreme court of Indiana held that: “It is erroneous to instruct the jury that a ‘reasonable doubt is such a doubt as the jury are able to give a reason for.’ ” In *State v. Sauer*, 38 Minn. 438, 38 N. W. 355, Mr. Justice Mitchell, who delivered the opinion of the court, says: “The most serious objection to it is that it is liable to be understood as meaning a doubt for which a person could express a reason in words. A person may, after a consideration and comparison of all the evidence, feel a reasonable doubt as to the guilt of a defendant, and yet find it difficult to state the reason for the doubt.” In *Owens v. United States* 130 Fed. 279, 64 C. C. A. 525, an instruction in the following language: “A reasonable ground of doubt is one which is reasonable from the evidence. It must be a ground of doubt for which a reason can be given, which reason must be based upon the evidence or want of evidence”—was disapproved.

We are of the opinion that the instruction given in this case was erroneous, and it therefore requires a reversal of this case.

Other errors arising during the course of the trial are assigned and argued, but as the cause must be reversed and remanded, with directions to grant a new trial, it is unnecessary to review them.

The judgment of the court below is reversed and the cause remanded, with directions to grant a new trial.

All the justices concur.

The Same Question Decided in the Principal Case was again presented to the supreme court of Oklahoma and determined in the same manner in *Gibbons v. Territory*, 1 Okl. Cr. 198, 21 Okl. 340, 96 Pac. 466.

Definitions of Reasonable Doubt will be found in the note to *Burt v. State*, 48 Am. St. Rep. 566. In *State v. Cohen*, 108 Iowa, 208, 75 Am. St. Rep. 213, it is said to be error in an instruction to define a "reasonable doubt" as one that the jury are able to give a reason for. According to *Jolly v. Commonwealth*, 110 Ky. 190, 96 Am. St. Rep. 429, in instructions on reasonable doubt it is best simply to follow the language of the statute: "If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal."

DRIGGERS v. UNITED STATES.

[1 Okl. Cr. 167, 21 Okl. 60, 95 Pac. 612.]

EVIDENCE of One Conspirator Against Another.—After a conspiracy has been formed, evidence of the acts and expressions of one of the conspirators is admissible against the others, whether the one against whom it is introduced was present or not, but when the evidence of an act or expression of an alleged conspirator is offered against another, the primary questions to be determined are, first, had the conspiracy been formed at the time of the act or expression, and second, if so did it still continue. (By the editor.) (pp. 829, 830.)

CONSPIRACY—Implied Adoption by the Person Joining the Conspiracy as to Acts Done Previously.—If a conspiracy has been formed between certain persons, and subsequently another joins the conspiracy, his joining is an adoption by him of the things said and done by the others in pursuance of the general plan formed prior to the joining. (By the editor.) (p. 830.)

CONSPIRACY—Preliminary Evidence to Warrant Admission of Acts and Declarations of One Conspirator Against Another—Question for the Court.—Whether there is any evidence of a conspiracy is primarily a question for the court. There must be some tangible material evidence of the conspiracy or a promise of its production before the court can properly admit evidence of statements made in the absence of the party against whom they are used, when he, in fact, was not present and knew nothing of them. This evidence need not be direct and positive and conclusive, but there should be some, and it is for the court in the first instance to say whether or not it exists. (By the editor.) (p. 831.)

CONSPIRACY—Evidence of the Declarations of a Conspirator Made Before Joining the Conspiracy.—Where the guilt of one of several defendants, jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the others for the commission of the crime, evidence as to acts or statements of the others must be confined to such statements as were made, or acts done, at times when the proofs in the case permit of a finding that a conspiracy existed, and where the acts or statements of one of the defendants, prior to the formation of the conspiracy, are inadmissible as evidence against others. (p. 832.)

WITNESS, Impeaching by His Prior Consistent Statements.—Evidence is not admissible to support an impeached witness that he made prior consistent statements, except in those cases where not only his veracity is attacked, but his motive is also impugned. (By the editor.) (p. 835.)

WITNESS—Prior Consistent Statements to Support, When Inadmissible.—It is a general rule that where evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions consistent with his evidence are inadmissible. But where it is charged that the evidence of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive or personal interest, his evidence may be supported by showing that he had made a similar statement before that relation or motive existed. (p. 835.)

OFFICER'S RETURN, Facts Which It is not Admissible to Prove.—Proof of the return of an officer on a subpoena that the witness is dead, the same not being authorized or required by law, and by the oral evidence of witnesses that they had been informed of his death, is insufficient to establish this as a fact to render competent in a final trial the testimony of such witness taken and transcribed at the preliminary examination. (pp. 839, 840.)

ACCOMPLICE, Instructions Concerning, When not Erroneous. Whether a witness is an accomplice requiring corroboration to support a conviction is a question of fact for the jury, and hence an instruction that under Mansfield's Digest, section 2259 (Ind. Ter. Ann. Stats. 1899, sec. 1602), a conviction cannot be had on the testimony of accomplice unless corroborated was sufficient, and it was not error not to further charge that a certain witness was an accomplice. If defendant regards the word "accomplice" as a technical one requiring a definition by the court, he should so request, but not ask an instruction that a certain witness is an accomplice, that being a question for the jury. (p. 842.)

JURY TRIAL, Instruction Which Should not be Refused.—If there is any evidence in the record upon which an instruction offered could properly be predicated, it should be given. (By the editor.) (p. 844.)

HOMICIDE on Mutual Combat, What is and the Guilt of the Persons Engaged Therein.—A charge that if defendant was informed and believed that the deceased had taken possession of a field claimed by him, and that he would be there with an armed party on the morning of the killing, and that they had made threats against the life of defendant, and the defendant, knowing all of these things, voluntarily organized a party, arming them with deadly weapons for the purpose of meeting said parties in deadly conflict, going to the place of the killing, and a conflict ensued, and the deceased was killed, then such conflict was a "mutual combat," and all parties who knowingly and intentionally engaged in it are guilty of murder, was not, under the theory of the prosecution and the evidence in this case, erroneous. (pp. 846, 847.)

(Syllabi by the court except where stated to be by the editor.)

H. M. Carr, Crawford & McKeown, Cruce & Cruce, Moman Pruiett and Potter, Bowman & Porter, for the appellant.

Charles J. West, attorney general, and W. A. Ledbetter, assistant attorney general, for the state.

¹⁶⁸ DUNN, J. October 3, 1903, the grand jury of the United States court for the southern district of Indian Territory returned its indictment, charging B. F. Driggers, Tom McCarter, John Underwood, and Ted Bennett, with the murder of Robert G. Brady, and L. W. Goff as a principal, in the second degree as to each of them. Goff was placed on trial at Ada, and after his conviction the venue was changed, for the trial of the other defendants, to Pauls Valley, at which place the appellant in this case was placed on trial in June, 1905, and the jury returned a verdict finding him guilty in the manner and form charged, without capital punishment. A motion for a new trial was filed and overruled, the defendant saving his exception, and the case was taken to the United States court of appeals of Indian Territory by writ of error. On September 26, 1905, that court affirmed the judgment ¹⁶⁹ of the lower court: *Driggers v. United States*, 7 Ind. Ter. 752, 104 S. W. 1166. A petition for rehearing was filed, which was pending at the time Indian Territory was admitted as a state, and the case is in this court by virtue of the terms of the enabling act.

On the consideration of the petition for rehearing this court granted it, and on the hearing on the merits of the case the attorney general, represented by Honorable W. A. Ledbetter, filed his answer to the contentions of the appellant, and admitted error in the record sufficient to require us to reverse the prior decision rendered herein. He admitted that the admission of the testimony of the witnesses Rhea and Saddler was erroneous, and then said: "There are other errors in the case, which will doubtless receive the attention of the court." In view of the fact that we concur in the conclusion reached by the attorney general's office, it will be unnecessary for us to discuss in detail and at length many of the propositions urged upon the attention and considered by Mr. Justice Clayton, who wrote the opinion for the United States court of appeals of Indian Territory, but will confine our discussion to those matters which, at the trial of the case anew, will probably arise again.

The scene of the homicide was a farm, located near the little town of Jesse, in the Chickasaw Nation in Indian Territory. An Indian woman by the name of Colbert owned this land,

which she had leased to a merchant by the name of McNeal. He, in turn, had rented the place, for the year 1902, to one of the defendants named in the indictment (Goff) and a man by the name of Riley. A crop of cotton had been raised on one part of the land, and a crop of corn on the other, the two crops joining, but without any fence or other division between them. Driggers, the defendant, who lived in that neighborhood, sometime in the month of October, 1902, bought the right to run his stock in the cornfield after the corn was gathered, paying therefor the sum of fifty dollars. Riley and Goff had not picked their entire crop of cotton; and, there being no fence between the cornfield and the unpicked cotton, the defendant Driggers did not turn his cattle in, under an ¹⁷⁰ agreement with his vendors that they would protect him and see that he was permitted to turn in after the cotton crop was gathered. Goff claimed that he had rented the land from McNeal for the year 1903, and it was under this asserted right of his that he agreed that Driggers might have the benefit of the stock field, notwithstanding the fact that the cotton crop was not all gathered at the end of December, 1902. McNeal testified that he had not rented to Goff, but the evidence shows that if he had, he changed his mind, and rented the land to Robert G. Brady, the deceased, who was living in that neighborhood, running cattle, and who, desiring to use the stock field, the day before the homicide, started to run a fence across the land dividing the cotton field from the stock field, so that his cattle might run therein without interfering with the unpicked cotton crop. While he was engaged with his hands in the construction of this fence, Goff came to him in the afternoon, and, according to the testimony of Kelley, said to Brady: "What the hell are you doing here? This is my land." I told him McNeal had rented the place to Brady. I walked on down the line a piece, and walked on up to where Brady was. Goff, it seems to me, stayed there a while, and went back and came back with an Indian Tom McCarter [who was a son in law of the woman who owned the land]. Q. What was then said? A. Well, there wasn't a great deal said, more than Brady told him. He says he didn't want to hear any more of his noise. He [Goff] said: 'If you put any cattle in here'--I understood him to say he would kill the cattle. As we started away, he said: 'If you put any cattle in here, I will kill you.' He stood there and talked, and he says: 'Put them in, and I will be with you, God damn you.' Brady didn't seem to pay any attention to him."

This testimony was offered on the theory that a conspiracy had been formed between Goff and the defendant McCarter,

which was subsequently joined by Driggers, and that it was admissible as against Driggers by virtue of this fact. It was objected to on the part of the defendant, and its admission is assigned as one of the errors. Goff immediately went down to where Driggers lived for the purpose of informing him of the ¹⁷¹ presence of Brady on the land, of the adverse claim, and the building of the fence. Driggers was not at home, but returned that night about 10 or 11 o'clock, and then learned that Brady was going to turn cattle in the cornfield. During the rest of that evening, and that night, the defendants here gathered together Winchesters and shotguns and ammunition, and arming themselves with them appeared next morning inside the field, along the highway where it was expected Brady would drive his cattle near to turn them in. Driggers testified that he and Kelley were enemies, and that he expected that he would accompany Brady when he came with the cattle; that he expected to drive them out if they were turned in; that his presence and purpose in going to the field with the parties named, armed as they were, was that he believed that when Brady saw they were there he would not come up; that he supposes that he was there to resist any trouble that Kelley would bring about, and that he thought he would keep the cattle out. On the morning of the difficulty a man by the name of French Curtiss came down, ahead of the Brady party, in a wagon, with some wire and posts for the purpose of completing the wire fence; and on arriving at a point in the road near where Driggers and Goff and the other parties stood inside the field, and on the south side of the cross-fence, Goff told him to go back, and to get back quick. Curtiss testified that Driggers told him to go back and to tell them not to bring the cattle there. A short time after Curtiss turned back, the cattle were driven down the road by Brady, Kelley and two brothers by the name of Saddler. Across the road, and nearly opposite the place where the defendants stood on the inside of the field, was a farm inclosed in a wire fence, the gate to which was either open or down, and when the cattle came opposite this point some of them ran into the inclosure. The deceased, turning his horse out of the highway, ran in and drove these cattle out, crossed the road, and stopped near the Driggers party, got down from his horse, and, according to the evidence of the prosecution, began to arrange his saddle blanket, or at least handle his saddle, and it is at this time, it is asserted, without any overt act on his part, he was ¹⁷² fired upon by the party with which defendant was connected, fell to the ground, arose, staggered or ran across the highway, and fell

lifeless. Kelley, who had not dismounted, was also fired upon, receiving wounds, and his horse was killed. The Saddler boys both retreated. According to the testimony of the defendant, Brady rode up within four or five feet of the fence near where Driggers stood, got down off his horse, pulled up the knee wire of the wire fence about two and one-half feet, took hold of the post, when defendant said: "Brady, don't you pull that fence down." He jerked the fence down and ran backward, grabbed for his gun, and jerked at the fence all at the same time, and ran backward, trying to get his gun; pulled it out, so that defendant saw it, who told him not to pull it. That he then shot him, or shot at him with a No. 12 shotgun, loaded with B. B. shot, when he was about twelve or fifteen feet from the fence. That he then shot at Kelley, whose horse fell with him across the road near the other fence.

The witness Tom McCarter, who was jointly indicted with Driggers, but who was offered as a witness on the part of the government, testified that at the time Brady got on the ground, and about the time the shooting commenced, he heard Driggers say to him: "Brady, don't you do that." Kelley, who was placed on the stand as a witness for the government, testified: "When Brady came out of the gate with those cattle, he rode in a northwest direction in the middle of the lane, and got off of his horse in the neighborhood of the middle of the lane. I had stopped, was simply moving a little at this time, on the right of Brady. I was watching to see what he was doing, and to see what these parties were doing. And he kind of put his hand on the saddle, just as though he was going to pull the saddle up, and raised his head to look. That was the first time he looked toward them. And Driggers shot."

Contradicting and impeaching Kelley and the testimony which he gave in reference to what Brady was doing at the time the shooting was done, the defendant introduced a witness by the name of Boatright, who testified that, on the same day of the shooting, at his home Kelley stated that Brady got off his horse, ¹⁷³ and went over and took hold of the fence post, and that Driggers shot him. The government then, for the purpose of supporting Kelley and his testimony, and to show that the statement which he had made on the witness-stand was in consonance with previous statements which he had made concerning the same matter, consistent with his evidence, introduced witness Rhea, who had a talk with Kelley, the defendant, after he was wounded,

concerning these matters. He testified that: "Kelley at the time did not say anything about the fence any more than Brady went inside the fence and drove some cattle out, came out, and got down off his horse, pulled his saddle up, and as he turned his head, the shooting commenced." To this testimony of Rhea the defendant objected and excepted, and that it is error is most strenuously insisted.

On the preliminary examination which took place before a United States commissioner, Jim Saddler, one of the parties who accompanied Brady to the scene of the homicide, testified concerning the affray. It is not necessary for the purpose of this case to recite his testimony here, but it was most material, and in many ways in conflict with the evidence of the defendant. On the trial of the cause he was not present, but the government introduced his written evidence as transcribed by the commissioner, upon a showing that by general report Saddler was dead, one witness testifying that his wife told him that her husband was dead; and the return of the subpoena, which was issued for him, made by the marshal who sought to serve it, while not appearing in the record, is conceded to have been by both parties returned that he was dead. The record is voluminous, a great number of witnesses being introduced, and a great amount of evidence being offered, but the foregoing statement of facts is sufficient for the purpose of this opinion.

From the conclusion ¹⁷⁴ to which the court has come, that it will be necessary to reverse the case and grant to defendant a new trial, we will note the assignments of error only which in the new trial granted will be liable to again arise.

The first and second assignments of error made by appellant are the usual ones, that the verdict was contrary to the law and the evidence. The third assignment of error is an averment that: "The court erred in permitting the government witness, Kelley, to testify, over the objection of defendant, to a conversation between the deceased, Brady, and one Goff, on the day before the difficulty, because the defendant was not present at such conversation, and because no conspiracy is shown to have existed at that time between the said Goff and the defendant, and the said testimony was purely hearsay."

This evidence was admitted by the court under the theory that a conspiracy existed between Goff, McCarter, and the defendant, or between Goff and McCarter, and afterward joined by Driggers, at the time these utterances were made. Under no other theory could this evidence have been ad-

mitted. The rule is as well established as any other that, after a conspiracy has once been formed, whether to bring about and effect the purpose finally accomplished or not, evidence of acts and expressions of one of the co-conspirators is admissible against the others, whether the conspirator against whom it is introduced was present or not. This, under the view taken by the authorities that, when a conspiracy is created, the parties so agreeing constitute a separate and distinct individuality, and that the act of one is the act of all, and that the expression of one is the expression of all made in pursuance of the conspiracy: 3 Greenleaf on Evidence, sec. 94. When evidence is offered of an act or conversation of a party in his absence, who is charged with being a party to a conspiracy, the primary question to be determined is, whether or not the conspiracy had been formed at the time, or had the conspiracy ceased. If it had not been formed, or if it had ceased, then the act or statement is inadmissible. In the case of *People v. Kief*, 126 N. Y. 661, 27 N. E. 556, the rule is laid down in the following language: ¹⁷⁵ "Where the guilt of one of several defendants, jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the others for the commission of the crime, evidence as to acts or statements of the others must be confined to such statements as were made, or acts done, at times when the proofs in the case permit of a finding that a conspiracy existed, and where the acts or statements were in furtherance of the common design. The acts or statements of one of the defendants prior to the formation of the conspiracy, or subsequent to its termination by the accomplishment of the common purpose, or by abandonment, are inadmissible as evidence against the others."

The evidence of which complaint is made is the statement Goff made to Brady the day before the shooting, when Brady was on the land constructing a fence, when Goff said to him: "If you put any cattle in here I will kill you"—this being further connected with the offense by Goff's statement to Brady at the time of the shooting, when he said, with an oath: "I told you the other day that I would kill you." The evidence of the relationship between these parties is set out in the statement of facts, and we submit that under it there must be great doubt as to whether or not the conspiracy was formed at the time Goff used that language. It is true, if one had been formed, and Driggers joined it afterward, his joining it would be an adoption by him of the

things done or said by the others in furtherance of the general plan formed prior to his joining it: *State v. May*, 142 Mo. 135, 43 S. W. 637. Whether there is any evidence of a conspiracy is primarily a question to the court. There must be some tangible material evidence of the conspiracy or a promise of its production before a court can properly admit evidence of statements made in the absence of the party against whom they are used, when he, in fact, was not present and knew nothing of them. This evidence need not be direct and positive or conclusive, in fact, but there should be some, and it is for the court to say, in the first instance, whether or not it exists. This does not apply, of course, where it is sought to show, by the very language itself, that it was a part of the formation of the conspiracy. Goff testified that he had rented ¹⁷⁶ this place for the year 1903, and that he was entitled to the possession of it. There is nothing in the record to show that at the time Brady started to run his cross-fence over this land, either Goff or Driggers or Tom McCarter or any of the other parties had any prior information that such was his intention. The fence was well under way when Goff discovered it, and, going over to where the work was going on, forbade continuance of it. He then left and returned, Tom McCarter accompanying him. There is no evidence from either McCarter or Goff or from any other source, as to why they went back, or what their purpose was. Goff again continued the conversation that he had begun before. McCarter said nothing, taking no part in the conversation nor doing any act which would show that there was any concert of action whatever between them or of any formation of a conspiracy. He was simply present. He said nothing. He did nothing. Certainly Goff could not form a conspiracy with himself. It might be asked why McCarter went over there with Goff, what his purpose was, if it were not the beginning of a conspiracy. We cannot say what his purpose was. We do not know. There is no evidence in the record to show. He was living on the place. It belonged to his mother in law, and this, in our judgment, is clearly as strong and pertinent a reason as the one ascribed to it by the district attorney, and is more in consonance with the strict policy of the law, which presumes innocence and not guilt. It is true that immediately after this took place Goff went to Driggers' house. McCarter immediately began to take action to get ammunition and a gun, and that as soon as Driggers returned home, and on being informed of the circumstances, he likewise

began to make preparations for the affray, but to us it seems more reasonable to conclude from the evidence that these acts were simply carrying out the purpose of the threat made by Goff, and the intent then formed, than was the threat part of a conspiracy formed prior to its being spoken. There is evidence of the conspiracy being formed immediately afterward. We cannot find any evidence that it was formed before. Hence we hold that this admission of the statement of Goff to Brady in the absence of Driggers was ¹⁷⁷ prior to any conspiracy formed, and, it not being shown that he consented or assented thereto, was erroneous.

The fourth assignment of error raises the question of the admissibility of the evidence of Rhea, which was offered to support the testimony given by Kelley when it was sought to impeach him by Boatright, who testified, in reference to the statements made by Kelley, contrary to those which he had given upon the witness-stand. In view of the contrariety of opinion existing among the text-writers and judicial expressions of the courts of the United States, and in view of the further fact that this question is a new one in this jurisdiction, have combined to impel us to give it a more extended examination than we otherwise should. It is the contention of the defendant that this was prejudicial error, and he cites a number of authorities to sustain his position. The theory adopted by some of the states in admitting this testimony is that, the credibility of the witness being impeached or assailed by proof of contrary statements made out of court, the witness may support his evidence, and his credibility is sustained by showing his consistent statements, made at or about the time when it is alleged the prior inconsistent statement was made; and some of the courts, unreservedly and without qualification, adhere to the doctrine that this evidence is admissible. Others hold that it is admissible under any circumstances, while others, with another line of authorities, and in our judgment by far the greater weight and number, hold that where it is attempted to be shown that the statement on the stand is a late fabrication, brought about by the changed situation of the witness to the case, or the parties to it, or because of a motive recently formed, then the evidence of prior statements, consistent with those made on the stand under oath, is properly admitted. The states which hold broadly and without qualification that such evidence is admissible appear to be the following: Texas, North Carolina, Missouri, and Indiana. The decisions of the courts of these states, which we have ex-

amined and in which it is so held, are as follows: *Jones v. State*, 38 Tex. Cr. 87, 70 Am. St. Rep. 719, 40 S. W. 807, 41 S. W. 638; ¹⁷⁸ *Easterwood v. State*, 34 Tex. Cr. 400, 31 S. W. 294; *Lee v. State*, 44 Tex. Cr. 460, 72 S. W. 195; *State v. Exum*, 138 N. C. 599, 50 S. E. 283; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *Hicks v. State*, 165 Ind. 440, 75 N. E. 641. The rule generally adopted in those states is expressed by the supreme court of Indiana, in the case of *Hicks v. State*, 165 Ind. 440, 75 N. E. 641, in the following language: "Where a witness is impeached by evidence of contradictory statements, he may be supported by corroborating statements made at about the same time as the alleged contradictory statements."

On the other hand, the following states seem to hold squarely against the admissibility of such testimony under any circumstances: Mississippi, Maine, Iowa, Georgia, Colorado, and Alabama. The cases decided by these courts which sustain this doctrine, and which we have examined, are as follows: *Head v. State*, 44 Miss. 731; *Ware v. Ware*, 8 Me. 42 (this was a case decided in 1834, and our researches do not disclose that the rule has been changed); *State v. Porter*, 74 Iowa, 623, 38 N. W. 514; *Cook v. State*, 124 Ga. 653, 53 S. E. 104 (but, in this connection, see the case of *Sweeney v. Sweeney*, 121 Ga. 293, 48 S. E. 984); *Davis v. Graham*, 2 Colo. App. 210, 29 Pac. 1007. In this case it will be noted, however, that there is a limitation placed upon the rule, which is that statements made after the alleged contradictory matter are not admissible: *Sonneborn v. Bernstein*, 49 Ala. 168. This case expresses the earlier doctrine of Alabama, and went to the extraordinary extent of holding that where a witness was impeached, not by proof of the contradictory statements made by him, but by showing that his general character for truth was bad, even under these conditions he may be supported, or his testimony may be corroborated by showing that, prior to the commencement of the action he made statements out of court, uniform and consistent with his testimony in court. This doctrine, however, was directly overruled, and the case went with it, in *McKelton v. State*, 86 Ala. 594, 6 South. 301, in which the court said: "A witness having been impeached by proof of contradictory statements made by him on the preliminary examination of the defendant before a committing magistrate, it is not permissible to ¹⁷⁹ sustain or corroborate him by proving that, just before his examination as a wit-

ness on that occasion, he made statements to the magistrate in substance the same as his testimony on the trial."

The view entertained on this question in that state is further complicated by the holding in the case of *Nichols v. Stewart*, 20 Ala. 358: "Proof of declarations, verbal or written, made by a witness out of court, is, as a general rule, inadmissible in corroboration of the testimony given by him on the trial of a cause"—this case being one in which the testimony of a witness was contradicted by showing contrary statements out of court, but it was allowed to be corroborated by evidence of prior consistent declarations. These different divergent opinions, cited from the Alabama court, are given to show how mixed some of the courts are on the propositions, but Alabama is not alone. Other states have made holdings practically as conflicting. The rule generally adopted in the above states is expressed by the supreme court of Mississippi in the case of *Head v. State*, 44 Miss. 731, in the following language: "To discredit a witness it is competent that he had made discordant statements at other times and places; but to re-establish his credibility, or to support what he had deposed on the trial, it is inadmissible to prove that he has made the same statements to third persons."

We now come to a consideration of the authorities which aver the rule so well expressed by the Tennessee supreme court in the case of *Legere v. State*, 111 Tenn. 368, 102 Am. St. Rep. 781, 77 S. W. 1059, that we adopt its language for our expression of the same: "It is a general rule that where evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions, consistent with his evidence, are inadmissible. But where it is charged that the evidence of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive or personal interest, his evidence may be supported by showing that he had made a similar statement before that relation or motive existed."

Arrayed in support of the doctrine declared by the court will be found the supreme court of the United States, Arkansas, California, ¹⁸⁰ Kansas, Illinois, Louisiana, Michigan, Massachusetts, New Hampshire, New York, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont and Washington. The cases examined in which the appellate tribunals of the United States and the states named have adhered to the rule last declared are as follows: *Ellicott v. Pearl*, 10 Pet.

412, 9 L. ed. 475. Arkansas: *Burks v. State*, 78 Ark. 271, 93 S. W. 983. California: *Barkley v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307; *People v. Turner*, 1 Cal. App. 420, 82 Pac. 397. Illinois: *Chicago Ry. Co. v. Matthieson*, 212 Ill. 292, 72 N. E. 443, 113 Ill. App. 246. Kansas: *County Commissioners v. Vickers*, 62 Kan. 25, 61 Pac. 391; *State v. Petty*, 21 Kan. 54; *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050. Louisiana: *State v. Waggoner*, 39 La. Ann. 919, 3 South. 119. Michigan: *Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78. Massachusetts: *Commonwealth v. Jenkins*, 10 Gray, 485. New Hampshire: *Reed v. Spaulding*, 42 N. H. 114. New York: *Robb v. Hackley*, 23 Wend. 50. North Carolina: *Wallace v. Grizzard*, 114 N. C. 488, 19 S. E. 760. Pennsylvania: *Commonwealth v. Brown*, 23 Pa. Super. Ct. 470; *Crooks v. Bunn*, 136 Pa. 368, 20 Atl. 529. South Carolina: *State v. McDaniel*, 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384. South Dakota: *State v. Caddy*, 15 S. D. 167, 91 Am. St. Rep. 666, 87 N. W. 927. Tennessee: *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085. Vermont: *State v. Flint*, 60 Vt. 304, 14 Atl. 178. Washington: *State v. Coats*, 22 Wash. 601, 61 Pac. 726. From the foregoing collaboration on the proposition involved it will be readily seen which side of the balance the great weight of judicial expression rests. We therefore declare the doctrine of this jurisdiction to be enunciated by the supreme court of Tennessee above quoted, which may be epitomized by saying that such evidence is not admissible to support an impeached witness, except in those cases where not only his veracity is attacked, but his motive is also impugned. This being so, we will now consider the evidence to which objection is urged.

The learned Mr. Justice Clayton, speaking for the court, in ¹⁸¹ his decision in this case states: "We think the court erred in admitting the evidence of Rhea. But was this prejudicial error?" He then urges that it was not in the following language: "The point in controversy was: Did the deceased at the time he was shot lay his hand on the post? And, if Kelley's testimony was contradicted, it was only on this point. We have already pointed out that the tearing down of the fence under the circumstances was not felony, and that act did not justify defendant in the shooting and killing Brady; and, therefore, if he were killed because of that, it was murder, and if he were not killed because of that, it was immaterial."

We clearly appreciate the force of the argument presented, but to our mind the error which was committed was not so much in reference to the substantive facts to which the evidence related as it was to the effect which it had upon the testimony of both Kelley and the defendant. The portion of the opinion quoted, relating to the tearing down of the fence and that this act did not justify defendant in shooting and killing Brady, calls for reference to the terms of the Annotated Statutes of 1899 of Indian Territory, relating to justifiable homicide. Paragraph 890 is as follows: "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony."

And paragraph 1008 of the Annotated Statutes of 1899 of Indian Territory which provides: "If any person shall willfully or maliciously burn or otherwise destroy any rail or plank fence, or other inclosure, . . . shall be deemed guilty of a felony."

And it being made to appear by the evidence of defendant that, at the immediate time of the homicide or the shooting, Brady was in the act of pulling out or tearing down the fence, and that if his acts brought him within the purview of the statute last cited, this in itself appeared to be a justification for defendant's action. The decision holds, and we think correctly, that they did not constitute a felony, and hence was no defense to defendant,¹⁸² even though he were relying upon it. The deceased carried his revolver in a scabbard under his arm, inside of his shirt, which was open in the front, and in addition thereto had a slit in it. His revolver was found partially drawn from its receptacle when he was examined immediately after his death, as he lay upon the ground where he fell. It was the contention of Driggers that the deceased was engaged in drawing his revolver and throwing down the fence at the immediate time the shooting began, and that he did not shoot until he saw the revolver partially drawn and in the hand of Brady. Kelley was the government's principal witness. He had been an officer in that country, holding commission from the United States marshal's office. Driggers testified that he and Kelley were enemies, and there was outside evidence tending to support him. Kelley and the defendant were the principal witnesses in this case as to what took place at the immediate instant of the shooting. They both claim to know, and they alone testify on that point, although there

was other evidence tending to sustain the government in its contention, that when Brady got off his horse he was engaged in fixing his saddle and blanket and did not have hold of the fence at the time the shooting began. Driggers was entitled to no more than the law gave him. But he was on trial for his life, and was entitled to all that the law gave him. If, as we have seen from the authorities cited, a witness contradicted or impeached by proof showing or tending to show that he has made statements out of court contrary to his evidence in court, may be supported under those conditions only where the party producing the impeaching evidence charges that the testimony of the witness is a recent fabrication, due to a late altered relationship to the parties or the cause or of some new motive, then if these conditions did not exist, Rhea should not have been permitted to have sustained Kelley, and in view of the fact that there is no evidence charging these things, or tending to show that his attitude toward the cause of the parties was in any wise altered, it was improper to admit this evidence; and while we agree with Justice Clayton that it was error, we cannot say it was not prejudicial. If it was not lawful to sustain Kelley in ¹⁸³ this matter, Driggers was entitled to be relieved of the support given the adverse witness' evidence, and of the imputation which such support cast upon his own. If the jury believed that Kelley was telling the truth when he stated that Brady did not have hold of the post, they necessarily believed that the defendant was guilty of falsehood. If they believed that Kelley told the truth, and that Driggers falsified, in reference to the fact mentioned, which occurred contemporaneously with the shooting, there can be no question that they would, at the same time and with good reason, come to the conclusion that Kelley also told the truth in reference to the shooting, and that here again Driggers was falsifying. It was this effect which the evidence in support of Kelley had, which to us appears to have constituted its chief prejudicial effect, rather than of the mere conflict in the evidence as to whether Brady did or did not take hold of the fence.

Was the evidence of Jim Saddler admissible? It will be observed that Saddler's evidence was taken before the United States commissioner. He was not present at the trial of this cause and his evidence as transcribed was admitted and read to the jury, over the objection of defendant, upon proof of the officer's return on the subpoena issued for him, showing that he was dead; and also it appears by the testimony of

other witnesses that they had been told that he was dead. The question now presents itself, taking into consideration the duty of the court in the admission of evidence under circumstances of this character, Was this proof of legal sufficiency as a foundation for secondary evidence? Paragraph 1995 of the statutes of Indian Territory provides: "A subpoena may be served by the sheriff, coroner or any constable of a county whose return thereof shall be proof of the service."

Encyclopedia of Pleading and Practice, under the title "Returns" (volume 18, page 963), states: "An official return is the best evidence of the doings of the officer under the mandates of the writ or process, and is sufficient as proof of the facts which the officer is authorized and required to certify."

¹⁸⁴ The question then arises, Was the marshal in this case authorized and required to certify to the death of the witness, to secure whose attendance he endeavored to serve the subpoena? Was this the return authorized by the statute? This question is answered by the supreme court of the United States in the case of *Walden v. Craig*, 14 Pet. 147, 10 L. ed. 393, wherein Mr. Justice McLean, who delivered the opinion of the court, says: "It is admitted that the marshal's return of service, or nonservice, which he indorses on the process, and of which he has official knowledge, becomes matter of record, and is binding upon the parties. But the marshal can only know, in common with other citizens, of the decease of a person named in the writ; and if he indorse the fact of such decease, though it may be spread on the record, it is clearly not binding on the parties. Shall a rumor which shall, in the opinion of the marshal, justify such indorsement make the fact a matter of record? It may excuse the officer, but it does not bind the party whose rights are involved."

The officer in the case at bar may have known, in common with the other citizens, of the decease of the witness Saddler; but his return thereof on the subpoena not being authorized and required by law, was clearly not binding on the defendant. When he went beyond the statutory requirement and certified to a fact not made by law a part of his official duty, such certificate or such statement then contained no greater evidentiary or probative force than if made by any other person, one not an officer: *Obermier v. Core*, 25 Ark. 562. This being true, the question then arises, What force was the evidence of the other parties called and

examined who testified that they had been told that Saddler was dead?

We have examined a number of authorities on this proposition, and, as usual, on close questions of this kind, there is contrariety of opinion among the courts. Alabama (*Burton v. State*, 107 Ala. 68, 18 South. 240), Michigan (*Wheeler v. Jenison*, 120 Mich. 422, 79 N. W. 643) and Iowa (*Spaulding v. Chicago etc. Ry. Co.*, 98 Iowa, 205, 67 N. W. 227) hold that the matter is addressed to the sound discretion of the court, and that hearsay evidence is admissible to prove the absence of a witness from the jurisdiction,¹⁸⁵ and sufficient to sustain the admissibility of secondary evidence. While this is true in the cases cited, in Alabama and Iowa the same courts have also held to the contrary on the same proposition. For instance, a later case in Alabama (*Mitchell v. State*, 114 Ala. 1, 22 South. 71) holds: "Where an officer, who had for execution the subpoena for an absent witness, and had returned it 'not found,' testifies that he had hunted for the witness, and she could not be found in the county, but he did not know that she had left the state, he cannot, for the purpose of laying a predicate for the introduction of evidence of the testimony of such absent witness given on the preliminary trial, further testify as to what was the report in the neighborhood where the witness lived as to her whereabouts, or that it was the general report in her neighborhood that she had gone out of the state, such evidence being merely hearsay and inadmissible."

In an earlier case in Iowa (*Baldwin v. St. Louis etc. Ry. Co.*, 68 Iowa, 37, 25 N. W. 918) the court holds: "Under the provisions of section 3777 of the Code the shorthand reporter's notes of the testimony of a witness cannot be used on the trial of another cause, without first showing, as in the case of the use of a deposition, that the witness himself cannot be produced in court; and evidence that the witness was reputed to have left the state was not sufficient for the purpose."

The fact relied upon was the death of Saddler, and it was sought to prove it by showing hearsay statements that he was dead. No facts stated before the court established Saddler's death. All that anything in the evidence proved was that the parties who testified had been informed by others that this was a fact. This was unquestionably unallowed hearsay, and was inadmissible to prove the fact; and as a fact it must be proved to admit the evidence. Hearsay evidence is admissible in many instances, but where it is

sought to introduce the evidence of a witness taken on a prior trial, based on the fact of his death, this death must be shown as a fact. And the court, in overruling the objection of defendant to the introduction of Saddler's testimony, committed error. All that these witnesses testified to could have been true, and Saddler may not only have been alive, but actually within the jurisdiction of the court. If he was, he should have been produced ¹⁸⁶ in person. If he was not, this should have been proven as other facts, by the testimony of some one who knew it.

The defendant took formal exception to but one instruction given by the court. This was the instruction relating to the law of mutual combat, but he offered to the court, and requested that they be given to the jury as the law of the case, six instructions which, with the exception of No. 2, related generally to rights which he claimed, growing out of his possession of the field over which the controversy arose. All of these were refused, and defendant urges error therefor. Instruction No. 2, which he offered, relates to the instruction in reference to Tom McCarter, who was one of the defendants jointly indicted with Driggers. Justice Clayton, speaking for the court of appeals in the decision heretofore rendered in this case, so accurately states the law applicable that we adopt that portion of the opinion as ours, and agree with that court that there was no error in refusing this instruction in view of the one given. His language is as follows: "The eighth assignment of error complains of the charge of the court relating to the necessity for corroborating testimony of an accomplice before conviction can be had. The defendant requested the following instruction: 'You are instructed that Tom McCarter, the witness introduced by the government, is an accomplice in the offense charged against the defendant, and a conviction cannot be had upon his testimony, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that an offense was committed and the circumstances thereof.' The charge of the court was as follows: 'Under the laws of Arkansas (Ind. Ter. Ann. Stats. 1899, sec. 1602), it is provided as follows: "A conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof." ' An

exception was saved to the refusal of the court to give the requested instruction, but none saved as to the charge given. The only difference between them is that in the requested instruction the court is asked to charge the jury that Tom McCarter was an accomplice, while the instruction given left ¹⁸⁷ that question to the jury. Whether McCarter was an accomplice or not was a question of fact, to be determined by the jury. 'The court is not required to affirmatively charge that a witness is an accomplice. Where he is admitted to be such, or the facts place this beyond dispute, the court may also charge, without invading the rule that charges should not be upon the weight of the evidence. Whether or not a witness is an accomplice is a question of fact, and the charge may be so framed as to submit this as an issue to the jury. It was not necessary in this case to instruct the jury that Anderson was an accomplice': *Dill v. State* (Tex. Cr. App.), 28 S. W. 950. 'It is urged that it was plain from the testimony of the witness Kelley that he was an accomplice of the defendant, if defendant committed the crime alleged, and the court should have so instructed the jury; but the court fully and carefully instructed as to the weight and effect of the testimony of an accomplice, and to have gone further and told them that Kelley was an accomplice would have been clearly a charge with respect to matters of fact, which is not allowed': *People v. Sansome*, 98 Cal. 235, 33 Pac. 204. See, also, *Spears v. State*, 24 Tex. App. 537, 7 S. W. 245. If the plaintiff in error regarded the word 'accomplice' as a technical, legal one, requiring, at the hands of the court, a definition, he should have requested it, and not by asking a declaration on the part of the court that McCarter was an accomplice, for this would be a finding of fact from the proof. And this was the effect of the requested instruction. 'While in one sense it is undoubtedly the duty of the judge to give instructions to the jury covering the entire law of the case, as respects all the facts proved, or claimed by the respective counsel to be proved, still if he omits something, and is not asked to supply the defect, the party who remained voluntarily silent cannot complain': 1 *Bishop's Criminal Procedure*, sec. 98; *Carroll v. State*, 45 Ark. 539. The court followed the language of the statute, and in this case it was amply sufficient, and there was no error in refusing the requested instruction."

In reference to the right which Driggers had, claiming, as he did, the possession and the right of possession of the field under contest, he requested the court to give the fol-

lowing instruction: "If the jury find from the evidence that the defendant Driggers had rented the stock field referred to in the testimony from Goff and Riley, and was in possession of the same, then the deceased ¹⁸⁸ would not have the lawful right to eject the defendant therefrom by force of arms. And if you further find from the evidence that the deceased attempted to take the possession of said stock field from the defendant Driggers with force of arms under such circumstances as reasonably indicated to defendant that it was the purpose of the deceased to use deadly weapons in obtaining possession of said stock field, then defendant Driggers had the legal right to meet force with force, and if the deceased by any act then done manifested an intention to kill defendant Driggers or to inflict serious bodily injury upon him, then the defendant had the legal right to kill the deceased; and if you so find, you will acquit the defendant. If the jury believes from the evidence that defendant Driggers was in his own field and on his own premises, and that he was advised that the deceased had threatened to take possession of his property by force, and in good faith believed, as a reasonable man, that the deceased intended to kill him or do him great bodily injury in order to get possession of the field, and whilst so in his own field deceased came there and undertook to enter the field by tearing down the fence, and in a violent, threatening manner reached for his pistol, and with said pistol partly drawn in a threatening manner undertook to enter the field where defendant was, and that defendant believed, as a reasonable man, that deceased intended to kill him or do him great bodily injury, and acting under the influence of said belief, whilst deceased was so endeavoring to enter the field, defendant killed him (deceased), the killing would be justifiable."

We believe from a reading and careful consideration of these instructions that they correctly state the law in reference to the right Driggers had in the premises and his right of defense in resisting the efforts of Brady to secure or take possession of the land. These being correct, the question now arises, Did the court give these instructions to the jury, or did the charge which he gave contain substantially the same matter? The court's instructions on this subject are as follows: "You are instructed that a man may use force to defend his real or personal property, in his actual possession, against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of

defense and prevention. But in the absence ¹⁸⁹ of an attempt to commit a felony, he cannot defend his property, except his habitation, to the extent of killing the aggressor for the purpose of preventing a trespass; and if he should do so, he would be guilty of a felonious homicide. Life is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress. You are instructed that although you may believe from the evidence that the deceased had rented the lands in controversy, and was entitled to the possession thereof, still he was not justified in driving his cattle thereon, or taking possession of the land by force, if the same was in the actual possession of the defendant. But the court would instruct you that an attempt of the deceased to drive his cattle on the premises would not of itself be a felony. If you believe from the evidence beyond a reasonable doubt that the defendant, either by himself or acting with others, armed himself, and had others with him who were armed, for the purpose of going to the stock field in question and preventing the deceased from driving the cattle into said stock field, and that his purpose in being so armed was to prevent an entry into said stock field on the part of the deceased with said cattle, and if you further believe that it was his purpose and intention in being thus armed and present at said place to make an assault upon and kill the deceased, or otherwise attempt to injure him with a deadly weapon, if the deceased attempted to drive said cattle into said stock field, and in pursuance of said purpose he did shoot at and others acting with him did shoot and kill the deceased, then in such case such act upon the part of the defendant, if the deceased was thereby killed, is murder, although you may believe that the deceased was fired upon and his death ensued thereafter by reason of the fact that he may have attempted to pull down the fence for the purpose of entering said cattle."

It will be observed that the instructions given by the court were probably predicated upon the testimony which Kelley gave concerning the threat made by Goff on the day previous, to the effect that if Brady put the cattle into the field he would kill him; either this, or upon the facts which developed between the time this threat was made and the affray. If upon the former, then it was correct, as the evidence we have found was incompetent; and if upon the latter, it seems to us that it scarcely ¹⁹⁰ takes into con-

sideration, to the extent to which defendant was entitled, his evidence given as to why he went to the field, and the contention made in reference to his claim of right there. His claim being, as stated by his counsel in his brief, that "he was on his own premises, trying to protect his own property against the wrongful trespass of the deceased, and while so protesting, and while making no effort to kill the deceased, the deceased assaulted him with a deadly weapon," and that the homicide took place, not by reason of the attempted trespass on the property, destruction of the fence, nor the turning in of the cattle on it by deceased, but because of the alleged attempt of deceased to draw his revolver and inflict death or great bodily harm upon the defendant. The instructions given by the court present the theory of the prosecution and state the law in relation thereto without error; but the defendant was entitled to have the law declared in reference to the facts which he contended the evidence reasonably tended to show, and if there was any evidence in the record upon which the instructions offered could properly be predicated, they should have been given.

The instructions asked and refused stated that: "Driggers had the legal right to meet force with force, and if the deceased by any act then done manifested any intention to kill the defendant Driggers, or to inflict serious bodily injury upon him, then the defendant had the legal right to kill the deceased; and if you so find, you will acquit the defendant."

And, further, that if, while defendant was peacefully in his own field, "the deceased came there and undertook to enter the field by tearing down the fence, and in a violent, threatening manner reached for his pistol, and with said pistol partly drawn in a threatening manner undertook to enter the field where defendant was, and that defendant believed, as a reasonable man, that deceased intended to kill him or to do him great bodily injury, and, acting under the influence of said belief, whilst deceased was so endeavoring to enter the field, defendant killed him [deceased], the killing would be justifiable." We believe this instruction, taken in conjunction with the elaborate and correct statement of the ¹⁹¹ law of self-defense, correctly stated the rule, which defendant was entitled to have declared.

As above stated, exception was reserved to but one instruction, given by the court, which was one on mutual combat, and is as follows: "If you should believe from the evidence that the defendant B. F. Driggers was informed and

believed that the deceased and one Tom Kelley had taken possession of a certain stock field the day previous to the killing, which stock field was also claimed by the defendant, and the defendant was informed and believed that the said Kelley and the deceased, or either of them, would be at the field in question on the morning of the killing, and that the man Kelley or the deceased had made threats against the life of this defendant, and that the defendant believed that Kelley and the deceased and others would be at the field in question, having in their possession deadly weapons, as mentioned heretofore, and you further believe that the defendant, knowing all these things, voluntarily organized or assisted in organizing a company of men, arming himself and such men with deadly weapons, guns, and revolvers loaded, and that such preparation was for the purpose of meeting the said Kelley and the said deceased in deadly conflict, and that the defendant proceeded to the place of the killing with said company and with said arms, and that at such time and place a conflict ensued with deadly weapons, and the deceased was killed, and the defendant participated in the shooting, then such conflict would be what is known in law as a 'mutual combat.' And if in such combat a party is killed, all parties who knowingly and intentionally engaged in the conflict are guilty of murder."

After the jury had retired and had been out about twenty hours it returned back into court and presented to the court the following question: "Your honor, does the charge of what is known as 'mutual combat' cut out the right of self-defense?" The court, in answer to this inquiry, added to the instruction above quoted, after the words "guilty of murder," the following language: "And cannot claim the right of self-defense if you can so find."

This instruction was predicated upon the contention of the prosecution in this case. The expression "mutual combat" about as clearly conveys the meaning of what is required to constitute it as any definition could. It means, in different language, though ¹⁹² probably not more clear, an agreement or meeting of minds between two parties to fight, whether with or without arms. It means a coming together, with a mutually understood purpose for a violent contest. The government took the position that the evidence in this case established that Driggers and his party knew that Brady and his party were coming to the field armed, for the purpose of driving cattle in on this field and taking possession thereof at all hazards. That they knew,

or had reasonable ground to believe, that Driggers and his party would be armed, with the purpose and intention, as declared to Brady by Goff on the day before, of killing him if they carried out this purpose. That Driggers and Goff gathered together men, arms and ammunition for the purpose of using them in preventing these things on the part of Brady, thereby, through these acts, creating the agreement to fight, and in view of this claim which, it must be conceded, may be said to find reasonable support in the evidence, in our judgment the instruction given was not erroneous.

Counsel for defendant in their briefs inveigh against it most vigorously, denominating it "a fiery and fierce résumé of the most strained construction of the evidence against the plaintiff in error, with many exaggerations to his detriment, which suggests many conclusions and deductions of which the evidence is wholly incapable." While it is true the instruction improperly includes a revolver with the other weapons which defendant's party had, yet it will be noted that this instruction in fact assumes nothing as proved or as true, but places upon the prosecution the very highest possible burden of proof in the case. It does not assume, as is asserted, that Brady had possession of the field, but requires the jury to find from the evidence that Driggers was informed and believed that Brady had taken possession of the field, and requires proof that defendant was informed and believed that Kelley and the deceased would be at the field in question on the morning of the killing, having in their possession deadly weapons, and further requiring the jury to find and believe that defendant, knowing of these things, voluntarily organized a company of men, and armed them "for the purpose of meeting said Kelley and the said ¹⁹³ deceased in deadly conflict." If this fact was not proved by the evidence, then the law of mutual combat did not apply, and the instruction fell with it. But to find this the jury were compelled to find against all of the evidence by defendant on this point, and to find that the extreme contention of the prosecution was true. We do not see that the defendant could complain of this.

This instruction placed a heavy burden upon the prosecution, and to our mind in fact, instead of being adverse to the defendant, was really favorable to him. Of course, in passing on this instruction we do not presume to say that the evidence in this case established mutual combat. All that we hold is that there was evidence in the case sufficient, under the claims of the prosecution, upon which to predi-

cate this instruction, and under it the government was entitled to have the law relating thereto declared. It is strenuously urged that it should have contained a saving clause, providing for the contingency of defendant's withdrawal from the coming fray. There is no question on the law on the subject, for the defendant, even though he went to the field for the purpose of engaging in a mutual combat, if he in good faith withdrew and sought to avoid the difficulty before the fatal moment, and if, while in this attitude, the deceased himself brought about, by his acts, a condition wherein the life of the defendant was endangered, or where he in good faith believed it was, then the right of self-defense would exist in him, and he would have the right to defend his life as against the deceased, notwithstanding his previous intentions to engage in a combat. But did he withdraw? Counsel urge and insist that when defendant sent word to Brady not to come there, he could not turn the cattle in; that this amounted to a withdrawal. We cannot consent to this. It seems to us that it was an effort, or an invitation at least, to induce Brady and his party to withdraw, not a withdrawal of Driggers. He remained where he was, with his gun and his party, and awaited the arrival of the deceased, who, with his party, came on, and the conflict ensued.

¹⁹⁴ We believe we have now covered practically all of the propositions urged in this court which will be likely to again arise in a new trial hereof, and we believe that a trial, conducted along the lines and within the limitation herein prescribed, will safeguard the rights of both the state and the defendant. The decision is accordingly reversed, and the case remanded to the district court of Garvin county, with instructions to grant the defendant a new trial.

Hayes, Kane and Turner, JJ., concur.

Williams, C. J., disqualified.

Each Conspirator is Liable when a conspiracy has once been entered into for all the acts of his co-conspirators done in furtherance of the objects of the conspiracy: Franklin Union No. 4 v. People, 220 Ill. 355, 110 Am. St. Rep. 248; State v. Routzahn, 81 Neb. 133, ante, p. 675. It makes no difference at what time anyone entered into a conspiracy, as everyone who enters into the common purpose and design is deemed a party to the act which has been done before by the others, and to every other act which may afterward be done by any of the others in furtherance of the common design: Smith v. State, 46 Tex. Cr. 267, 108 Am. St. Rep. 991. Or, as otherwise stated, everyone who enters into a conspiracy is deemed a party to every act connected

therewith done by the others before that time, and a party to every act afterward done by any of the others in furtherance of the common design: *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, and note.

The Acts and Declarations of One Conspirator in furtherance of the common design may be shown as evidence against his associates: *Butt v. State*, 81 Ark. 173, 118 Am. St. Rep. 42. They are admissible against one of the conspirators although made in his absence: *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 291. Every act and declaration of each member of a conspiracy, in pursuance of the original concerted plan and with reference to the common object, is original evidence against each of them, without reference to the time at which they entered the conspiracy: *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267; *Patch Mfg. Co. v. Protection Lodge*, 77 Vt. 294, 107 Am. St. Rep. 668.

It is Immaterial Whether the Evidence Showing a Conspiracy is introduced before or after the acts of the conspirators are received in evidence, if upon the whole case a conspiracy is shown: *Butt v. State*, 81 Ark. 173, 118 Am. St. Rep. 42. But on the trial for murder by conspirators the evidence must show beyond a reasonable doubt that the conspiracy was formed prior to the homicide, otherwise the acts and declarations of the conspirators cannot be considered: *Smith v. State*, 46 Tex. Cr. 267, 108 Am. St. Rep. 991.

Convictions on the Testimony of an Accomplice are discussed in the note to *Stone v. State*, 98 Am. St. Rep. 158.

ADMISSIBILITY IN EVIDENCE OF AN OFFICER'S RETURN.*

- I. Scope of Note, 848.
- II. What an Officer's Return Should Show, 848.
- III. Of What Facts the Return Affords Evidence, 849.
- IV. Admissibility of the Return Where It Contains Recitals not Properly the Subject of a Return, 854.
- V. Admissibility of the Return to Show Excuse for Failure of the Officer to Serve the Writ or Process, 856.
- VI. Admissibility of the Return as a Predicate for the Former Testimony of an Absent or Deceased Witness, 856.

I. Scope of Note.

This note will be confined to the admissibility of the returns of officers to writs and process. The conclusiveness of such returns and the remedies of persons injured thereby was treated in a recent note attached to the case of *Reiger v. Williams*, 124 Am. St. Rep. 756.

II. What an Officer's Return Should Show.

In determining whether an officer's return is admissible, it is frequently necessary to ascertain whether the return contain more or less than ought to be stated therein. Hence, it is proper to consider what the return should contain. A return is defined as a short account in writing made by an officer in respect to the manner in which he has executed a writ or process: *Phillips County v. Pillow*,

*REFERENCES TO MONOGRAPHIC NOTES.

Amendments to returns to writs: *Malone v. Samuel*, 13 Am. Dec. 173.

Conclusiveness of sheriff's return of service of summons and remedies of persons injured thereby: *Reiger v. Mullins*, 124 Am. St. Rep. 756.

47 Ark. 404, 1 S. W. 686; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Aultman v. McGrady*, 58 Iowa, 118, 12 N. W. 233; *State v. Melton*, 8 Mo. 417; *Davis v. Reavis*, 7 Lea (75 Tenn.), 585. It is his official statement of the acts done by him under the writ in obedience to its directions and in conformity with the requirements of law: *Hooper v. McDade*, 1 Cal. App. 733, 82 Pac. 1116. "A return is nothing but the sheriff's answer relative to that which he is commanded to do by the writ; and it is intended to inform the court of the truth of that alone which it concerns them to know. Third persons ought not to be injured by a return because the sheriff has departed from its proper object and mingled with it irrelevant matter": *Smith v. Kelly*, 7 N. C. 507. The return is the statement of the officer certified to the court under the sanction of his official oath as to what he did touching the execution of the writ. It may properly contain the facts touching his acts under the mandate and the law: *Hutton v. Campbell*, 10 Lea (78 Tenn.), 170. It is the officer's certificate as to what he has done in obedience to the command of the process given to him for execution, or the reasons for his failure to fulfill the commands therein set forth: *Jones v. Goodbar*, 60 Ark. 182, 29 S. W. 462. Frequently, however, in statutes, and usually in common speech, the word "return" means merely the certificate, without regard to whether it has been filed or not: *Easton v. Childs*, 67 Minn. 242, 69 N. W. 903.

III. Of What Facts the Return Affords Evidence.

The return of service of process is always admissible in evidence for the purpose of showing the fact of such service: *Dunklin v. Wilson*, 64 Ala. 162; *Sanford v. Nichols*, 14 Conn. 324; *News Printing Co. v. Brunswick Pub. Co.*, 113 Ga. 233, 38 S. E. 853; *Newman v. Greeley State Bank*, 92 Ill. App. 638; *Birch v. Frantz*, 77 Ind. 199; *Buck v. Hawley*, 129 Iowa, 406, 105 N. W. 688; *Schnack v. Boyd*, 59 Kan. 275, 52 Pac. 874; *Utter v. Smith* (Ky.), 80 S. W. 447; *Baham v. Stewart Bros. & Co.*, 109 La. 999, 34 South. 54; *Wardell v. Etter*, 143 Mass. 19, 8 N. E. 420; *Crosby v. Farmer*, 39 Minn. 305, 40 N. W. 71; *Newcomb v. New York Cent. R. Co.*, 182 Mo. 687, 81 S. W. 1069; *Goble v. Brennehan*, 75 Neb. 309, 121 Am. St. Rep. 813, 106 N. W. 440; *Wendell v. Mugridge*, 19 N. H. 109; *Vigers v. Mooney*, 3 N. J. L. 909; *Wheeler v. New York etc. R. Co.*, 24 Barb. 414; *Richardson v. Penny*, 10 Okl. 32, 61 Pac. 584; *Benwood Iron Works v. Hutchinson*, 101 Pa. 359; *Home Ins. Co. v. Webb*, 106 Tenn. 191, 61 S. W. 79; *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141; *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808; *White River Bank v. Downer*, 29 Vt. 332. The return is generally prima facie evidence of those matters which the law requires the officer to certify even as between strangers to the suit: *Crow v. Hudson*, 21 Ala. 560; *Tucker v. Bond*, 23 Ark. 268; *Allen v. Gray*, 11 Conn. 95; *Butler v. State*, 20 Ind. 169; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Bott v. Burnell*, 9 Mass. 96; *Tullis v. Brawley*, 3 Minn. (Gil. 191) 277; *Cornell v. Cook*, 7 Cow. 310; *Browning v. Hanford*, 7 Hill, 120;

Hathaway v. Goodrich, 5 Vt. 65. Hence, where an officer performs an act in pursuance to a duty enjoined on him by law, his official statement of its performance is evidence thereof: *Moore v. Bank of Missouri*, 6 Mo. 379; *Perryman v. State*, 8 Mo. 208; *Minor v. Natchez*, 4 Smedes & M. 602, 43 Am. Dec. 488; *Pool v. Wedemeyer*, 56 Tex. 287. Where a sheriff levied upon, inventoried, advertised and sold part of the goods as sheriff, his return is prima facie evidence that he is a sheriff: *Brewster v. Vail*, 20 N. J. L. 56, 38 Am. Dec. 547. A return when made is a matter of record, and is admissible in all cases where the execution to which it is attached is: *Creagh v. Savage*, 14 Ala. 454; *Peebles v. Pate*, 90 N. C. 348. Likewise, the officer's return upon search and seizure process is admissible in evidence as a part of the record: *State v. Lang*, 63 Me. 215.

It has been held that the value of the property attached and taken on execution, as stated in the return, is, in the absence of all other evidence on the subject, evidence on that subject: *French v. Stanley*, 21 Me. 512. But in *Robinson v. Edwards*, 70 Me. 158, which was an action of trespass for seizing plaintiff's goods on an execution against another person, the court said: "The returns of the officer on the execution in the original actions were offered in evidence by the defendant to show the amount of goods and their value, as ascertained by the sheriff's sale on the execution, but they were ruled out. This ruling was correct. The execution would show the amount of goods returned thereon, but it would not show that more goods had not been taken. The plaintiff, at all events, was entitled to recover the fair market value of the property at the time and place of its taking. What that was could not be shown by an officer's return of the price which articles seized brought at a forced sale on execution at public auction months after the original attachment."

Where an inventory is attached by the sheriff to a levy of an attachment and made a part thereof, it is competent evidence in a suit by a claimant of the goods, but its statement of values is not admissible, since it is but an ex parte statement of the officer: *Schloss v. Inman*, 129 Ala. 424, 30 South. 667. The recitals in the return to an attachment or execution are admissible to prove the fact of the levy and the time when made: *Tucker v. Bond*, 23 Ark. 268; *Cornell v. Cook*, 7 Cow. 310; *Loftin v. Hugins*, 13 N. C. 10; *Grandy v. McPherson*, 52 N. C. 347; *Lowry v. Cady*, 4 Vt. 504, 24 Am. Dec. 628; *Stanton v. Hodges*, 6 Vt. 64. And in an action against an officer for property claimed as exempt, his return showing its seizure is prima facie evidence of that fact: *Boesker v. Pickett*, 81 Ind. 554. And where an officer has attached personal property, his return on the writ is prima facie evidence that the property therein enumerated was attached: *Kelly v. Tarbox*, 102 Me. 119, 66 Atl. 9. The return of a sheriff that a debt was replevied with a certain person as surety is, at least, prima facie evidence against such surety in a proceeding on a lost replevin bond: *Newton v. Prather*, 1 Duvall (62 Ky.), 100.

The return of a sheriff on an execution is admissible as evidence that he had received no payment on the execution: *Portis v. Ennis*, 27 Tex. 574. But the sheriff's return that he paid the amount of the execution to plaintiff is not evidence of such payment. The sheriff must prove it otherwise than by his own return. "Such a return is not commanded to be made by the writ, nor is it authorized by law. The sheriff may indeed excuse himself by showing that he has paid the amount collected to the plaintiff or his attorney, but he must prove the fact by other evidence than his return. To put the plaintiff upon proof that he had not received the money, because the sheriff had returned that he had, would be preposterous in itself and attended with the most mischievous consequences": *First v. Miller*, 4 Bibb, 311.

In *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151, the return of the sheriff indorsed on an execution placed with him for collection recited that the execution was satisfied by promissory notes received for the amount due on it. The court, in sustaining the objection to the admissibility of the return to prove the satisfaction of the judgment, said: "If this return contained any element entitled to be considered, which tended to prove satisfaction of the judgment, it was admissible. But we think it does not. The officer, by virtue of his office, had no authority to accept notes in satisfaction of the judgment, and no authority to certify any other act than one performed in the proper exercise of his powers. . . . If there was any satisfaction of the judgment and execution, it was by an acceptance of the notes referred to in the return by the plaintiff in the execution, under a special agreement to take the paper as absolute payment; and it was necessary to prove such acceptance and agreement by testimony other than the sheriff's certificate. The sheriff's certificate upon that point was no more entitled to be considered than the certificate of any other person. His return that it was satisfied in the particular manner specified in effect amounts to nothing more than a certificate that the plaintiff received the notes under a special agreement to accept them as absolute payment and extinguishment of the debt, and in satisfaction of the judgment. The certificate being incompetent to prove these facts, it was error to admit it in evidence."

An officer may use his return in his own favor in a suit by or against him arising out of the service of the process, but it is only prima facie evidence of the truthfulness of its recitals: *Baylor v. Scott*, 2 Port. 315; *Raker v. Bucher*, 100 Cal. 214, 34 Pac. 654, 849; *Splahn v. Gillespie*, 48 Ind. 397; *Nichols v. Patton*, 18 Me. 231, 36 Am. Dec. 713; *Sanborn v. Baker*, 1 Allen, 526; *Hand v. Grant*, 5 Smedes & M. 508, 43 Am. Dec. 528; *Chadbourne v. Sumner*, 16 N. H. 129, 41 Am. Dec. 720; *Smith v. Emerson*, 43 Pa. 456; *Nichol v. Ridley*, 5 Yerg. 63, 26 Am. Dec. 254; *Barrett v. Copeland*, 18 Vt. 67, 44 Am. Dec. 362. Thus in an action for a false return or other action against an officer who has been guilty of a breach of official duty, his return is admissible in his favor, but the plaintiff has a

right to contradict it: *Waymire v. State*, 80 Ind. 67; *Whitehead v. Keyes*, 3 Allen, 495, 81 Am. Dec. 672; *Joyner v. Miller*, 55 Miss. 208. In *Barrett v. Copeland*, 18 Vt. 67, 44 Am. Dec. 362, the court in speaking to this subject said: "We find it laid down as undoubted law that such a return is admissible evidence in the officer's favor, as also to affect the rights of third persons: *Gyfford v. Woodgate*, 11 East, 296; *Phillips on Evidence*, 1st Am. ed., 293, 294; *Hathaway v. Goodrich*, 5 Vt. 65; *Stanton v. Hodges*, 6 Vt. 66. But these authorities uniformly assert that when offered for such a purpose it is but prima facie evidence. Its admissibility is put upon the ground of the general credit due to the return of such an officer, in cases where it is his duty to make a return. But upon principle it should be subject to contradiction by third persons, because they are neither parties nor privies to the transaction, and because they would not, according to any precedent with which I am acquainted, be entitled to a remedy against the officer for a false return. It should also be open to contradiction collaterally as against the officer, even by a party to the process. To hold otherwise, and put the party to his remedy for a false return, would produce a circuitry of action neither warranted by analogy, nor required to meet the justice of the case."

A return of an execution indorsed *nulla bona* is admissible in evidence in favor of a sheriff in an action against him for a failure to return an execution within sixty days, even where the return is made after the commencement of the action: *Bechstein v. Sammis*, 10 Hun, 585. And in suits in the nature of creditors' suits to reach equitable interests or choses in action of the judgment debtor, a return of execution unsatisfied is naturally admissible, to show that the creditor has exhausted his remedies at law: *Russell v. Chicago Trust etc. Co.*, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; *Baxter v. Moses*, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350; *Trego v. Skinner*, 42 Md. 426; *Wade v. Ringo*, 62 Mo. App. 414; *Campbell v. Foster*, 16 How. Pr. 275; *Cresswell v. Smith*, 8 Lea (76 Tenn.), 668; *Daskam v. Neff*, 79 Wis. 161, 47 N. W. 1132.

The return of a *fieri facias* unsatisfied has been held to be evidence of the insolvency of the debtor: *Lovell v. Payne*, 30 La. Ann. 511, but in a Kentucky case a return of *nulla bona* to such a writ with a recital that defendant is not an inhabitant of the county of the sheriff making the return has been declared no evidence of the insolvency of the debtor, since he may have property elsewhere. It is, however, evidence that he has no property in the county: *Hogan v. Vance*, 2 Bibb (5 Ky.), 34.

A return of "no personal property found" is no such evidence of an exhaustion of the personal assets of the debtor as to authorize a sale after his death of land levied on before that event, since the deceased may have had personal estate which the officer could not find or which was situate in another county: *Stockard's Heirs v. Pinkard*, 6 Humph. (25 Tenn.) 119. A sheriff's return on an execution is prima facie evidence of the sale and who was the purchaser at such sale: *Simpson v. Hiatt*, 35 N. C. 470.

The officer's return to a subpoena cannot be used as evidence that the person named therein as a witness is in fact a fictitious person because the officer is unable to find the person. Thus in *People v. Lee*, 128 Cal. 330, 60 Pac. 854, which was a prosecution for forging the name of a fictitious person to a check, it was sought to prove the nonexistence of the person whose name was signed to the check by the return to a subpoena for such person, which recited that the officer, after a diligent search and inquiry, was "unable to find J. P. Collins in the county of Santa Barbara." The court, in declaring the return not admissible for that purpose, said: "The return of the sheriff upon process is declared by statute to be prima facie evidence of the facts in such return stated (Pol. Code, sec. 4178; Stats. 1897, p. 480); but this must be held to mean that the return is prima facie evidence when the question under investigation is of a character which renders that mode of proof appropriate. Thus, to take some negative illustrations, in proceedings for divorce, residence of the plaintiff in the county where the action is brought is essential to the maintenance of the action (Civ. Code, sec. 128); on an issue of residence raised by the pleadings in such an action we suppose no one would claim that the sheriff's return on a subpoena for the attendance of the plaintiff as a witness would be competent evidence to prove or disprove the fact of residence. In an action against a corporation the summons may be served on the president of the corporation, and the sheriff serving the process must make return of it according to the fact (Code Civ. Proc., secs. 411, 415); the sheriff's certificate that he made service by delivering the proper copies to a specified person, described as president of the defendant corporation, is prima facie evidence, for the purpose of establishing the fact of service on the corporation, that the individual named was in fact such president; but suppose the action involved, let us say, some issue whether the corporation was bound by some act of such individual as its president, it would hardly be contended that the return on the summons could be competent evidence at the trial to establish his official status. The case here is but little different in point of principle from the cases instanced. The return of the subpoena that J. P. Collins, wanted as a witness, could not after diligent search be found in Santa Barbara county, was prima facie evidence upon an issue to which the simple fact returned might have been relevant—some question which directly involves a right or liability or consequence resulting from the official act which the return purports to describe (see *Stanton v. Hodges*, 6 Vt. 64, 66); but the question whether such a person as J. P. Collin or J. P. Collins had existence in Santa Barbara county or elsewhere at the date of the check was not one which the sheriff was required to officially ascertain or declare; it is illustrated only inferentially, and by very remote inference at that, from the facts stated in the return; it is an issue in no way dependent upon, or connected with, the discharge of the sheriff's duty in serving or attempting to serve the subpoena; it is therefore to be proved in the ordinary way, by testimony of sworn witnesses subject to cross-examination by defendant, and not by

official certificate. The admission of the subpoena and return in evidence was material error."

IV. Admissibility of the Return Where It Contains Recitals not Properly the Subject of a Return.

The general rule is that a return as to facts to which the officer was required to certify is prima facie evidence for or against even strangers to the suit, and hence such a return is necessarily admissible in evidence: *Crow v. Hudson*, 21 Ala. 560; *Tucker v. Bond*, 23 Ark. 268; *Dutton v. Tracy*, 4 Conn. 79; *Butler v. State*, 20 Ind. 169; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Caldwell v. Harlan*, 3 T. B. Mon. 349; *Kendall v. White*, 13 Me. 245; *Tullis v. Brawley*, 3 Minn. 277; *Russel v. Gray*, 11 Barb. 541; *Cornell v. Cook*, 7 Cow. 310; *Browning v. Hanford*, 7 Hill, 120; *Loftin v. Hugins*, 13 N. C. 10; *Paxson's Appeal*, 49 Pa. 195; *Hathaway v. Goodrich*, 5 Vt. 65; *Goodall v. Stuart*, 2 Hen. & M. 105.

But the return of an officer is not competent evidence as to facts which he is not required to certify in the proper execution of his powers: *Wickersham v. Reeves*, 1 Iowa, 413; *Barr v. Combs*, 29 Or. 399, 45 Pac. 776. The return cannot be used as evidence of acts beyond the territorial jurisdiction of the officer making: *Arnold v. Tourtellot*, 13 Pick. 172. The recitals in the return as to matters which the officer is not required to certify in his return are mere hearsay: *Obermier v. Core*, 25 Ark. 562; *Browning v. Hanford*, 7 Hill, 120. Hence the recitals in an officer's return showing the acts of some one other than that of the officer are not admissible in evidence: *Aultman v. McGrady*, 58 Iowa, 118, 12 N. W. 233. A sheriff cannot officially know the inhabitants of the commonwealth, and therefore he is not authorized to make a return that a certain individual is not an inhabitant of the commonwealth, but such a return may be admissible to show that the person was not an inhabitant of as much territory as the officer could officially know, which naturally is limited to the county: *Greenup's Representative v. Bacon's Exrs.*, 1 T. B. Mon. 108. The return of an officer to a subpoena that the witness named therein is dead, not being authorized and required by law, is clearly not binding on the parties. Where the return certifies to a fact not made by law a part of his official duty, such certificate or statement is of no greater evidentiary or probative force than if made by anyone not an officer: *Driggers v. United States*, 1 Okl. Cr. 167, 21 Okl. 60, ante, p. 823, 95 Pac. 612. A return by a sheriff on an execution that he had "sold the within tract of land subject to a deed of trust" is not evidence of the existence of the deed of trust as against the purchaser at the execution sale: *Mitchell v. Lipe*, 8 Yerg. 179, 29 Am. Dec. 116. And a statement in a return on an execution that the officer paid the money to plaintiff, not being in response to the command of the writ, is not competent evidence to prove that fact: *Walker v. McKnight*, 15 B. Mon. 467, 61 Am. Dec. 190.

A sheriff's return of an execution is not evidence of anything relating to the title of the property sold on the execution sale. The

sheriff's deed under such circumstances constitutes *prima facie* evidence in respect to whom the property was sold. The court in *Kimmel v. Meier*, 106 Ill. App. 251, in rejecting an indorsement by the sheriff on the execution showing a levy thereof on certain land, and that the land was "duly advertised and sold according to law to Charles A. Kimmel for one hundred and forty-one dollars and thirty-five cents," as evidence that the land was so sold, said: "Plaintiff claims he made the required proof by the indorsements upon the executions, the substance of which is above stated. In *Osgood v. Blackmore*, 59 Ill. 261, 271, the court said: 'The return of the sheriff forms no part of the title. The title would be equally as good without as with a return. Nor can the sheriff, by anything he may say in his return, in the slightest degree affect the rights of the purchaser. The statute has not made the return evidence of anything relating to the title, nor is it made notice.'

"In *Gardner v. Eberhart*, 82 Ill. 316, it is no part of the office of a sheriff's return to show what land is sold upon the execution. The office of the return is to show the satisfaction or part satisfaction of the judgment or the failure to make satisfaction of any part of the judgment. Where land is sold at sheriff's sale, the sale, with the subject matter thereof and the name of the purchaser, may be shown by the certificate of purchase or by the recitals in the sheriff's deed. *McDaniel v. Bryan*, 8 Ill. App. 273.

"We conclude that the indorsements by the sheriff on these executions were not competent evidence, and did not prove that the land was sold under the Richardson execution, nor that it was redeemed from such an execution sale by Mrs. Boeking as a judgment and execution creditor."

What may and may not be proved by an officer's return is well shown by the opinion of the court in *Sheldon v. Comstock*, 3 R. I. 84, wherein the court set forth the functions of an officer's return. It said: "An officer's return on process of every kind should state that he has performed what the mandatory part of the process required of him. It should contain a statement of the acts which he has done under and by virtue of it, and the place and the time when and where they were done. His office is simply ministerial. Hence it is insufficient for him to return that he has duly or legally served the process committed to him. He should set forth what he did, and when and where, and leave the question of the legality of his proceedings to some judicial tribunal.

"Where the law prescribes any particular forms or proceedings in the service of process, the return of the officer should show that they were specifically complied with. The return should set them forth as fully and circumstantially as though they had been specially required in the mandatory part of the process. All this should be in the return, and as a general thing nothing more. But if more be added, although it may not vitiate the return, it will not be considered as part of it. The facts essential to a return are taken as conclusively proved, if stated in it, except in those cases where express provision to the contrary is made by statute, and except in

suits against the officer making it for a false return. The return of the officer is the only proper evidence to prove these facts. If other facts are contained in the return, they are to be rejected. The officer's return is no proper evidence of their truth."

V. Admissibility of the Return to Show Excuse for Failure of the Officer to Serve the Writ or Process.

An officer's return is only admissible to prove such acts as he is required to perform and certify to in the return. Hence it is not evidence of matters of opinion or excuse for failure to perform the duty commanded by the writ or process: *Lindley v. Kelley*, 42 Ind. 294; *Hessong v. Pressley*, 86 Ind. 555; *Bruce v. Dyall*, 5 T. B. Mon. 125; *Browning v. Hanford*, 5 Denio, 586.

VI. Admissibility of the Return as a Predicate for the Former Testimony of an Absent or Deceased Witness.

In the principal case the return of an officer to a subpoena reciting that the witness was dead was rejected as a predicate for the admission of the testimony given by the witness at a preliminary hearing. The reason for the rule rejecting the admission of the officer's return was that such a recital in the return was not authorized nor required by law. When the officer certifies to a fact in his return not made by law a part of his official duty, such return is of no greater evidentiary or probative force than if made by one who is not an officer: *Driggers v. United States*, 1 Okl. Cr. 167, 21 Okl. 60, ante, p. 823, 95 Pac. 612. To explain the absence of a witness, a subpoena with the return of the officer that he was unable to find the witness is admissible to show a proper effort on part of the party at whose instance it was issued to produce in court the best evidence: *Heyfron v. Mahoney*, 9 Mont. 497, 18 Am. St. Rep. 757, 24 Pac. 93. In *Burton v. State*, 107 Ala. 68, 18 South. 240, a return to a subpoena that the witness was "not found" was admitted together with other evidence as a predicate for his former testimony. In *Mitchell v. State*, 114 Ala. 1, 22 South. 71, the return of a subpoena for a witness returned "not found" was also admitted in evidence, but the question in the case was the admission of the testimony of the deputy sheriff as to general rumors in the neighborhood that the witness had gone out of the state, as a predicate for the testimony of the witness taken at the preliminary hearing. The testimony of the deputy sheriff was not admitted. But in *Spaulding v. Chicago etc. Ry. Co.*, 98 Iowa, 205, 67 N. W. 227, the officer was allowed to testify that he had made diligent search and inquiry and had been informed that the witness had left the county, the court saying that the facts disclosed would have justified him in making a return on the subpoena that the witness could not be found. And in *Wheeler v. Jenison*, 120 Mich. 422, 79 N. W. 643, an affidavit of a deputy sheriff that he was unable to find the witness in the state, and was informed that he was at a certain city in another state, was also admitted as a predicate for the former testimony of such witness.

CASES
IN THE
CRIMINAL COURT OF APPEALS
OF
OKLAHOMA.

EX PARTE JOHNSON.

[1 Okl. Cr. 286, 97 Pac. 1023.]

CRIMINAL PROSECUTION—Right to Hold Defendant in Custody Until a New Indictment can be Procured.—Where, upon the trial of a case, it appears to the court that there is a variance between the allegations of the indictment or information and the testimony introduced, and the jury is discharged upon this ground, and it is the opinion of the court that a new indictment or information can be framed upon which the defendant can be legally convicted, it is the duty of the court to commit the defendant to custody, or to admit him to bail until such new indictment or information can be presented against him. (p. 858.)

HABEAS CORPUS, What are not Grounds for.—Mere errors and irregularities which do not render the proceedings void are not ground for relief by habeas corpus. (By the editor.) (p. 859.)

HABEAS CORPUS—Plea of Former Jeopardy not Available in Support of.—The writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy. (p. 860.)

(Syllabi by the court except where stated to be by the editor.)

F. S. Winn, for the petitioner.

Charles R. Bostick and W. C. Reeves, assistant attorney general, for the respondent.

287 FURMAN, P. J. On the sixth day of October, 1908, petitioner, B. M. Johnson, was placed upon trial in the district court of Noble county, Oklahoma, upon an information filed against him by the county attorney of said county, wherein the said B. M. Johnson was charged with the offense of obtaining money under false pretenses. The defendant entered a plea of not guilty. A jury was impaneled and sworn, and the state proceeded to introduce its evidence; but before the state had concluded its evidence in chief the

county attorney moved to dismiss the cause, and requested that the defendant be held to answer to the charge of obtaining the signature of E. J. Miller to a written instrument designedly and by false representations, with intent to cheat and defraud him, the said E. J. Miller. Thereupon ²⁸⁸ the court ordered that said cause be dismissed, and that the said defendant, B. M. Johnson, be remanded into the custody of the sheriff of Noble county, Oklahoma; and the county attorney was ordered to file, in the county court of Noble county, a complaint against the said B. M. Johnson for the said charge of obtaining the signature of E. J. Miller to a written instrument designedly and by false representations, with intent to cheat and defraud the said E. J. Miller, and that said defendant be proceeded against as directed by law. To all of which rulings and orders the defendant duly excepted.

On the eighth day of October, 1908, the defendant applied to this court for a writ of habeas corpus, alleging that the order of the trial court committing him to the custody of the sheriff of Noble county pending the filing of a complaint against him was without authority of law, and that he was entitled to his liberty. In order that this question might be decided and set at rest the writ was issued as prayed for. The presence of the defendant and of the sheriff of Noble county in this court was waived by stipulation of counsel on both sides and the matter was set for hearing on the 13th instant.

In his answer to the writ of habeas corpus the sheriff set up the matters hereinbefore stated, and further stated on the ninth day of October, 1908, complaint was filed before the county judge of Noble county, in which the defendant was charged with having obtained the signature of E. J. Miller to a written instrument designedly and by false representations, with intent to cheat and defraud the said E. J. Miller, and that on said date commitment was issued out of said county court of Noble county commanding said sheriff to hold the defendant upon said charge, to await the further action of the court; that on the tenth day of October the defendant appeared before said judge and entered his plea of not guilty, and that the bail of said defendant was fixed by said judge in the sum of five hundred dollars, in default of which the defendant was committed to the custody of said sheriff. It further appears that by agreement of counsel said cause before said judge was set for preliminary hearing on the fifteenth day of ²⁸⁹ October, 1908, and that the defend-

ant is now in the custody of the sheriff of Noble county awaiting said trial.

It is contended by counsel for the defendant that the proceedings, which are now pending before said county judge of Noble county, are for one and the same offense as that upon which he was previously placed upon trial in the district court of said county, and that this court should order his release upon the ground of former jeopardy. This presents two questions for determination, viz.: 1. Did the district court of Noble county have the power to make the order committing defendant to custody pending the filing of a new complaint against him? 2. Can the question of former jeopardy be considered upon a hearing on habeas corpus? We will now consider these questions in order named.

1. Section 5508 of Wilson's Revised and Annotated Statutes of Oklahoma of 1903 is as follows: "If the jury be discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail that the bail be exonerated, or if he have deposited money instead of bail, that the money deposited be refunded to him, unless in its opinion a new indictment can be framed, upon which the defendant can be legally convicted. in which case it may direct that the case be resubmitted to the same or another grand jury."

From this it is clear that the trial court had the power to direct that the case be resubmitted to the same or another grand jury. The grant of power to do a certain thing necessarily carries with it the power to do all things which are necessary to the full accomplishment of the purpose had in view in granting the original power. To say that the court can direct a resubmission of a case to a subsequent grand jury, but is without power to hold the defendant in custody, or on bail, to answer an indictment which may be found, is to so construe the law as to result in its defeat, and thus render it absurd and abortive. It is a familiar principle of law that a statute must never be so construed as to defeat the plain purpose which it has in view. We therefore ²⁹⁰ hold that it was the duty of the court to direct that the defendant should be held until another prosecution could be instituted. If the defendant requests bail pending the institution of the new prosecution, the court should fix the amount to be given. The evident purpose of section 5508, Wilson's Revised and Annotated Statutes of Oklahoma of 1903, was that in the cases therein provided for the defendant might

be held until he could be legally proceeded against. To construe this section otherwise would be to place form above substance.

2. Can the plea of former jeopardy be heard on habeas corpus proceedings? It is an elementary principle of law, of universal acceptance, that mere errors or irregularities which do not render the proceedings void are not ground for relief by habeas corpus. We have an authority directly in point to the question now under consideration in the case of *In re Belt*, 159 U. S. 95, 15 Sup. Ct. Rep. 987, 40 L. ed. 88. The petition for the writ set up former jeopardy as the ground upon which the petitioner sought to be released from custody. The supreme court says: "The general rule is that the writ of habeas corpus will not issue unless the court under whose warrant the petitioner is held is without jurisdiction, and that it cannot be used to correct errors." It then held that the lower court had jurisdiction, and the writ was denied. In *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. Rep. 297, 40 L. ed. 406, the writ was sought also upon the ground of former jeopardy. Referring to this plea the court said: "Whatever effect it might have if pleaded to a subsequent indictment affords no ground for his discharge on habeas corpus." In the case of *Ex parte Crofford*, 39 Tex. Cr. 547, 47 S. W. 533, the court says: "The decisions have been uniform that the writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy."

We could cite authority without limit to sustain the proposition that a petitioner cannot be discharged on habeas corpus upon the plea of former jeopardy, but do not deem it necessary to do so. The district court of Noble county had jurisdiction of ²⁹¹ the offense charged and of the prisoner. It has jurisdiction to hear and decide upon the defenses offered by him. As to whether the defense now relied upon is good involves questions both of law and of fact. The trial court should pass upon the questions of law. A jury, under the instructions of the trial court, should pass upon the questions of fact involved. As the identity of the two alleged offenses is in question, this must go to the jury.

The relief prayed for cannot be granted.

Baker and Doyle, JJ., concur.

Habeas Corpus will Lie, according to *Ex parte Davis*, 48 Tex. Cr. 644, 122 Am. St. Rep. 775, to prevent the violation of a constitutional provision that no person shall be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction.

REED v. TERRITORY.

[1 Okl. Cr. 481, 98 Pac. 583.]

INDICTMENT OR INFORMATION not in the Language of the Statute.—When an indictment uses substantially the same language in charging an offense as is used in the statute in creating the offense, the indictment is sufficient. (p. 863.)

INDICTMENT, Motion to Set Aside—Insufficient Statement of Grounds of.—A general allegation that the grand jury which found the indictment was not properly and legally drawn is too indefinite and uncertain to require notice. (p. 863.)

CLERK OF THE COURT, Power of to Act by Deputy.—Under the act of Congress of February 9, 1906 (34 Stats. 11, c. 155), a deputy clerk could perform the purely ministerial duties directed to be performed by the clerk of the court, in the matter of recording the list of the jurors upon the journals of the court, and certifying to the correctness thereof. (p. 864.)

INDICTMENT, Application to Take Evidence to Set Aside, by What must be Supported.—An application to take evidence to sustain a motion to set aside an indictment, upon the ground that the jury was not properly drawn and impaneled, must be supported by an affidavit in which the allegations of the motion are alleged to be true. (p. 864.)

INDICTMENT, Motion to Set Aside, When Proper and Necessary.—It is not error to overrule a motion to set aside an indictment, when the facts alleged in the motion are not sufficient to show that the motion should be sustained, if proven to be true. (p. 864.)

INDICTMENT, Finding of a Second Before the First has been Disposed of.—The fact that an indictment or information is pending against a defendant will not of itself prevent a grand jury from finding another indictment against the defendant for the same offense. (p. 865.)

INDICTMENT, Pendency of One as an Abatement or Bar of Another.—The pendency of an indictment or information against a defendant, when there has been no jeopardy upon it, cannot be pleaded, either in abatement or bar to a second indictment or information for the same offense. (p. 865.)

CRIMINAL TRIAL, Continuance of Because of the Pendency of Another Indictment or Information.—The pendency of an indictment or information, when there has been no jeopardy upon it, cannot be set up as ground for continuance, when trial is sought on a new indictment or information presented against the defendant for the same offense. (p. 865.)

CRIMINAL TRIAL, Continuance, Application for, What must State.—An application for a continuance should allege that the defendant could not prove, by other witnesses, the same facts which he desires to prove by the absent witness, unless the testimony of the absent witness is intrinsically more valuable than that of the witnesses by whom the same facts could be proven, and then the facts which make this true must also be stated in the application. (p. 865.)

CRIMINAL TRIAL, Continuance, Application for Stating Only Negative Conclusions.—An application for a continuance, which consists of a statement of negative conclusions of fact, is not sufficient. (p. 866.)

EVIDENCE Neither Oral nor Written, but Consisting of Visible Objects.—It is not error to permit a jury to inspect, look at, and

smell the contents of a bottle which has been properly identified and admitted in evidence and is alleged to contain whisky. (p. 867.)

EVIDENCE, Permitting the Jury to Take into Their Room When It Consists of Whisky.—If a bottle of whisky is offered and received in evidence, the court should not permit it to be taken to the juryroom. In the absence of a statute to the contrary, the jury should not be permitted to have any kind of beer or intoxicating liquors in their room. (By the editor.) (p. 869.)

JURY TRIAL—Inspection by the Jury of Anything Offered in Evidence Should be in the Presence of the Court and of the Accused.—When, in the opinion of the court, the ends of justice will be advanced by permitting the jury to examine and inspect anything introduced in evidence, the court must permit it to be done, but the examination and inspection must be in open court, in the presence of the defendant, and at all times subject to the control of the court. (p. 870.)

EVIDENCE—Judicial Notice.—Courts of this state take judicial notice of the boundaries of the state and of the counties in the state, and also of the geographical locations and positions of the towns and cities within their jurisdictions. (p. 871.)

CRIMINAL TRIAL—Venue, When Sufficiently Proved.—If, on the trial of a prosecution for selling liquor without a license, there is evidence tending to show that the offense was committed in a designated town in the state, the evidence is sufficient to establish the venue, for the court will take judicial notice of the county in which the town is situated. (By the editor.) (p. 871.)

CRIMINAL TRIAL—Evidence of the Want of a License, What Sufficient.—On a prosecution for selling liquor without having a license so to do, the testimony of the deputy clerk of the county wherein the sale took place that he had examined the records of such county and they did not show that any license had been granted is sufficient to prove that no license existed. (By the editor.) (pp. 871, 872.)

Burdick & Reece, for the appellant.

W. C. Reeves, assistant attorney general, and Fred S. Caldwell, for the territory.

482 FURMAN, P. J. Bryan Reed was convicted of selling intoxicating liquor without a license, and appealed to the supreme court of Oklahoma Territory, whence the cause was transferred under the constitution of Oklahoma and the enabling act to the supreme court of that state, and from that court to the criminal court of appeals. Affirmed.

Bryan Reed (hereinafter called defendant) was convicted in the district court of Payne county on the eleventh day of October, 1906, of the offense of having sold intoxicating liquor at retail without first having obtained a license therefor. A motion for a new trial was made and overruled, and on the first day of November thereafter defendant was sentenced by the court to pay a fine of three hundred dollars and costs. An appeal was taken to the supreme court of Oklahoma Territory. Upon the admission of the state of Oklahoma into

the Union, under the terms of the constitution and the enabling act, the case was transferred to the supreme court of the state. When the criminal court of appeals was created, as directed ⁴⁸³ by law, the supreme court transferred the case to this court.

The defendant complains that the trial court erred in overruling his demurrer to the indictment. The specific point relied upon is that the indictment charges that the defendant did sell at retail, for the price of twenty-five cents, to James Hoggatt "one half-pint of spirituous liquors, to wit, whisky, without first having complied with the provisions of law and obtained a license as a vendor of malt, vinous and spirituous liquors."

The statute upon which the indictment is based is in this language: "Any person who shall sell at retail or give away upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks without first having complied with the provisions of this act, and obtained a license as herein set forth," etc.: Wilson's Rev. & Ann. Stats. 1903, sec. 3407.

While it is true that the exact language of the statute is not followed in the indictment, yet the words used are of similar and equal import with those used in the statutes, and the indictment substantially charges the offense named in the statute, and is therefore sufficient: *Weston v. Territory*, 1 Okl. Cr. 407, 98 Pac. 369.

2. The defendant complains of the action of the trial ⁴⁸⁴ court in refusing to sustain his motion to dismiss the indictment upon the ground that the grand jury was not regularly drawn. The general charge that the grand jury was not properly and legally drawn is too uncertain and indefinite to require notice. The specific allegations of irregularity state that the deputy clerk performed duties which, under the statute, should have been discharged by the clerk. It is true that section 1 of the act of Congress of February 9, 1906 (34 Stats. 11, c. 155), providing for the selection of grand and petit jurors in Oklahoma Territory, does state that, after the names of the jurors have been selected, the clerk shall record said list upon the journal of the court and certify to the correctness thereof. And the statute further provides that, as soon as said list is completed and recorded, the clerk of the district court shall forthwith write each name upon separate pieces of paper and place them in a box, etc. If these acts required the exercise of judicial powers, then they could not have been performed by the deputy clerk in the absence of a statute giving the deputy this power. But

it appears upon their face that these were purely ministerial acts, and it was therefore within the power of the deputy clerk to perform them; and his action is just as regular and binding as if it had been performed by his principal. 7 Cyc., page 248, is as follows: "In the absence of any statutory provision or implication to the contrary, a deputy clerk is authorized to perform any official ministerial act that may be done by his principal, except to make a deputy. Thus it has been held that a deputy clerk may administer oaths, take affidavits and acknowledgments, take claims of witnesses for attendance, approve bonds, make certificates, issue and test writs, draw the names of grand jurors, and order the seizure of personalty in an action of claim and delivery."

The defendant filed an application to take evidence in support of his motion to set aside the indictment. This application was based on section 5399, Wilson's Revised and Annotated Statutes of 1903, which is in part as follows: "To enable the defendant to make proof of the matter set up as grounds for setting aside the indictment, the defendant may file his application before any court of record in the county. ⁴⁸⁵ setting out and alleging that he is indicted in the district court, naming it, and setting out a copy of his motion to set aside the indictment, and alleging, all under oath, that he is acting in good faith, and praying for an order to examine witnesses in support thereof."

It will be observed that the statute in express terms states that this application must allege "all under oath." The affidavit in this case fails to comply with this statute, because it does not allege that the facts stated in the application are true. It was therefore not sufficient to authorize the court to make an order to take evidence in support of the motion to set aside the indictment. Two things must concur before a court would be authorized to make the order prayed for: 1. The facts alleged in the application must be sufficient, if true, to set aside the indictment, which we have held was not true of the application in this case; 2. The affidavit must state that the allegations made in the application are true. This was not done in the affidavit. For these reasons there was no error in the action of the court in overruling the motion and refusing to take evidence.

3. Defendant complains that the trial court erred in overruling his application for a continuance. The first ground relied upon was that there was then pending in the probate court of Payne county an information against the defendant for the same offense, and that defendant had an agreement

with the county attorney that the case so pending in the probate court should be continued to await the result of some other case pending on appeal in the supreme court of the territory. It is almost universally recognized that a grand jury can find a valid indictment against a defendant, notwithstanding the fact that another indictment or information is pending against the accused for the same offense, and the pendency of the other indictment or information, when there has been no jeopardy on it, cannot be pleaded either in abatement or in bar of the second indictment. The indictment having been legally returned into court, it was the duty of the court to dispose of it, just as if the information was not pending.

⁴⁸⁶ The second ground relied upon for the continuance was the absence of R. B. Bryan, who was alleged to be a material witness for the defendant, and who was at that time in the territory of New Mexico. There are two objections to the motion for a continuance: First. It does not allege that the defendant could not prove, by other witnesses, the same facts desired to be proven by the absent witness. In the case of *Murphy v. Hood & Lumley*, 12 Okl. 593, 73 Pac. 261, the supreme court of Oklahoma Territory held that this omission was fatal to an application for a continuance. While we concur in this view as a general proposition, yet we do not desire to be understood as holding that it should be enforced in all cases. It might occur that cases may arise in which the testimony of an absent witness might be intrinsically more valuable than that of any other witnesses available. When such contingency arises, the application for a continuance should state the facts fully which would take the case out of the general rule. Secondly. The application for a continuance, omitting the question of diligence, stated that: "That affiant believes said witness will prove the following facts, to wit: That the said R. B. Bryan, on the twelfth day of May, 1906, was a resident of the town of Glencoe, Payne county, territory of Oklahoma, and the owner and proprietor of a drug-store in said town, and that Bryan Reed worked for him as a clerk in said drug-store; that said R. B. Bryan was then giving his personal attention to said business, and was in his said store as usual on the twelfth day of May, 1906, and that his said clerk, Bryan Reed, was present in the store on that day; that he is well acquainted with James Hoggatt, and that said person did not purchase or obtain any whisky or any spirituous or intoxicating liquor on said twelfth day of

May, 1906, or at any other time, from anyone in said drug-store or from Bryan Reed; that said R. B. Bryan and Bryan Reed were both present in the store at work together throughout the said twelfth day of May, 1906, as upon other days, and that said R. B. Bryan would have seen said James Hoggatt if he obtained or purchased any whisky or other intoxicating liquor from said Bryan Reed on said day or at any other time."

It is seen that the evidence of the absent witness, as set out in the application for the continuance, consisted, so far as this ⁴⁸⁷ case is concerned, in statements of negative conclusions of fact, and that it shows upon its face that if this defendant was not guilty of the offense charged there was better evidence of this than that on account of which the continuance was sought. No attempt was made to procure the testimony of James Hoggatt, and a continuance on account of his absence was not sought. There was therefore no error in the action of the court in overruling the application for a continuance.

4. It appears from the record that upon the trial of this cause a government witness produced a bottle which he testified contained whisky, and identified it as being the bottle of whisky that he had purchased from defendant. This bottle was introduced in evidence, and the jury were permitted to look at and smell the contents of the bottle. To all of which the defendant duly objected and excepted. Counsel in their brief say "the evidence must either be oral or written, and the jury cannot act as witnesses as well as triers of facts." It is true that counsel cite cases from the supreme courts of Kansas and Alabama in support of their position, but we cannot agree with their contentions. Both upon reason and authority we submit that there are three channels through which tribunals of fact receive evidence, namely, inspection, documents and oral testimony. No jury ever decided any controverted question of fact without using one or more of their five senses. The senses of hearing and sight are used in every case for more purposes than that of simply seeing the witnesses and hearing their words. Through these senses impressions are made upon the minds of the jurors which cause them to accept as true or reject as false the statements made by the several witnesses. Thus the exercise of these senses, on the part of the jurors, affects their verdicts. But this does not make them witnesses in the case. They have simply tested the credibility of the witnesses by the personal experience and observations of the jurors. A thousand things in the lives and

observations of the jurors may influence them in doing this, but a knowledge of these things has never been regarded as making the jurors witnesses in the case. In this case the jurors were permitted to ⁴⁸⁸ smell the contents of the bottle offered in evidence, to enable them to decide as to whether the prosecuting witness had told the truth about its being whisky. By this the jurors did not learn any facts independent of the evidence; they simply tested the facts in evidence by the use of one of their senses. Or, in other words, they were permitted to hold an autopsy on part of the evidence already before them, to test its true character.

Our statute permitting the inspection of places and premises, referred to in the evidence, when, in the opinion of the court, such inspection will promote the ends of justice, clearly recognizes the right of a jury to receive evidence by inspection. If this is true with reference to places and premises, which cannot be incorporated in the record or introduced in evidence before the jury in the courtroom, why should it not be true as to any other object or thing which is introduced in evidence before the jury, under the direction of the trial court? If the jury can exercise the power of inspection through the sense of sight, why should they not exercise the power of inspection through any or all of their other senses? We hold that they have this power as to all objects and things introduced in evidence before them, subject to the discretion and control of the trial court, a proper understanding of which depends upon the common experience of men. In a matter requiring expert knowledge this would not be true.

We are fully sustained in these views by the following authorities:

After discussing the subject of inspection by the jury, or autoptic evidence, at length, Mr. Wigmore, in the second volume of his work on Evidence, in section 1152, says: "In short, it does not appear that there is, in the nature of the process, any distinction to be taken as regards the kind of fact presented for inspection. Anything cognizable by the senses of the tribunal may thus be offered."

17 Cyc., page 290, is as follows: "The tribunal of fact receives evidence through three channels—inspection, documents, and witnesses. Evidence gained by inspection covers facts which the tribunal cognizes with its own ⁴⁸⁹ senses; sees, hears, smells, tastes, or otherwise perceives for itself."

This question of the right of a party to introduce autoptic evidence, which is the same thing as an inspection by the jury, came up in the case of *Gentry v. McGinnis*, 3 Dana

(Ky.), 382. This case involved the question as to whether the plaintiff was a white or negro woman. Chief Justice Robertson said: "The counsel denies that personal inspection by the jurors on the trial is proper or allowable evidence. . . . To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. . . . Hence autopsy, or the evidence of one's own senses, furnishes the strongest probability, and indeed the only perfect and indubitable certainty of the existence of any sensible fact. . . . (Jurors), when they decide altogether on the testimony of others, do so only because the fact to be tried is unsusceptible of any better proof. Their own personal knowledge of the fact would always be much more satisfactory to themselves, and afford much more certainty of truth and justice. . . . Hence the policy of having a jury in the vicinage; and hence, too, jurors have not only been permitted, but required, to decide on autoptical examination wherever it was practical and convenient."

Wharton on Criminal Evidence, ninth edition, section 312, is as follows: "The remains of a deceased person may be produced, when in a fit condition, for the purpose of showing the nature of an injury. So all instruments by which an offense is alleged to have been committed; all clothes of parties concerned, from which inference may be drawn; all materials in any way part of the *res gestae* may be produced at the trial of the case. Injury to the person may also be proved by inspection. Thus, in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial, to be inspected by the court and jury while the surgeon who was employed to set it testifies as to the injury. When the issue is infancy, on an indictment, the court and jury may decide by inspection, and so when the question arises as to the color of a person. On an issue of bastardy, the jury may judge of likenesses by inspection; and so on an issue ⁴⁹⁰ of adultery, for the purpose of connecting a child with a putative father."

In *Commonweath v. Stevens*, 142 Mass. 457, 8 N. E. 344, the court said: "The small bottle of whisky produced by the witness Pease was properly admitted in evidence; it being identified as the whisky which he bought of the defendant."

In *State v. McCafferty*, 63 Me. 223, Justice Dickerson, in rendering the unanimous opinion of the court, said: "The leave granted to the jury by the court to take to their room

a bottle of the liquor introduced in evidence, not as the liquor seized, but as liquor manufactured and sold by the same person under the same name as the liquor seized, was unobjectionable, coupled with the instruction to the jury not to consider the qualities of such liquor unless they should find from the evidence in the case that it was the same kind as that seized."

We think that the court went too far in permitting the jury to take to their room the bottle of liquor introduced in evidence, on account of the danger of abuse of the privilege. In the absence of a statute to the contrary, the jury should not be permitted to have any kind of beer or intoxicating liquor in their room.

In the case of *People v. Kinney*, 124 Mich. 486, 83 N. W. 147, the supreme court of Michigan held that: "After Mahoney had given his testimony, the prosecution offered the bottle of cider in evidence. Counsel for respondent objected to this offer on the ground that it was incompetent, irrelevant, and immaterial. The court said: 'Unless the evidence in this case shows that the contents of this bottle is in the same condition it was on October 5th, it would be of no value as evidence; but if the evidence has any tendency to show it in the same condition, it would be admissible.' It was received in evidence, and the court then said: 'There is a tumbler, gentlemen, if you want to taste of it—any of you.' Respondent's counsel objected to these remarks of the court instructing the jury that they might taste it. The argument of respondent's counsel here is that if the jury, by tasting it, smelling or drinking it, as they were ordered by the court, thereby acquired knowledge or formed opinions of its properties, as to whether it was hard or fermented cider, those ⁴⁹¹ tasting or smelling it could not give evidence to their fellow-jurors without being sworn. There is nothing in the record showing, or tending to show, that any of the jurors smelled or drank of it, nor is there any evidence that the bottle was placed in their hands for examination. The record is entirely silent upon that subject; but even if it had been handed them and they had tasted it, we think it would not have been error."

In *Schulenberg v. State*, 79 Neb. 65, 112 N. W. 304, the supreme court of Nebraska said: "The authorities are somewhat in conflict as to the propriety of permitting jurors to taste of liquor in prosecutions of this character, and the question has never before been in this court for determination. The appellate court of Kansas in *State v. Lindgrove*,

1 Kan. App. 51, 41 Pac. 688, held that it was error to permit jurors to taste of liquor produced in evidence. The reasoning seems to be that the jurors thus obtained private grounds of the belief, and that, after tasting of the liquor, they were properly witnesses in the case and disqualified as jurors. We are unable to concur in that reasoning. If a belief founded on the evidence during the progress of a trial can be held to be a private ground of information, then it may be so held because of a belief founded on any class of evidence. In *Commonwealth v. Brelsford*, 161 Mass. 61, 36 N. E. 677, it is said: 'There are grave reasons against giving liquor to a jury to drink for the purpose of determining whether or not it is intoxicating.' We entirely agree with the sentiment there expressed, where such course is taken by direction of the court, express or implied. The tasting should not be compulsory."

In the case of *Weinandt v. State*, 80 Neb. 161, 113 N. W. 1040, it is held that: "While the court would have no authority to direct or compel the jury to taste or sample liquors, it was not error to permit them to taste thereof if they so chose."

When the trial court is of the opinion that the ends of justice will be advanced by permitting the jury to examine or inspect anything that has been introduced in evidence, the court may permit this to be done, but the examination or inspection must be in open court, and in the presence of the defendant, and at all times subject to the control of the court. Our statute, permitting an inspection by the jury of places or premises, when in the judgment of the court the ends of justice will be promoted ⁴⁹² thereby, is simply an extension of the power of inspection to places and premises which cannot be brought into court. Thus we see that our statute recognizes, indorses and extends the power of inspection. There was no abuse of the power of the trial court in permitting the jury in this case to smell the contents of the bottle introduced in evidence.

5. Defendant complains that the venue was not proven in this case. The indictment laid the venue in Payne county, territory of Oklahoma. The witness Pennington testified that the whisky was purchased from the defendant in Glencoe, Oklahoma, and that defendant was a clerk in the drug-store of R. B. Bryan, which drug-store was in Glencoe, Oklahoma. C. E. Donart testified that he was deputy clerk of Payne county, and that the record did not show that R. B. Bryan had a license to retail malt, spirituous or vinous

liquors in Glencoe, Oklahoma, on the twelfth day of May, 1906. The courts of this state take judicial notice of the boundaries of the state and of counties in the state, and also of the geographical position and location of cities and towns within their jurisdiction: *Harvey v. Territory*, 11 Okl. 156, 65 Pac. 837. Under this rule the evidence in the case was sufficient to support the venue of the case.

6. The defendant complains that there was no sufficient evidence that R. B. Bryan did not have a license to retail malt, spirituous and vinous liquors. The deputy county clerk testified that the records in his office did not show that any such license had been granted to R. B. Bryan. We are at a loss to know how any better proof of a want of license to retail liquors could be made than was made in this case. *Black on Intoxicating Liquors* cites and discusses all of the authorities, and then, on page 507, sums up as follows: "The rule established by the vast preponderance of authority is that, in cases where a license to sell, if produced and relied on, would constitute a complete defense to the action, the prosecution is not bound to produce any evidence in support of the negative allegation that the sale was made without license, but, on the contrary, the defendant must assume the burden of proving that ⁴⁹³ he was licensed. Various reasons have at different times been advanced in support of this rule. Thus, Dr. Bishop thinks that a *prima facie* case is made out for the prosecution, without evidence on this point, by the presumption that the defendant belongs to the general mass of people who are unlicensed, rather than to the exceptional class of license holders, and that as there was certainly a time when he was not licensed, the presumption of continuance applies, which presumptions the rule requires him to overcome by proof. But we believe the rule is sufficiently justified by considerations of convenience and reasonableness. It is a general and well-settled principle that 'Where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, or the like. Here the party, if licensed, can immediately show it without the least inconvenience, whereas if proof of the negative were required, the inconvenience would be very great.' Another view advanced by the court in Georgia is that a plea

of 'not guilty' to a charge of selling without license amounts to an allegation of selling with license, and the rule applies that he who alleges affirmative must prove it, especially if it is peculiarly within his knowledge."

Finding that no material error was committed on the trial of this case, the judgment is in all things affirmed.

Baker and Doyle, JJ., concur.

An Indictment Following the Language of the Statute is generally regarded as sufficient, unless the statute does not contain all the essential elements of the crime: Kelly v. People, 192 Ill. 119, 85 Am. St. Rep. 323; State v. Williamson, 22 Utah, 248, 83 Am. St. Rep. 780; State v. Doran, 99 Me. 329, 105 Am. St. Rep. 278; Caldwell v. State, 73 Ark. 139, 108 Am. St. Rep. 28.

Continuances in Criminal Cases because of the absence of witnesses are considered in the note to Blackburn v. State, 122 Am. St. Rep. 745.

The Practice of Permitting Jurors to Take Exhibits to the juryroom for examination is considered in Sibley v. Nason, 196 Mass. 125, 124 Am. St. Rep. 520; People v. Dolan, 186 N. Y. 4, 116 Am. St. Rep. 521; Chicago etc. Ry. Co. v. Spence, 213 Ill. 220, 104 Am. St. Rep. 213.

The Drinking of Intoxicating Liquors by Jurors as invalidating their verdict is discussed in the note to Hilton v. Southwick, 35 Am. Dec. 257. Subsequent cases on this question are State v. Broussard, 41 La. Ann. 81, 17 Am. St. Rep. 396; State v. Lee, 80 Iowa, 75, 20 Am. St. Rep. 401; Brown v. State, 137 Ind. 240, 45 Am. St. Rep. 180.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

BAKER v. ATLANTIC COAST LINE RAILROAD COMPANY.

[82 S. C. 146, 63 S. E. 611.]

CARRIERS—Limitation of Liability.—The Assent of a Shipper to a stipulation in the bill of lading limiting the amount of the liability of the carrier is presumed from his signature, in the absence of fraud, misrepresentation or concealment, and he is bound by such stipulation. (p. 875.)

P. A. Willcox and Mark Reynolds, for the appellant.

Lee & Moise, contra.

147 **GARY, J.** This is an action to recover one hundred and eighty-five dollars, the value of certain furniture shipped from Darlington, South Carolina, to Harvins, South Carolina, and which was lost in transportation; also, to recover the penalty of fifty dollars for failure to adjust the claim for such loss within the time required by law.

The defendant denied each and every allegation of the complaint, and for a defense set up that the plaintiff, at the time of the shipment, entered into a contract with the defendant, whereby, in consideration of a reduced rate, it was agreed that in the event of loss or damage to any of the articles shipped, their value should not exceed five dollars per one hundred pounds. The property weighed eleven hundred pounds.

The jury rendered a verdict in favor of the plaintiff for two hundred and thirty-five dollars, and the defendant appealed.

The first exception that will be considered is as follows:
“Because his honor erred in not charging the jury, in ac-

cordance with the defendant's last request to charge, that if they believed the plaintiff signed a contract to release, they could only find a verdict of fifty-eight and thirty one-hundredths dollars, and in modifying said request by saying ¹⁴⁸ to the jury: Provided, you find that by signing same, he thereby agreed to it. Whereas, he should have charged the jury said request, without any modification, in the absence of any proof by the plaintiff of fraud, misrepresentation or concealment on the part of the defendant. The best evidence that the plaintiff agreed was the fact that he signed it, and his honor should have so instructed the jury."

His honor had previously charged the jury as follows: "Now, the law declares when one person signs a contract, that is, contract in writing, he is presumed to have known the contents of that contract, and is bound by the terms and conditions of it, in the absence of fraud, misrepresentation or concealment."

He had also charged the following requests which were presented by the defendant's attorney: "If you believe from the evidence that the bill of lading shows an agreement between the plaintiff and the defendant by which, for a reduced rate of freight, the plaintiff, in case of loss or damage, agreed to limit the value of goods to five dollars per hundred pounds, then, in case of loss or damage to said shipment, the plaintiff would only be entitled to recover such limited value, together with the amount of freight paid thereon, if he paid the freight. In other words, if you find from the evidence, if such evidence there be, that there was a writing signed by the plaintiff by which he agreed to limit the value in case of loss to five dollars per hundred pounds, and that the defendant performed its part of the contract by accepting or charging a reduced rate of freight in case of loss or damage, you could only give a verdict for the loss or damage limited to five dollars per hundred pounds of the goods lost, together with the freight paid thereon by plaintiff, if he paid freight."

"Where a stipulation for a valid limitation of the carrier's liability is embodied in a receipt delivered by the carrier to the shipper and accepted by the latter, the assent of the shipper to such stipulation is presumed, and the limitation thus embodied will be binding upon him as a special ¹⁴⁹ contract, in the absence of any evidence of fraud, imposition or deceit practiced by the carrier."

Before modifying the request mentioned in the exception, his honor, the circuit judge, had charged the law correctly.

In the modification of the request he seems to have been of the opinion that the plaintiff could recover the amount claimed, even though he signed that portion of the bill of lading containing the words: "Weight, 1,100. Released and value limited to \$5.00 per cwt. in case of loss or damage (stamped)," in the absence of fraud or misrepresentation, if it appeared from the testimony that he did not otherwise agree to such provision.

This conception of the law is erroneous. Mr. Freeman thus states the rule in 88 Am. St. Rep. 81, note: "In the absence of fraud or imposition therefor, and with the exception of the two jurisdictions before mentioned as holding the opposite view (Illinois and Ohio), the rule is well settled, both in this country and in England, that assent to stipulations in a bill of lading, limiting the carrier's liability, will be conclusively presumed from the acceptance of that instrument by the shipper without dissent."

The respondent's attorneys, however, rely upon the case of *Jenkins v. Southern Ry.*, 73 S. C. 289, 53 S. E. 480. There are at least two material differences between that case and the one under consideration. In the first place, the plaintiff in that case did not sign the bill of lading; and, in the second place, there was an issue whether the words: "Release and value limited to \$5.00 per hundred pounds in case of loss or damage," were stamped upon the bill of lading before it was delivered to the plaintiff.

These views practically dispose of all questions presented by the exceptions.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded for a new trial.

Contracts Limiting the Liability of a Carrier of Goods are discussed at length in the note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74. Such contracts must, in order to be valid, be reasonable and based upon a consideration. They must also be fairly obtained: *St. Louis etc. R. R. Co. v. Pearce*, 82 Ark. 353, 118 Am. St. Rep. 75; *St. Louis etc. Ry. Co. v. Coolidge*, 73 Ark. 112, 108 Am. St. Rep. 21; *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955. As to whether the shipper can evade the contract by showing that he did not sign it, see *St. Louis etc. R. R. Co. v. Pearce*, 82 Ark. 353, 118 Am. St. Rep. 75; *Atlantic Coast Line R. R. Co. v. Dexter*, 50 Fla. 180, 111 Am. St. Rep. 116; *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955.

STATE v. COLUMBIA WATER POWER COMPANY.

[82 S. C. 181, 63 S. E. 884.]

NAVIGABLE WATERS.—A Canal Constructed to Improve the Navigation of navigable streams is itself navigable water. (p. 880.)

NAVIGABLE WATERS.—The Navigability of Water does not Depend on Its Actual Use for navigation, but its capacity for such use. (p. 881.)

NAVIGABLE WATERS—Canal Out of Repair.—The Failure to Keep the Lock at one terminus of a canal in order, while impairing the full utility of the canal, does not destroy the public right of navigation. (p. 881.)

NAVIGABLE WATERS—Obstruction of Unfinished Canal.—The fact that a public highway, such as a canal, is unfinished does not make its obstruction any the less a public nuisance. (p. 881.)

NAVIGABLE WATERS—Exactng Tolls as Affecting Navigability.—The navigability of a canal is not affected by the fact that at one time the statutes exacted tolls for its use. (p. 881.)

NAVIGABLE WATERS—Use for Pleasure.—When Water is Navigable for Commercial Purposes, though not actually used therefor, the public is as much entitled to be protected in its use for floating pleasure boats as for any other purpose. Navigable water is a highway which the public is entitled to use for the purpose of travel either for business or pleasure. (p. 882.)

NAVIGABLE WATERS—Obstruction.—The State is Entitled to Enjoin the obstruction of a navigable canal by the pipes and bridge of a water company; the remedy by indictment or action for damages is inadequate. (pp. 882, 886.)

INJUNCTION—Discretion in Issuing Against Nuisance.—The remedy by injunction against a mere nuisance is in the sound discretion of the court; but when the wrong is clear, and the injury present and manifestly impending, the court will not refuse an injunction, especially if public property, safety or health is impaired or threatened, or the nuisance is permanent and maintained in defiance of the express public policy of the state. (p. 885.)

NAVIGABLE WATERS—Right of State to Protect.—The state, as trustee for the people, has the right to the intervention of a court of equity to protect the right of free navigation. (p. 885.)

INJUNCTION—Modification to Protect Public Rights.—In enjoining the obstruction of a navigable canal by the bridge and pipes of a water company, the court will frame its judgment so as to protect, as far as possible, the welfare and health of a city depending upon the defendant for its water supply. (p. 887.)

Attorney General J. Fraser Lyon, B. P. McMaster and James Verner, for the petitioner.

B. L. Abney, Barron & Ray and Allen J. Green, contra.

182 WOODS, J. The attorney general by his petition. filed in behalf of the state, alleging the Columbia canal to be navigable water of the state, asked this court to require the respondents, the Columbia Water Power Company, the

Columbia Electric Street Railway, Light and Power Company, and the city of Columbia, to show cause why they should not be enjoined from continuing the construction of a bridge across the canal, and why they should not be required to move all obstructions at the entrance of the canal. At the hearing, when the defendants had submitted their several returns to the order to show cause, the attorney general and counsel associated with him consented to an order discharging the Columbia Water Power Company, the return of that respondent showing it had no participation in the erection of the obstructions complained of. As to the returns of the other respondents, it was insisted on behalf of the state that they contained no denial of the substantial allegations of the complaint, and stated no facts constituting a defense. In this state of the case, in deciding whether the defendants should be enjoined, the allegations of the petition can be taken as true only so far as they are not denied by the returns, while all allegations of the returns ¹⁸³ intended as a defense are to be taken as true. No other allegations will be regarded in the discussion.

The bridge or structure complained of is to be used for the purpose of supporting water-pipes, through which water is to be pumped from the Saluda river into the reservoir, from which the city of Columbia furnishes water for its public purposes and for the private use of its inhabitants. The bridge will be within a few inches of the water line of the canal, so that it will be impossible for boats of any kind to pass under it; and it will be a complete obstruction to the passage of boats from one end of the canal to the other. If the canal is navigable, there can be no doubt that the construction of the bridge will effectually obstruct its navigation. The first question to be decided then is, whether the Columbia canal in its present condition is navigable. The answer depends mainly on the statutes of the state, and the action taken thereunder with respect to the construction, maintenance and operation of the canal.

Passing by the general appropriations for internal improvements made by the state from time to time, the appropriation act of 1822 contains this provision: "On the Columbia canal, locks, dams and works attached thereto, the sum of forty thousand dollars": 6 Stats. 201. An act of December 20, 1823, relating to the management of the several canals of the state, requires the appointment of a board of commissioners for the Columbia, Saluda, and Bull Sluice canals, and punishment for any person who "shall

obstruct the navigation of any of the said canals": 6 Stats. 214. The rate of toll for boats passing through any part of the Columbia canal was prescribed by act of December 20, 1828 (6 Stats. 370), and by act of December 19, 1833 (6 Stats. 493). The sum of forty thousand dollars was appropriated in 1836 for the completion of the Columbia canal from Young's Mill to Bull's Sluice: 6 Stats. 567. The canal was leased to F. W. Green for ¹⁸⁴ twenty-one years, with authority to collect toll, by act of December 19, 1843; but the statute contemplates that it shall be kept up by him for purposes of navigation: 11 Stats. 304. By acts of 1865 (13 Stats. 293) and of 1863 (14 Stats. 83), commissioners were authorized to sell the canal, and one of the conditions of the sale was to be "that the same shall be kept open and in proper order for boating purposes (free of all charge for toll or otherwise) as far as the same is now used. A sale having been made and the purchaser having failed to comply with its terms, by act of February 14, 1878 (16 Stats. 360), the General Assembly declared the title had reverted to the state. The act of March 12, 1878 (16 Stats. 444), provides for a commission to take possession of the canal, and control and direct its development, giving them authority to lease sites for factories. The design to develop the water-power of the canal for manufacturing purposes is still more prominent in subsequent legislation. By the act of February 8, 1882 (17 Stats. 855), the property was turned over to the board of directors of the penitentiary, with authority to improve and develop the water-power by constructing a dam and otherwise, but the purpose to reserve the right of navigation is made evident by the provision that the right of condemnation of property for improvement of the canal is conferred "for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of said Broad and Congaree rivers, and the transportation of supplies to market."

The state, on December 24, 1887, transferred the canal to trustees for the city of Columbia, the statute (19 Stats. 1090) by which the transfer was made containing these provisions:

Section 2: "That the said board of trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an adequate water-power for the use ¹⁸⁵ of the

penitentiary and for other purposes hereinafter named, they are hereby authorized, empowered and directed to improve and develop the same."

Section 3: "That in order to improve and develop the power of the said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad river, etc."

Section 5: "That said canal shall be open for navigation free of charges by the said board of trustees, the state reserving the right to make such improvements in the canal as may be necessary to promote navigation through the canal more rapidly than can be accomplished by the board under this act: Provided, the said board of trustees or lessees of the water-power are indemnified against any damage arising therefrom."

Section 6: "That the said board of trustees are required to build only one bridge over the canal, to wit, one on Gervais street. That the said trustees or assigns shall not be required to build any draws or passageways through any other bridges across the canal, unless they voluntarily build additional bridges, and draws or passageways therein shall become necessary for purposes of navigation; and if such draws and passageways or bridges other than those above provided for should be built, they shall not be required to work the same except for their own benefit, nor shall they be required to attend on any locks which may be built." The duties of the trustees in developing the canal for navigation are again set out in the amendment of 1890 (20 Stats. 967).

On January 11, 1892, the board of trustees of the Columbia canal conveyed by deed to the Columbia Water Power Company the canal and its appurtenances, subject to all the conditions, duties, limitations and liabilities imposed by the statute under which the state turned over the property to the trustees of the canal. The Columbia Water ¹⁸⁶Power Company went into possession under this conveyance and completed the canal from its source at Bull's Sluice to the north side of Gervais street. Afterward, on July 1, 1905, the Columbia Water Power Company by its deed made a like conveyance of the property to the Columbia Electric Street Railway, Light and Power Company, subject to the same duties, conditions, limitations and liabilities. The Columbia Electric Street Railway, Light and Power Company is now in possession of the property,

and it is by virtue of a contract with that corporation that the city of Columbia is building the bridge or structure to bear across the canal the pipes through which the city intends to pump water from the Saluda river into the city reservoir.

From the foregoing statement of its legislative history it is evident the canal was constructed by the state, and used for many years as an improvement of the navigation of two navigable streams, the Broad and Congaree rivers, made necessary by the shoals at Columbia. From this fact the legal result follows that for purposes of navigation the canal is to be regarded a part of those rivers, and therefore navigable, just as any other portion of them is navigable. It is true that according to the generally accepted definition, water is navigable when in its ordinary state it forms by itself or its connection with other waters a continued highway over which commerce is or may be carried in the customary mode in which such commerce is conducted by water: *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *The Montello*, 78 U. S. 411, 20 L. ed. 191; 87 U. S. 430, 22 L. ed. 391; *State v. Pacific Guano Co.*, 22 S. C. 50; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 46 Am. St. Rep. 702, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42; 1 Farnham on Waters, 67. Under the definition, a stream not naturally navigable but made so by artificial means is not navigable water in a legal sense. How long this definition will be adhered to in view of the rapid development of watercourses for navigation¹⁸⁷ by government agency is a matter with which we are not now concerned. It does not affect the question here involved to regard the definition strictly accurate, for the Broad and Congaree rivers fall under the definition and are navigable streams. This being so, the authorities leave no doubt that a canal constructed to improve their navigation is navigable water. The supreme court of the United States held in the case of *Ex parte Boyer*, 109 U. S. 629, 3 Sup. Ct. Rep. 434, 27 L. ed. 1056, the Illinois and Lake Michigan canal, connecting the Chicago river and Lake Michigan with the Illinois river and the Mississippi river, to be navigable water though wholly artificial. The doctrine was followed and elaborated in *Perry v. Haines*, 191 U. S. 17, 24 Sup. Ct. Rep. 8, 48 L. ed. 73, holding the Erie canal, originally constructed to connect Lake Erie with the Hudson river, to be a navigable water of the United States. The rule is the same in England. In *Queen v. Betts*, 16 Q. B. 1020, 19 L. J. Q. B., N. S., 501, an artificial watercourse cut to straighten

a navigable river was held to be navigable water. The doctrine was applied to water wholly within a state in *Weatherby v. Micklejohn*, 56 Wis. 73, 13 N. W. 697.

It is said, however, that the canal has ceased to be navigable water, because the lock at the Broad river terminus has been so neglected that it cannot now be used, and that there is now no commerce on its water. The navigability of water does not depend on its actual use for navigation, but on its capacity for such use. For, as will be seen by reference to the authorities above cited, the definition of navigable water embraces not only that which is actually used, but that which is susceptible of use for navigation in its ordinary state. It is true that where the character of the water is in doubt, the fact that the water has never been used for navigation after long settlement of the country might, possibly be evidence tending to show that it was not susceptible of navigation; but it would be nothing more than evidence.¹⁸⁸ The issue would remain the same whether the water was capable of use, not whether it had been actually used.

The capacity and fitness of the canal for navigation is shown by the undisputed fact that it was actually used for many years for the transportation of goods by boats and other water craft. The failure to keep the lock at the upper terminus in order is an impairment of the full utility of the canal for purposes of navigation, but obviously it cannot have the effect of completely destroying the public right of navigation from Gervais street to the lock. Even as it is, the canal has a public entrance at Gervais street and a public terminus at the lock on Broad river, and is capable of navigation up to the lock. The fact that the General Assembly has not seen fit to preserve its highest efficiency for navigation by keeping the lock in condition, so that portage from Broad river would be unnecessary, does not destroy the character of the canal as a navigable water: *The Montello*, 87 U. S. 430, 22 L. ed. 391. Nor is the character of the canal affected by the fact that at one time, as appears by the statutes above cited, tolls were to be exacted for its use. It is well established that the improvement of a navigable stream by the construction of a canal or otherwise is a sufficient consideration to the public for the exaction of toll, and such exaction is not a violation of statutory or constitutional provision that all navigable waters shall be free: *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 8 Sup. Ct. Rep. 113, 31 L. ed. 149; 1 *Farnham on Waters*, 390, where

the authorities, both English and American, are cited. It is true the canal is unfinished, but the fact that a public highway is unfinished does not make its obstruction any the less a public nuisance: *State v. Lythgoe*, 6 Rich. 112.

It is strongly pressed by the respondents that this obstruction of the canal should be allowed because there is now no navigation thereon, except by pleasure boats, and no commercial use is to be anticipated. In view of the great and growing importance to the public of the diversion ¹⁸⁹ of boating, there is a tendency in modern judicial thought to hold water to be navigable which is of such character and so situated as to be capable of general use for pleasure boating, though not useful for commercial purposes. Upon that point, however, no expression of opinion is here necessary, for where, as in this case, the water is shown to be navigable for commercial purposes though not actually used for such purposes, there cannot be the least doubt that the public is as much entitled to be protected in its use for floating pleasure boats as for any other purpose: *Attorney General v. Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139, 18 L. R. A. 670; *Smart v. Aroostook Lumber Co.*, 103 Me. 37, 68 Atl. 527, 14 L. R. A., N. S., 1083. Navigable water is a public highway which the public is entitled to use for the purposes of travel either for business or pleasure. The right of the public to use such a highway is thus comprehensively stated in 1 Farnham on Waters, 130: "The public is entitled to the free, uninterrupted and unobstructed use of every part of the stream, from bank to bank and throughout the length of the channel, which at the ordinary stage of the water is of such depth and of such accessibility with respect to the current or main body of the stream as to be capable of navigation by boats, or of valuable floatage in connection with the main body of the stream, either up and down or across, or from the main stream on to any particular part in question, or thence on to the body of the stream; and this whether part has ever been so used, and whether there is any present or anticipated necessity for so using it": 3 Kent, 546.

From these considerations, disregarding the terms of the deeds of conveyance to the respondents of the canal for the use of its water-power, and the obligations imposed by those conveyances, the conclusion is inevitable that even under the common law the canal is navigable water; that the respondents have no right to obstruct it; that the extent of

the public use is no defense; that the respondents cannot be ¹⁹⁰ allowed to say that the state cannot complain, on behalf of the public, because the use of the canal for navigation is undeveloped, when the obstruction placed by them will effectually prevent the development of the use for navigation.

When the contractual obligations assumed by the respondents under the constitution and statutes of the state are considered, these conclusions are still more manifest. The constitution provides: "All navigable waters shall forever remain public highways free to the citizens of the state and of the United States, without tax, impost or toll imposed": Const. 1868, art. 1, sec. 40; Const. 1895, art. 1, sec. 28. This statement of the constitutional declaration of rights, except the imposition of toll, is hardly anything more than a constitutional sanction of the common-law rights of the public in navigable water. After this provision became a part of the constitutional law of the state, the Columbia Electric Street Railway, Light and Power Company took a conveyance of the canal property from the Columbia Water Power Company, by which it bound itself to all the burdens imposed by the statute of 1887, as amended by the act of 1890 authorizing the transfer of the canal from the board of directors of the penitentiary, who held it for the state, to the trustees of the Columbia canal. That conveyance, as already shown, imposed the obligation "that the said canal shall be opened for navigation free of charges." The respondents, therefore, have upon them not only the negative obligation imposed by the common law not to obstruct the canal, but the respondent, Columbia Electric Street Railway, Light and Power Company, expressly contracted to keep the canal open for navigation; and the city of Columbia, acting under a contract with the Columbia Electric Street Railway, Water, Light and Power Company, can have no higher right than that corporation, and cannot escape its obligations: *Ex parte Boyer*, 109 U. S. 629, 3 Sup. Ct. Rep. 434, 27 L. ed. 1056.

¹⁹¹ We consider next the defense that the obstruction will be nothing more than a nuisance, and that the state has an adequate remedy at law by indictment, and, therefore, there is no ground for the intervention of a court of equity. A nuisance is anything which works hurt, inconvenience or damage; anything which essentially interferes with the enjoyment of life or property: 29 Cyc. 1152; Addison on Torts, sec. 370. Regarding the obstruction as a nuisance

merely, there is no doubt of the power of the court of equity to prevent its erection or maintenance by injunction: *Attorney General v. Riddock & Byrnes*, 78 S. C. 286, 58 S. E. 803. The doctrine of this case is fully sustained by authority in this country and in England. The cases sustaining it are so numerous that we cite only a few relating to different kinds of nuisances: *Mayor of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. ed. 1012, obstruction of navigable stream; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092, obstruction of mails and interstate commerce; *Carleton v. Rugg*, 149 Mass. 550, 14 Am. St. Rep. 446, 22 N. E. 55, 5 L. R. A. 193; *Devanney v. Hanson*, 60 W. Va. 3, 53 S. E. 603; *Sand Point v. Doyle*, 11 Idaho, 612, 83 Pac. 598, 4 L. R. A., N. S., 810, illegal sale of intoxicating liquors; *People v. St. Louis*, 10 Ill. 531, 48 Am. Dec. 339, obstruction of navigable stream; *Weiss v. Taylor*, 144 Ala. 440, 39 South. 519, obstruction of public street; *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184, opening house of public prostitution; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 351, 1 Am. & Eng. Ann. Cas. 38, note, keeping bawdy-house; *Huron v. Bank of Volga*, 8 S. D. 449, 59 Am. St. Rep. 769, 66 N. W. 815, keeping a dangerous building; *Eau Claire v. Matzke*, 86 Wis. 291, 39 Am. St. Rep. 900, 56 N. W. 874, and note, obstruction of public street; note to *City of Mansfield v. Bristor*, 118 Am. St. Rep. 878 et seq.; *Attorney General v. Forbes*, 2 Mylne & C. 123, 40 Eng. Reprint, 587, obstruction of highway. In *Attorney General v. Sheffield Gas Co.*, 19 Eng. Rul. Cas. 273, 19 Eng. L. & Eq. 639, it was held that it is within the power of a court to enjoin a nuisance where irreparable injury is threatened to the public¹⁹² or to a private individual, and the remedy at law is inadequate; but the injunction was refused in that case because the injury complained of was trivial and temporary. *Attorney General v. Johnson*, 2 Wils. Ch. 87, 37 Eng. Reprint, 240, obstruction of navigation, was enjoined, and a motion to dissolve the injunction was refused notwithstanding the pendency of indictment for the nuisance.

In *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. Rep. 689, 36 L. ed. 537, an injunction was granted against the taking of phosphate rock from a navigable stream of the state, and the additional point was decided that it was proper for the attorney general, as representing the public, to institute the action. The doctrine of this case is followed in *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627, in which an injunction was granted against

the waste of natural gas; in *Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147, 50 S. E. 998, 69 L. R. A. 564, enjoining the obstruction of a public highway; in *State v. Vandalia*, 119 Mo. App. 406, 94 S. W. 1009, obstruction of public highway. But even if there were doubt as to the right of the attorney general to institute proceedings of this character under the common law, section 641 of Civil Code, in prescribing the duties of the attorney general, provides: "He may, when in his judgment the interest of the state requires it, file and prosecute informations or other process against persons who intrude upon the lands, rights or property of the state, or commit or erect any nuisance thereon."

The defense that the state had an adequate remedy at law did not avail in any of the cases just cited, and it cannot avail in this case. It is manifest that there could be no way of estimating the damage to the public from the obstruction of a highway, and the respondents could not be heard to say that they should be allowed to take public or private property without authority of law upon payment of damages. The remedy by indictment is always available for the abatement of a public nuisance, but it is not exclusive nor adequate. Not being available before the nuisance ¹⁹³ is established, it is not adequate to prevent the wrong. Indictment is not adequate for another reason. It would be unjust to require one in possession of property or in enjoyment of any right, in order to secure it against another who had invaded his property or impaired his right, or was about to invade his property or impair his right, to establish his case beyond a reasonable doubt. This would be the result if a nuisance affecting public or private property or right could be remedied only by indictment.

It is true the remedy by injunction against a mere nuisance is not a matter of absolute right, but rests on the sound discretion of the court. In exercising discretion, the courts consider all the circumstances. But where the wrong is clear, and the injury present and manifestly impending, the court will rarely refuse the injunction, especially if public property, safety, health or welfare is impaired or threatened, or the nuisance is permanent and maintained in defiance of a law expressive of the public policy of the state. In this case the obstruction of the canal will not only be a permanent nuisance; it will be much more. The state, as a sovereign, holds the property right of unobstructed navigation of the navigable waters of the state in trust for the people of the state and of the United States. This is a property right of great value. It is well established that an

individual has a right to injunction against threatened, repeated or continued injury to his property rights. For a greater reason has the state, as trustee for the people, a right to the intervention of the court to protect the valuable right of free navigation. When the right is clearly established, as it has been in this case, not only under the common law and constitutional and statute law of the state, but by the express contract of the parties themselves, the court would be acting arbitrarily to refuse the injunction: *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. Rep. 689, 36 L. ed. 537.

¹⁹⁴ The right of the state and the proposed violation by the defendants of that right being perfectly clear, the court cannot refuse to enforce the state's right by enjoining the defendant's proposed obstruction on the ground that the right of navigation of the Columbia canal may be of small value in comparison with the great value to the city of Columbia of the obstruction it proposes to erect. The court's discretion is not broad enough to permit it to refuse to protect either private or public property or rights, because the invasion of such property or the violation of such right would be of benefit to an individual or to a portion of the public: *Mason v. Apalache Mills*, 81 S. C. 561. Nor is it for the respondents to say the necessity for the navigation of the canal has ceased when they have contracted to keep it open for navigation.

The state is entitled to an injunction against the construction of a bridge that will interfere with the navigation of the canal. There are, however, allegations of the return of the city of Columbia which make it necessary for the court to have further information before framing its final order.

It is alleged that the supply of wholesome water to the city of Columbia depends upon piping the water from the Saluda river across the canal to the city waterworks; that the bridge across the canal, used for this purpose before it was destroyed by the flood of 1908, stood a considerable height above the water level of the canal; and it is further alleged that the jar of pumping the water rendered the joints of the piping insecure and caused them to give way and burst; and that this strain on the pipes would be prevented by using a bridge near the water level. The return does not show that the expense of repairing the pipes was so great as to be prohibitory or that joints could not be secured strong enough to stand the strain. Mr. Chisolm, the engineer and superintendent of the waterworks, makes an affidavit, how-

ever, in which he says: "That in his professional opinion it is impossible to raise the pipes ¹⁹⁵ across the canal higher than six inches above the water level; and that in order to tunnel the canal for these pipes it would be necessary to drain the canal for a period of at least three months, for which time the city would be without water supply, and the industries and public service corporations dependent upon the canal cut down and without power." The obligation rests on the court in protecting the public right of navigation so to frame its judgment as to protect, as far as possible, the welfare and health of the city of Columbia. It is, therefore, referred to A. D. McFadden, Esq., master for Richland county, to take testimony and report his conclusions of fact on these issues: Would an order enjoining at once the destruction of the bridge described in the petition so seriously interfere with the water supply of the city of Columbia as to endanger the health of the city? In issuing the order of injunction for the protection of the free navigation of the canal, what length of time should be allowed the city of Columbia to provide another method of conveying an adequate supply of water to the waterworks of the city?

The court cannot order the respondents to put the lock in order, because section 15 of the act of 1887, by virtue of which the state's interest in the canal was transferred to the trustees of the Columbia canal, expressly provided that the trustees should not be required to attend on any locks that may be built, and the Columbia Electric Street Railway, Light and Power Company assumed only the obligations imposed by that act. Assuming, but not deciding, that the Columbia Electric Street Railway, Light and Power Company is bound under its contract to keep the lock free from obstruction to navigation, it is manifest the lock would be of no use without someone to operate it. Until the state may see fit to provide such operation, it would be useless to require the lock to be cleared of obstruction. We do not consider the allegation made in the returns that the use of the lock for navigation of the canal from the Broad river ¹⁹⁶ would greatly impair the value of the large manufacturing and public service works run by the water of the canal. It is to be assumed that the General Assembly, when it provides for attendance and use of the lock, will have due regard for the interests involved in the operation of these plants.

The final order in the cause will be deferred until the report of the special master is filed.

What are Navigable Waters, and the Tests for Determining the Question, are considered at length in the recent note to *Kamm v. Normand*, 126 Am. St. Rep. 710.

Navigable Rivers are Public Highways, subject to public use, and the right of passage over them extends to all parts of their channels, and any obstruction thereof is a public nuisance: *Pascagoula Boom Co. v. Dixon*, 77 Miss. 587, 78 Am. St. Rep. 537. See the discussion of what are public nuisances in the notes to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 195; *City of Mansfield v. Bristol*, 118 Am. St. Rep. 868. A court of equity has jurisdiction to restrain an existing or threatened public nuisance at the suit of the state or the people of a municipality, or some public officer representing the state or the municipality: *Huron v. Bank of Volga*, 8 S. D. 449, 59 Am. St. Rep. 769.

STATE v. STOCKMAN.

[82 S. C. 388, 64 S. E. 595.]

WITNESSES.—Leading Questions are within the discretion of the trial court, and permitting them is rarely cause for reversal. (p. 890.)

HOMICIDE.—In Giving Evidence of Threats it is proper for witness to state the language, or the substance of the language, used by the declarant, so that the court and jury may determine whether in fact there was any threat, and the nature thereof. (p. 892.)

HOMICIDE.—Evidence of Hostility or Threats.—Under a plea of self-defense testimony is not admissible that the deceased had said that he considered himself of "better stock" than the accused; such evidence falls short of showing threats or hostile feeling. (p. 892.)

HOMICIDE.—Evidence of Bias of Witness.—When, with a view to show bias, it is brought out on cross-examination of a witness for the defense that the deceased had prosecuted him for killing his dog, a question by counsel for the defense whether the deceased ever killed dogs calls for irrelevant matter. (p. 892.)

HOMICIDE.—Self-defense—Opinion Evidence.—When the plea of self-defense is raised, it is proper to refuse to permit a minor son of the accused to answer the question, "state if your father had not killed him at the time he did what would have happened." (p. 892.)

HOMICIDE.—Opinion that Deceased was Sober.—In reply to testimony brought out by the defense that the deceased was drunk on the day of the homicide, a witness may testify that he met the deceased that day and he appeared to be sober. (p. 893.)

EVIDENCE.—Opinion as to Intoxication.—Whether or not a person was drunk or sober at a particular time is a proper subject of nonexpert opinion. (p. 893.)

WITNESS.—It is not Necessary to Lay a Foundation in order to contradict the statement of a witness that he was at a particular place at a certain time. (p. 894.)

HOMICIDE.—When a Witness Testifies that on a Certain Day he purchased goods at the store of the deceased which he had charged, and as he went away heard the deceased make a threat against the defendant, it may be shown in reply on what day the goods were

actually bought and that the deceased was at another place at the time. (p. 894.)

WITNESS.—A Witness may be Contradicted as to His Statement to a person whom he did not know, if sufficiently advised as to the identity of the conversation to give him a fair opportunity to recollect and deny or explain. (p. 895.)

HOMICIDE—Nonexpert Opinion as to Wound.—The Sheriff may Testify that when the accused arrived at the jail after committing the homicide that he had bruises on his face which in his judgment were made with the fist, if it is shown that he is familiar with that class of wounds. (p. 895.)

HOMICIDE—Self-defense and Reasonable Doubt.—It is proper to instruct the jury that self-defense is an affirmative defense which must be established by a preponderance of the testimony, when the jury is also instructed that the state must establish the guilt of the defendant beyond a reasonable doubt. (p. 896.)

HOMICIDE—Self-defense—Imminence of Danger.—The circumstances under which one may excuse a homicide in self-defense must be such as would justify a belief of the necessity of taking life in the mind of a person possessed of ordinary firmness and reason. (p. 896.)

HOMICIDE—Self-defense—Bringing on Difficulty.—To excuse one for taking life on the ground of self-defense he must, as a rule, be without fault in bringing about the difficulty. (p. 897.)

HOMICIDE—Defense of Habitation.—To Excuse the Taking of Life in the defense of one's dwelling and its inmates, the danger must be imminent and not past. (p. 897.)

Graham & Sturkie, W. H. Sharpe, Johnstone & Cromer and J. Wm. Thurmond, for the appellant.

George B. Timmerman, Efird & Dreher and E. L. Asbill, contra.

390 JONES, J. The defendant, S. W. Stockman, at his residence in Lexington county, on December 29, 1906, shot and killed his son in law, Hampton Hartley. Upon an indictment of murder he was tried at summer term, 1907, general sessions for Lexington county, Judge Dantzler ³⁹¹ presiding, convicted of manslaughter with recommendation to mercy, and sentenced to seven years' imprisonment in the state penitentiary.

The defendant contended that Hartley entered his home under the influence of whisky and was guilty of impropriety of conduct toward one of defendant's daughters, a sister of Hartley's wife, and was rebuked therefor by defendant and ordered to leave the house; that thereupon Hartley, with a buggy whip, made an attack upon defendant and his nephew, J. W. Taylor, who was visiting at the house; that Mrs. Stockman got Hartley to leave the house; that he went some distance and started back again toward the house, meeting Taylor near the gate and assaulted Taylor with whip in left hand

and pistol in right hand; that Hartley, after knocking Taylor down, pointed his pistol at defendant, who was then in the yard with a shotgun in hand, and threatened to kill defendant, whereupon defendant shot and killed Hartley in defense of his person and habitation.

The theory of the state's case was, that whatever may have taken place in the house, Hartley left it and went out of the gate into the road; that Taylor came out of the gate and went up to Hartley and they commenced fighting, Taylor with his fist and Hartley with a buggy whip held in his right hand; that Hartley drew no pistol, his pistol being found in his right hip pocket under him with his overcoat buttoned up; that defendant fired upon Hartley while he was fighting Taylor, the line of fire being from the rear at an angle of about forty-five degrees, some of the shot striking Hartley in the right temple, some striking behind and in front of the right ear.

The defendant presents thirteen exceptions to the ruling of the court as to the admissibility of certain testimony and eight exceptions to the charge given the jury.

1. State's witness Elzy Long testified as to the position of Hartley's body on the ground where he fell and the ³⁹² solicitor, with reference to the position of his hands, asked the question: "Were they or not lying by his side?" Defendant's counsel objected without stating any reason, and the court ruling the question competent, the witness answered "Yes." Appellant claims that the question was leading and prejudicial. Conceding that questions beginning "whether or not, etc.," may be leading in certain circumstances, such questions are in the discretion of the trial court and will rarely be cause for reversal: *State v. Marchbanks*, 61 S. C. 17, 39 S. E. 187; *Koon v. Southern Ry.*, 69 S. C. 101, 48 S. E. 86. There is nothing to show abuse of discretion nor prejudice to appellant. The position of the hands of deceased was fully brought out in other testimony given previously and afterward by other witnesses. Further the trial court was not informed that the question was objected to as leading and had no opportunity to have the question properly framed.

2. Defendant's witness, Pick Sullivan, testified that John Wingard, a witness who was present at the homicide and testified for the state, told witness at a house on McCarthy's place a few days after the killing that he went behind the shed and did not see the killing. Defendant's counsel asked

who was living in that house, and witness answered, "Mr. Wingard." Then counsel asked: "You mean to say that Wingard was living in this house where this conversation took place?" The witness answered, "Yes," when the solicitor objected and the court sustained the objection as to what he meant to say, saying to defendant's counsel: "He is your witness; let him state." There was no error and no prejudice. As the witness had stated without objection that Wingard was living in the house where the conversation occurred, the point seems very immaterial.

3. State witness Wingard having denied that he and Hartley were drunk on that day previous to the homicide, when riding together in a buggy leading two mules, and ³⁹³ having testified that he did not, on that occasion, meet Simeon P. Alewine in the road, Alewine, for the defense, testified that he did meet them in the road apparently drunk, that the horses had broken out of the buggy. Counsel for the defendant asked, "Did he get them?" and the witness answered, "Yes." The court asked counsel, "How is that relevant?" Counsel did not think it strictly relevant, but proceeded to ask the witness whether he (witness) was traveling in a wagon, which was answered, and how many wagons he had, which was answered, and then, finally, who had the wagon, when the court said, "All that is irrelevant." The third exception complains of this ruling. It is manifest that the court was correct and that the ruling in no wise excluded the real matter sought to be shown—that is, whether Alewine met Wingard and Hartley at the time mentioned and that they were apparently drunk.

4 and 5. The fourth and fifth exceptions are based upon the following from the case:

"Q. Did you know the late Hamp Hartley? A. Yes, sir.

"Q. Did you hear him make threats against Stockman?

"The Solicitor: We object.

"The Court: Objection sustained; that is a conclusion.

"Q. (By Mr. Graham.) Did you hear him say anything about Stockman? A. Yes, sir; I heard him speak about him.

"Q. What did he say? A. I heard him say that he considered himself of better stock than Stockman.

"The Solicitor: We object.

"The Court: Yes, sir; strike that out.

"Q. Give me the words he used. A. He said if Stockman fooled with him he would shoot him the same as a rattlesnake.

“Q. How long before Hartley was killed did you hear him say that? A. I suppose it was over a year. He talked and ran on.”

The fourth exception is based upon the first ruling of the court above. It is proper in giving evidence as to threats for the witness to state the language, or the substance of the language, used by the declarant, so that court and jury may ³⁹⁴ determine whether there was, in fact, any threat and what was the nature thereof. The appellant met this view later by having the witness state the language constituting the threat and hence there is no ground for objection.

Under the fifth exception it is contended that it was harmful for the court to strike out the statement that Hartley said he considered himself of better stock than Stockman, as the statement tended to show the mind and feeling of Hartley toward the defendant. Where there is some evidence tending to support a plea of self-defense in a trial for homicide, it is competent, for the purpose of showing that the deceased was the aggressor, to introduce evidence reasonably tending to show that deceased had hostile feelings toward defendant at the time of the encounter, such as former threats to injure, quarrels or difficulties, assaults and the like: *State v. Emerson*, 78 S. C. 83, 58 S. E. 974. The trial court may well have supposed that the particular matter under consideration could not reasonably tend to show such a hostile state of mind as would prompt or explain a personal assault upon the deceased. Generally and naturally a feeling of superiority of birth, or social superiority, would tend to produce aloofness rather than a personal encounter. The testimony would at most tend to show that deceased “had a prejudice” against defendant, and falls short of being a threat: *State v. Wyse*, 33 S. C. 582, 12 S. E. 556.

6. The solicitor having, on cross-examination of the defendant’s witness, Hair, brought out the fact that the witness had been prosecuted by the deceased for killing his dog, with a view to show bias, defendant’s counsel asked the witness whether the deceased sometimes killed dogs. The court correctly ruled the matter irrelevant.

7. It is contended that there was error in refusing to allow the defendant’s witness, Eugene Stockman, to answer the question, “State if your father had not killed him at ³⁹⁵ the time he did, what would have happened?” The question involved the mere opinion of a lad of sixteen years upon the vital issue in the case, as to what the deceased would have done. This does not fall within that class of

cases which allow a nonexpert witness to give his opinion after detailing circumstances, as, for example, as to time, distance, and such matters as cannot be made intelligible to the jury, except as interpreted by the impression made on the mind of the witness at the time, as in *Jones v. Fuller*, 19 S. C. 66, 45 Am. Rep. 761; *Ward v. Charleston City Ry. Co.*, 19 S. C. 521, 45 Am. Rep. 794; *Bridger v. Asheville & S. Ry. Co.*, 25 S. C. 24; *Harmon v. Columbia & G. Ry. Co.*, 32 S. C. 127, 17 Am. St. Rep. 843, 10 S. E. 877; *Easler v. Southern Ry. Co.*, 59 S. C. 311, 37 S. E. 938. What the deceased was doing or threatening to do when he was slain was an issue, and the witness testified fully as to all the circumstances, the meaning of which could not be made plainer by his opinion, and the inference to be drawn from the circumstances was peculiarly for the jury.

8. The court allowed state witness T. S. Nichols to state in reply that he met the deceased and Wingard in a buggy on the road from Lexington to Summit the day of the homicide and that they appeared to be sober. It was objected (1) that this was not in reply, and (2) that it involved the opinion of the witness. The ruling was correct. The testimony was in reply to the testimony brought out by the defendant that deceased and Wingard were drunk while traveling that same road that day. Whether one is drunk or sober at a particular time is one of these matters which involve the statement of the impression or belief in the mind of the witness, produced by the various circumstances occurring at the time, and falls within the rule of the case of *Jones v. Fuller* and other cases cited *supra*. Questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, state of sickness or health, disposition, temper, anger, fear, excitement, ³⁹⁶ intoxication and generally where it is not practicable to put the jury in possession of all the facts as they appeared at the time upon which the opinion is grounded—may be subject matter of nonexpert opinion: *Elliott on Evidence*, secs. 676, 678, citing, among cases as to intoxication, *Edwards v. City of Worcester*, 172 Mass. 104, 51 N. E. 447; *West Chicago Ry. Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447. Similar testimony was allowed on behalf of defendant, and the ruling was fair and consistent with the ruling discussed under the seventh exception.

9. The court allowed Sarah Wingard, witness for the state, to testify in reply that Pick Sullivan was not at her house on Sunday after Hartley was killed, Pick Sullivan having

testified as to a conversation with J. W. Wingard at that house on that day.

It was objected that no foundation had been laid for a contradiction. The court correctly ruled that the question was not of that class of contradictions by previous statements of a witness as required the laying of a foundation. It was a mere contradiction of Sullivan's testimony at the trial by the statement of a fact which, if true, would make it impossible that Sullivan's testimony could be true. Sullivan, having testified that he was at the house at the time mentioned, did not need to be advised that such statement would be contradicted.

10. Charles Howard testified for the defense that he heard deceased Hartley in August, 1905, in the afternoon, before the arrival of the train from Columbia and about two and a half miles from Summit, in Lexington county, declare that he would kill the defendant; witness fixed the day of the declaration as the time, in August, 1905, when he purchased some goods at Hartley's store from Socrates Keisler, the clerk and bookkeeper, and had them charged. The solicitor was allowed to show in reply by Keisler that he sold and charged goods to Howard on August 31, 1905, and on no other day in that month, ³⁹⁷ with the purpose of showing that Hartley was in Columbia, South Carolina, at the time mentioned. There was no error in this. The testimony was strictly in reply.

11. For the same reason there was no error in allowing witness C. M. Asbill to testify in reply that Hartley was in Columbia, South Carolina, on the afternoon of August 31, 1905.

12. The testimony of J. W. Taylor was taken at a former trial of this case, and, he having afterward died, the same was introduced on this last trial. Taylor having testified that Hartley was some feet from him after knocking him between the wheels of a buggy and was pointing his pistol at Stockman when Stockman shot him, the solicitor sought to contradict Taylor by showing that he had made a different statement to F. D. Shealy on Saturday after the killing, in the road close to the place of the difficulty. Taylor admitted meeting a man that day who was driving two mules and wagon, but stated that he did not know whether it was Shealy or not, and denied that he said to the man on that occasion that when Stockman fired Hartley was striking him (Taylor), and that it was a wonder Stockman had not hit him (Taylor). Shealy testified that such statement was made to him by Taylor at the time and place named.

It is objected that the foundation for contradiction was not sufficiently laid. We think the witness was sufficiently advised as to time, place, person and subject matter of the proposed contradiction. The fact that he did not know the name of the party as F. D. Shealy did not render the question incompetent, if the court was satisfied that the witness was sufficiently advised as to the identity of the conversation with another to give him a fair opportunity to recollect, so as to deny or explain: *State v. Hampton*, 79 S. C. 179, 60 S. E. 669. It appears that Taylor was also indicted in this case, and, in that view, on the former trial it was not necessary to advise him of the purpose to contradict by previous statements (*State v. Emerson*, 78 S. C. 83, 58 S. E. 974), but ³⁹⁸ as Taylor was not on trial in this case, being dead, we have treated the question as if Taylor was a mere witness.

13. There being some testimony that Hartley at the time of encounter with Taylor struck Taylor with his pistol, or a pair of knucks, or the butt of his whip, breaking his nose, P. H. Corley, who was the sheriff of Lexington county, was put upon the stand by the state in reply and testified that when Taylor got to the jail that night after the killing he had a bruise on each side of his nose, and that the skin was not broken. The witness, after describing the wound and stating that he had seen bruises made by a man's fist, was asked whether or not, in his judgment, the bruises appeared to have been made with a man's fist. Upon objection the court ruled that if the witness was familiar with wounds made by the fist he could answer. Thereupon he gave his opinion that the bruises on the nose must have been made with the fist.

It is charged that this ruling was erroneous, as it appeared by the testimony of the witness that he was not an expert, and not sufficiently acquainted with wounds and bruises to express an opinion. As the ruling of the court required that the witness should be familiar with wounds made by the fist, we must assume that it was understood that the witness had such special knowledge on the subject as would result from such familiarity. As such, he might be considered an expert and entitled to express an opinion as to what agency was capable of producing such wound: *State v. Senn*, 32 S. C. 400, 11 S. E. 292. No objection was made on the trial that the form of the question and answer was in the concrete instead of the abstract, and the only point of objection raised in the exception is that the witness was not such an expert as to express an opinion. This is not a case in which an expert was allowed to give an opinion on the

very point in issue, as it was a collateral matter, and practically immaterial whether Hartley struck Taylor with fist, whip or pistol. Defendant does not claim ³⁹⁹ to have shot Hartley because of the character of his assault on Taylor, but that he shot in defense of his own person.

14. The court did not err in charging the jury that self-defense is an affirmative defense and must be established by the preponderance of the testimony, when the jury was also instructed that, in order to convict, the state must establish the guilt of the defendant beyond a reasonable doubt: *State v. Welsh*, 29 S. C. 4, 6 S. E. 894; *State v. Bodie*, 33 S. C. 117, 11 S. E. 624; *State v. Way*, 38 S. C. 333, 17 S. E. 39; *State v. Way*, 76 S. C. 91, 56 S. E. 653.

15. In behalf of the defendant the court was requested to instruct the jury: "10. The law, recognizing the imperfections of human nature, does not require that one charged with homicide should show that there was no other possible means for escape when he struck the fatal blow, but he is only called upon to satisfy the jury, that under all the circumstances by which he was surrounded, he really believed there was a necessity for taking the life of his adversary in order to preserve his own, or to save him from serious bodily harm, and that, in the opinion of the jury, those circumstances were such as would justify such a belief."

In response to which the court said: "That will not do as it stands. This is right to a certain extent, but it does not go far enough. Now, for instance, 'that, in the opinion of the jury, those circumstances were such as would justify such a belief'; that is, such belief in the mind of a person possessed of ordinary firmness and reason; that the accused at the time of the killing actually believed that he was in such immediate imminent danger of losing his life, or sustaining serious bodily harm, that it was necessary for his own protection to take the life of his assailant, and that the circumstances in which the accused was placed were such as would justify such belief in the mind of a person possessed ⁴⁰⁰ of ordinary firmness and reason. With that modification I charge you that request."

The modification was correct: *State v. McGreer*, 13 S. C. 464; *State v. Thompson*, 68 S. C. 133, 46 S. E. 941.

16. The court was requested to charge as follows: "In a case where the testimony shows that the deceased assaulted the defendant with a gun or pistol in such a way or manner as to cause a defendant to believe that such deceased was about to take defendant's life or inflict some great bodily harm upon him at the time he fired the fatal shot, and that

a man of ordinary reason would have so believed, it would make no difference whether the deceased intended to take the life of such defendant or to do him some serious bodily harm; for, under such circumstances, the shooting would be justifiable, the killing excusable and such defendant should be acquitted."

Responding to this request, the court said: "There is one essential element of excusable homicide lacking in that request, and that is he must have been without fault in bringing about the difficulty. I charge you that proposition in the light of my general charge to you and as modified."

The modification was in accordance with the well-settled law as to self-defense: *State v. Dean*, 72 S. C. 74, 51 S. E. 524.

17, 18 and 19. These exceptions complain of error in charging the law as to defense of one's dwelling. The court was requested to instruct the jury: "16. That the dwelling-house where a man lives is his home or castle, and that he may repel force by force in the defense of his person, habitation or property, against one who manifestly intends and endeavors by violence to commit a felony on either, and in such case is not bound to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kills his ⁴⁰¹ adversary in so doing, it is a justifiable defense and the jury should acquit him."

In response to this the court said: "Very true, Mr. Foreman, as I charged you before; no one has the right to take the life of another, if the danger is passed, but he has the right, where the danger is immediate, to take the life of another to protect his home and family."

In the general charge the court said: "Now a man's house is his castle; he has the right to protect every member occupying it, or there with him, and he may take life if it is necessary to do so, in order for such protection, but the danger must be imminent, must be immediate; when the danger has passed, one has no right to follow up another who has invaded his home for the purpose of taking his life; he has no right to do that under the law; no such law anywhere making the taking of human life excusable unless there be a necessity for it. But one when danger is passed, is over, is not allowed under the law to follow up another and take his life. The danger must be imminent; it must be immediate."

The modification was correct. The deceased when killed was in the public road near the gate of defendant's yard,

and defendant had left his house and come into his yard armed with his shotgun. The theory of the defense was that deceased, after knocking Taylor down, started to enter the gate with pistol pointed at defendant and threatening to kill him. The theory of the state was that deceased left the house when ordered out and was in the road striking Taylor with a whip in his right hand and with no pistol drawn when Stockman shot him from the rear. The issues thus presented made it very proper for the court, in charging the law as to defense of one's dwelling, to point out that the danger should not be passed, but should be imminent. The charge was in harmony with the law as declared in *State v. Rochester*, 72 S. C. 194, 57 S. E. 685, and *State v. Brooks*, 79 S. C. 144, 128 Am. St. Rep. 836, 60 S. E. 518, 17 L. R. A., N. S., 483.

⁴⁰² 20 and 21. These exceptions allege that the charge as a whole conveyed to the jury that, in the opinion of the court, the defendant was guilty. These exceptions are without foundation. The charge was fair and impartial.

The judgment of the circuit court is affirmed.

PER CURIAM. After careful consideration of the petition for rehearing in this case the court is unable to discover that any material question involved in the appeal has been overlooked or disregarded. It may be conceded that the court was in error in supposing that the deceased was killed while within the limits of the public road in front of defendant's dwelling, and that deceased was really shot when he was some eighteen feet in front of defendant's gate and between defendant's inclosed yard and the public road, still such mistake does not materially affect the correctness of the conclusions reached by the court.

It is therefore ordered that the petition for rehearing be dismissed and the order staying remittitur herein be revoked.

The Law of Self-defense is considered in the notes to *State v. Sumner*, 74 Am. St. Rep. 717; *State v. Gordon*, 109 Am. St. Rep. 804. As to what extent one may go in defending his property or habitation from trespass or invasion, see *State v. Brooks*, 79 S. C. 144, 128 Am. St. Rep. 836, and cases cited in the cross-reference note thereto. As to whether one may invoke the right of self-defense where he himself has provoked the difficulty, see *Young v. State*, 53 Tex. Cr. 416, 126 Am. St. Rep. 792; *State v. Cook*, 78 S. C. 253, 125 Am. St. Rep. 788; *King v. State*, 51 Tex. Cr. 208, 123 Am. St. Rep. 881; *Beard v. State*, 47 Tex. Cr. 50, 122 Am. St. Rep. 672. In a case of homicide all that is necessary for the accused to show to make out a case of self-defense is that the conduct of his assailant induced in him a reasonable and well-grounded belief that he was at the time of the killing in apparent danger of losing his life or suffering great bodily harm, and he is not required to show that he acted as a man of "ordinary judg-

ment and courage would have acted under the circumstances": *People v. McGinnis*, 234 Ill. 68, 123 Am. St. Rep. 73.

The Admissibility of Threats in Evidence in prosecutions for homicide is discussed in the notes to *State v. Nelson*, 89 Am. St. Rep. 691; *Campbell v. People*, 61 Am. Dec. 53. If the other elements of self-defense exist and the deceased has made threats against the defendant, which have been communicated to him, he has the right to act upon any overt act or hostile demonstration which may have led to the honest belief that he was in imminent peril, although such act or demonstration may not have amounted to a felonious assault: *George v. State*, 145 Ala. 41, 117 Am. St. Rep. 17.

ROGERS v. MORRELL.

[82 S. C. 402, 64 S. E. 143.]

WILLS—*Per Stirpes or Per Capita*.—Under a will giving "unto Hy. W. Morrell and W. F., L. M. and Hazel S. Gilbert all my notes . . . to be equally divided between them," the division of the property should be per capita. (p. 900.)

WORDS AND PHRASES.—The Word "Between" Implies a Division between two persons or classes, yet it frequently is used colloquially in the sense of "among," especially when it follows the word "divided." (p. 900.)

WILLS.—When a Will is not Ambiguous in Terms it is unnecessary to resort to testimony as to the surrounding circumstances in order to ascertain its meaning. (p. 900.)

Simpson & Bomar, for the appellant.

Wilson & Osborne, contra.

403 JONES, J. The appeal in this case involves the construction of a clause of the will of W. F. Morrell, deceased, which is as follows:

"I further bequeath unto Hy. W. Morrell and W. F., L. M. and Hazel S. Gilbert all my notes, mortgages and moneys to be equally divided between them, also my cot or personal property, horse, cows or utensil of any kind to be sold to the highest bidder and the money equally divided between the legatees above named."

It appears that Henry W. Morrell is a son of the testator, and that W. F. Gilbert, L. M. Gilbert and Hazel S. Gilbert are children of a predeceased daughter.

The question at issue between the parties was whether the division of the property under the terms of the will should be per stirpes or per capita. The probate court held that the division should be per stirpes because this construction would give full effect to the word "between," because the

name of Henry W. Morrell is followed by the word "and," and because the Gilbert children are grouped together thus: "W. F., L. M. and Hazel S. Gilbert."

404 The circuit court reversed the probate court, holding that the word "between" was clearly intended to mean "among" and that the division should be per capita.

We agree with the circuit court. While it is true that in a strictly technical sense the word "between" implies a division between two persons or classes, yet frequently by the uneducated and colloquially it is used in the sense of "among"; especially is this true when it follows the word "divide," as in this instance: 1 Words and Phrases, 768. The notes, mortgages and moneys were "to be equally divided between them," and the other personalty sold and "equally divided between the legatees above named." "Them" and "legatees above named" clearly refer to all the individuals designated as the persons among whom the equal division was to be made. The word "and" after the name "Henry W. Morrell" cannot have the effect of defeating this plain meaning of the will.

This case does not fall within the principle stated in *Cole v. Creyon*, 1 Hill Ch. 311, 26 Am. Dec. 208, as in that case the bequest was to an ascertained individual and to a class of unascertained individuals, whereas in this case the individuals are ascertained and named.

The rule is well settled in this state that if a devise be made to an individual designated by name and to other individuals designated as a class, all the individuals take equally and per capita and not per stirpes: *Connor v. Johnson*, 2 Hill Ch. 441; *Dupont v. Hutchinson*, 10 Rich. Eq. 1; *Feemster v. Good*, 12 S. C. 576.

The will not being ambiguous in terms, it is unnecessary to resort to testimony as to the surrounding circumstances in order to ascertain its meaning: *Reynolds v. Reynolds*, 65 S. C. 390, 43 S. E. 878.

The judgment of the circuit court is affirmed.

Under a Devise of Property to be divided equally between two named persons and the children of another, the children take per stirpes, not per capita, if such appears to be intention of the testator from evidence aliunde: *White v. Holland*, 92 Ga. 216, 44 Am. St. Rep. 87. But if a bequest is made to a person, and to the children of another, or to a person described as standing in a certain relation to the testator, and to the children of another person standing in the same relation, the general rule is that the legatees take per capita and not per stirpes: *Collins v. Feather*, 52 W. Va. 107, 94 Am. St. Rep. 912. Under a devise of the testator's property to his heirs at law

to share the same equally, if he leaves a sister and the children of a deceased sister, his estate must be distributed per stirpes, viz., one-half to the sister and the other half equally among the children of the deceased sister: *Allen v. Boardman*, 193 Mass. 284, 118 Am. St. Rep. 497.

PYROSS v. FRASER.

[82 S. C. 498, 64 S. E. 407.]

PAYMENT—Tender Before Maturity.—Legal tender of the amount of a debt cannot be made before maturity. (p. 902.)

PAYMENT—Right to Make Before Maturity.—A creditor is not compelled to receive payment before the maturity of the debt. (p. 902.)

MORTGAGE—Tender of Payment Before Maturity.—The tender of the amount of a mortgage before maturity is not a legal tender and does not discharge the lien, for the mortgagee cannot be required to accept payment until the debt is due. The fact that he has previously accepted a part of the debt before maturity is not a waiver of his right to hold the remainder of the investment until maturity. (p. 902.)

T. St. Mark Sasportas, for the appellant.

M. W. Pyatt, contra.

⁴⁹⁸ **WOODS, J.** This action was brought for the foreclosure of a mortgage on land in the city of Georgetown, given by the defendant to the plaintiff to secure a bond for the sum of two hundred and fifty dollars, the purchase money of the land. The complaint alleged the balance due at the time of the commencement of the action to be one hundred and seventeen dollars, with interest and attorney's fees. The defense alleged in the answer was tender on March 14, 1905, of the sum of sixty-seven dollars, as the full amount then unpaid. The issues were referred to a referee, who reported that the last installment of the bond became due on July 20, 1905, and on that day the entire sum due by the defendant was forty-seven dollars; and that the defendant's ⁴⁹⁹ tender on March 14, 1905, was not a legal tender, and did not discharge the lien of the mortgage, because the tender was made before the last installment fell due, and the mortgagee could not be compelled to accept his debt until maturity. The circuit court sustained the referee and made a decree of foreclosure.

Few adjudications of the question here made as to the right of a debtor to pay his debt before maturity are to be found, for the reason that a creditor rarely refuses to accept

a premature tender of his debt when it includes interest to the date of maturity. In all the cases, however, where the question has been decided under the common law, it has been held that the creditor cannot be compelled to give up his investment before maturity: *Quynn v. Wheteroft*, 3 Har. & Mill. (Md.) 136, 1 Am. Dec. 375; *Abbe v. Goodwin*, 7 Conn. 377; *Brown v. Cole*, 14 Sim. 427, 60 Eng. Reprint. 424. To hold otherwise would be to change the contract of the parties. The creditor may, however, waive his right to insist on strict compliance with the contract.

In this case it was admitted the plaintiff received from the defendant without objection a partial payment of fifteen dollars of the last installment on February 15, 1904, long before it became due. The argument is, that this showed waiver of right to insist on postponement of payment of the remainder until maturity. But this favor extended to the defendant as to part of the debt did not bind the creditor to extend a like favor as to the remainder. Each party had an equal right to require the other to perform the contract as it was written. Paying a part of the debt before maturity would not have been a waiver by the debtor of his right to postpone payment of the remainder until maturity. So receiving a part of the debt before maturity was not a waiver of the right of the creditor to hold the remainder of his investment until maturity.

The provisions of section 2375 of Civil Code, requiring satisfaction of mortgages on payment or legal tender of the 500 debt, though relied on by the appellant, does not affect the matter, for the reason that the tender before maturity was not a legal tender.

The judgment of this court is that the judgment of the circuit court be affirmed.

Tender is Discussed with Reference to Its Sufficiency and Effect in the note to Moynahan v. Moore, 77 Am. Dec. 470. A creditor cannot be required to accept a part of a debt which has not become due. Hence a mortgagee who has entered for condition broken for non-payment of interest is not obliged to accept payment of principal not yet due; but the mortgagor has the right to regain possession and protect his estate by paying or tendering the interest due: *Saunders v. Frost*, 5 Pick. 259, 16 Am. Dec. 394.

SULLIVAN v. WESTERN UNION TELEGRAPH COMPANY.

[82 S. C. 569, 64 S. E. 752.]

TELEGRAPH COMPANY—Message Delayed by Strike.—A telegraph company is not answerable in punitive damages for the delay of a message caused by a strike of its employés. (p. 905.)

George H. Fearons and John Gary Evans, for the appellant.

Hood & Sullivan, contra.

⁵⁶⁹ GARY, J. This action was commenced in a magistrate's court to recover actual and punitive damages.

⁵⁷⁰ The following statement is set out in the record: "Plaintiff brought action for one hundred dollars' damages for delay in the transmission and delivery of a telegram from Newberry, South Carolina, to Anderson, South Carolina. He alleges that the telegram was filed with defendant's agent at Newberry, South Carolina, between 10 and 11 o'clock A. M., September 10, 1907. That at the time of filing the message plaintiff asked if the message could be got through at once, and was assured that it could be. That the telegram was not delivered until the morning of the 12th of September, and that plaintiff suffered damages, as set out in the complaint.

"Defendant answered at the trial, admitting the filing and sending and delivery of the telegram as alleged. Further answering, defendant said if there was any delay it was not due to defendant's negligence, or its agents, employés and servants, but was due to strikers or others acting against the law; or to the act of God or the public enemy; and to unavoidable delay, and interruption in the working of its line, and that plaintiff, signing the blank on which the message was written, agreed to the provision on the back of the blank that defendant should not be so liable under such circumstances. At the close of the testimony for the plaintiff, defendant's attorneys moved for a nonsuit on the whole case, because there is no evidence tending to show that the damages alleged in the complaint were such proximate damages as were occasioned by the delay in delivering the message. This motion was overruled. At the close of the whole testimony, defendant moved for a nonsuit on the whole case, in so far as the charge of willfulness, wantonness and recklessness was concerned, on the ground that there was no evidence

tending to sustain such allegations. This motion was overruled. The magistrate found for plaintiff one hundred dollars, defendant appealed to the circuit court, and Judge Prince sustained the magistrate. In due time defendant gave notice of intention to appeal, and ⁵⁷¹ does now appeal to this court from the order of Judge Prince."

The order of his honor, Judge Prince, is as follows: "After hearing the argument on the appeal in the above-entitled cause, it is ordered: That the grounds of appeal be and the same are overruled, the appeal dismissed, and the judgment and verdict of the magistrate sustained.

"As matters of fact, I find that a preponderance of the evidence shows neither negligence nor willfulness in the handling of said telegram at Newberry, South Carolina, nor at Anderson, South Carolina, but that said telegram was intentionally and willfully intercepted by one of defendant's operators who was at the time an agent of defendant company, and said agent's scope of employment by said company included the sending and receiving of telegrams, general authority over one of defendant's telegraph offices, and control of defendant's telegraphic instrumentalities, usually found in connection with such offices; that said agent was at the time also in the employ of a railroad company, being an agent of the said railway company as well as an agent of defendant; that by reason of said agent's authority to send and receive telegrams, and general control of defendant's telegraphic instrumentalities as aforesaid, said agent intentionally and willfully intercepted said telegram as aforesaid, and said willful act was within the scope of said agent's employment by defendant. I, therefore, conclude and find as a matter of law that defendant is liable for its agent's willful act as aforesaid, because I find that said act was within the scope of said agent's employment by defendant as aforesaid."

We will first consider the exceptions raising the question whether his honor, the circuit judge, erred, in overruling the ground of appeal assigning error on the part of the magistrate, in refusing the motion for nonsuit, as to punitive damages.

The uncontradicted testimony, even that of the plaintiff, ⁵⁷² shows that there was a strike at the time the message was delivered for transmission.

And as the circuit judge found as matter of fact that there was neither negligence nor willfulness in the handling of the telegram at Newberry, South Carolina, nor Anderson,

South Carolina, the only reasonable inference from the testimony is, that the strike was the proximate cause of the delay. The case of *Oxner v. Western Union Tel. Co.*, 82 S. C. 510, 63 S. E. 545, shows that under such circumstances punitive damages are not recoverable. The exceptions raising this question are sustained.

The next question that will be considered is whether the circuit judge erred in not concluding that where a strike is the direct cause of delay in the transmission of a telegram, the company is not liable.

The rule is thus stated in section 360 of Jones on Telegraph and Telephone Companies: "Under the ancient rule carriers were not exonerated for losses caused by the acts of mobs or other riotous persons; but the stringency of this rule has been somewhat relaxed by the more modern authorities. They are still held liable for all losses caused by such acts, but are not liable for loss in the transportation of goods, by any delay caused thereby. There is a difference, however, in the application of this rule to carriers and to telegraph and telephone companies. As a general rule, the latter companies are not liable for losses arising from acts of mobs and other riotous persons. The acts of the mob stand, with respect to these companies, in almost the same category as those of the public enemy. The different means and instrumentalities through which they accomplish their respective corporate purposes bring about the difference in the application of this rule. It is never presumed that mobs intend to take possession of goods and convert them to their own use; and the tangible property to such, being in the custody of the carriers, they are more able to protect and deliver them safely to the consignee; and, as has been said, they are not liable for losses caused by such ⁵⁷³ delay. On the other hand, the main and principal objects of mobs and other riotous persons who interfere with the business of telegraph companies is to prevent and obstruct the transmission of news; especially until they shall have accomplished some particular purpose. As has often been said, they are never liable as insurers, unless an express agreement has been entered in to that effect. And for the reason that they are not in possession of the tangible property of the message in transit, they do not have the same opportunity to protect it as the carrier has his goods. It is the duty, however, of these companies, where they have been thus interfered with, to make a reasonable effort to transmit the telegram by other lines or by other means; and

on failure to do so, they will be held liable for all losses suffered."

In section 361 of the same work it is said that "the same rule applies where the mob is composed of employés of the company who are on a strike."

The testimony shows that the delay was the result of an unavoidable cause, in so far as the company was concerned. The exceptions raising this question are also sustained.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded for a new trial.

Damages Against Telegraph Companies are discussed in the note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 286.

Exemplary Damages Against Corporations are discussed in the note to *Hoboken Print. etc. Co. v. Kahn*, 59 Am. St. Rep. 589. And the liability of an employer in exemplary damages for the acts of his employé is the subject of a note to *Crane v. Bennett*, 101 Am. St. Rep. 730.

The Liability of Carriers for Injuries Done by Strikes or Mobs is the subject of a note to *Fewings v. Mendenhall*, 97 Am. St. Rep. 526.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

STATE v. DELAMATER.

[20 S. D. 23, 104 N. W. 537.]

LIQUORS—License for Selling—Interstate Commerce.—A statute requiring an annual license fee of a traveling salesman who solicits orders for intoxicating liquors in quantities less than five gallons is not, as applied to interstate transactions, in conflict with the commerce clause of the federal constitution, especially in view of the Wilson act. (p. 913.)

LIQUORS—Place of Interstate Sale.—One Who Solicits Orders for liquors in one state, the orders to be forwarded for acceptance to another state where the liquor is to be delivered to the purchaser on board the cars, is within a statute of the first state requiring an annual license fee of salesmen soliciting orders for liquors. (Justice Haney dissented.) (pp. 918, 919.)

Lee Stover, for the plaintiff in error.

Philo Hall, attorney general, S. M. Howard, state's attorney, and Aubrey Lawrence, for the state.

²⁴ HANEY, J. The evidence upon which the defendant was convicted is conceded to have established the following facts: "That the defendant, Jay Delamater, is now, and was on the tenth day of February, A. D. 1904, a traveling salesman employed by Lewis L. Metzger & Co., and that the said Lewis L. Metzger & Co. are residents of the city of St. Paul, in the state of Minnesota, and that the said Lewis L. Metzger & Co. have their place of business at the said city of St. Paul, and have no place of business in the state of South Dakota, and have had no such place of business in the said state of South Dakota. That on the tenth day of February, A. D. 1904, Jay Delamater, as such employé, was engaged as said traveling salesman in soliciting proposals or orders for said Lewis L. Metzger & Co. for the sale of

intoxicating liquors in quantities less than five gallons from citizens and residents of and within the county of Potter and state of South Dakota, who were not merchants, traders or dealers in intoxicating liquors; that on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Gross, who were not merchants, traders or dealers in intoxicating liquors, at and in the county of Potter and state of South Dakota, soliciting or requesting proposals or orders from said last-named persons for the sale to them by Lewis L. Metzger & Co. of said intoxicating liquors. That the said proposals and orders were ²⁵ procured by defendant from said named persons, forwarded to his principal, the said Lewis L. Metzger & Co., in the city of St. Paul, state of Minnesota. At said time no money was paid by either of the said persons to said defendant or to said Lewis L. Metzger & Co., and said proposals or orders were forwarded with the understanding that they were subject to the approval of said Lewis L. Metzger & Co., and that the defendant had no power or authority to approve said proposals or orders, nor to receive any money thereon. In addition to being subject to the approval of said Lewis L. Metzger & Co., said proposals or orders were conditioned that the said whisky so ordered should be delivered to the said Ferdinand Renner and Paul Gross, hereinbefore named, f. o. b. cars at the city of St. Paul, in the state of Minnesota. That the said Ferdinand Renner and Paul Gross, hereinbefore named, were to pay the freight from the city of St. Paul, in the state of Minnesota, and were to make remittance of the purchase price of said goods to said Lewis L. Metzger & Co., at the city of St. Paul, in the state of Minnesota, within sixty days after receipt of said liquor in said county of Potter. That this defendant has never paid any license to the county of Potter or state of South Dakota, or to the treasurer, or to anyone, as required by section 2834 of the Revised Political Code of the year 1903 of the state of South Dakota, and that the said defendant had not then and there, and has never, paid any license or fee whatsoever to any township, precinct, town, or city within said county or state; and that said liquor therein sold was intoxicating liquor, to wit, whisky, and was not a proprietary patent medicine; and that the said defendant is not now, and never has been, a licensed pharmacist under the laws of the state of South Dakota."

Article 6, chapter 27, of the Revised Political Code, relating to intoxicating liquors, contains the following pro-

visions: "In all townships, precincts, towns and cities of this state there shall be annually paid the following license upon the business of selling or keeping for sale by all persons whose business in whole or in part consists in selling or keeping for sale in this state distilled, brewed or malt liquors, or mixed drinks as follows: . . . Upon the business of selling or offering for sale any of the above-mentioned liquors at ²⁶ retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, two hundred dollars per annum. Said license to be paid in each county in which said traveling salesman does business in accordance with the provisions of section 2836. . . . All persons engaged in the selling or keeping for sale of any of the liquors mentioned in this article, whether as owner or as clerk, agent, servant or employé, shall be equally liable as principals for any violation of the provisions of this article": Rev. Pol. Code, secs. 2834, 2852.

Defendant contends: (1) That he did not violate the law; (2) that if he did, it conflicts with the interstate commerce clause of the federal constitution, and is invalid. "The supreme court of the United States is the one ultimate judicial authority on all questions of interstate commerce. But as has been often pointed out, and even admitted by the court itself, the decisions of that high tribunal have been far from uniform, and any attempt to reconcile all that has been said and decided by it must end in confusion. The difficulty, if not impossibility, of reconciling all the decisions upon the subject is shown by the extraordinary number of dissenting opinions in the cases. Most of the important decisions were rendered by a divided court. Still it can safely be said that the differences of opinion thus manifested have not been so much upon fundamental principles as upon the application of those principles to particular facts and the construction of the various state statutes which have been under consideration. The principles themselves are fairly well settled. In view of these facts the supreme court has said that it would be a useless task to undertake to fix an arbitrary rule by which the line separating the powers of the state from the exclusive power of Congress in this regard must in all cases be located, and that it is better to settle each case as it arises upon a view of the particular rights involved": 17 Am. & Eng. Ency. of Law, 41. It is therefore especially important to have the real issues presented by this appeal accurately defined. The nature of the legislation assailed is no longer open to contro-

versy in this court. It is an exercise of the police power. It is regulation, not taxation: *State v. Buechler*, 10 S. D. 156, 72 N. W. 114. It does not discriminate between ²⁷ resident and nonresident dealers. All persons whose business in whole or in part consists in selling or keeping for sale intoxicating liquors in this state are required to procure a license before engaging in such business. If the defendant violated the law, it is because he was acting as the agent or employé of Metzger & Co., who were engaged within this state in the business of selling or offering for sale such liquors at retail by traveling salesmen who solicited orders in lots of less than five gallons. The power of the state to impose restraints and burdens upon persons and property in conservation of the public health, good order, and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. The power of Congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive. The failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states: *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572. That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power is a proposition which has never for a moment been doubted: *Black on Intoxicating Liquors*, sec. 31. And it is now established beyond dispute that such liquors are legitimate subjects of interstate commerce: *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128; *Vance v. Vandercreek*, 170 U. S. 438, 18 Sup. Ct. Rep. 674, 42 L. ed. 1100; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572. When the Wilson act was adopted such liquors were exempted from state regulation by operation of the interstate commerce clause to the same extent as other legitimate articles of commerce. A citizen of one state, notwithstanding the laws of another, had the right to import intoxicants into the latter, and there sell them in the original packages. Up to the point of time when the importation was sold or the original package broken by the importer, the state, in the absence of congressional permission, "had no power to interfere by seizure or any other action in prohibition of importation and sale by the foreign or nonresident ²⁸ importer": *Leisy v. Hardin*,

135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128. The Wilson act, which was adopted for the purpose of allowing state laws to operate on liquor shipped from one state into another so as to prevent the sale of original packages in violation of the state laws, provides that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise": 17 Am. & Eng. Ency. of Law, 293. By that act Congress "simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction": *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572. "Arrival within the state," as employed in that act, has been construed to mean arrival of the importation at its destination, and state regulation attaches to the subject of an interstate shipment only after such shipment has been consummated by the arrival of the goods at their destination and their delivery to the consignee: *Rhodes v. State*, 170 U. S. 412, 18 Sup. Ct. Rep. 664, 42 L. ed. 1088. A consignee may receive for his own use regardless of state laws: *Vance v. Vandercook*, 170 U. S. 438, 18 Sup. Ct. Rep. 674, 42 L. ed. 1100. So it would seem that these propositions have been established: (1) An importer of liquors from another state has no right to sell them in the original packages or otherwise, except on the terms prescribed by the legislature of the state where the sales are made. (2) When intoxicating liquors are shipped from one state into another, they do not become subject to any state police regulation on crossing the boundaries of the state into which they are shipped, but retain their character as an article of interstate commerce until delivered into the hands of the consignee; but upon such delivery they become subject to such regulations. (3) The receiver in one state of intoxicating liquors sent from another state has the constitutional right to receive it for his own use, without regard to any state law ²⁹ to the contrary; but when received he can dispose of it in the original package or otherwise only on the terms prescribed by the state statutes. Beyond question all legitimate subjects of interstate commerce,

other than intoxicating liquors, may be imported and sold by the importer in the original package, and no feature of the transaction, from its inception to its consummation, is subject to a state regulation such as we are considering. "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce": *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694. Hence a state statute which requires that "each peddler or solicitor taking orders for groceries, clothing, hardware, or other mercantile establishments shall pay a license of not less than seventy-five dollars nor more than one hundred and twenty-five dollars per year" in each county in which such soliciting is done is clearly unconstitutional when applied to the case of a traveling salesman employed by a Minnesota tailor in soliciting orders for men's clothing to be manufactured in that state and shipped to individual purchasers in this: *State v. Rankin*, 11 S. D. 144, 76 N. W. 299. But that case and the one at bar are easily distinguishable. In that case the court was dealing with a commodity which the importer had a right to import and sell in the condition in which it was imported, notwithstanding the state law. In this it is dealing with a commodity which the importer has a right to import notwithstanding the state law, but which he cannot sell, within this state, in the original package or otherwise, without conforming to the requirements of the state statute. In that case the law, by its terms, required a license for the mere soliciting of orders. In this it only requires a license of those who engage in the business of selling or offering for sale within the state. As heretofore suggested, this law, when properly construed, does not, by its terms, impose any restrictions upon the traffic beyond its territorial boundaries, or before the intoxicants have by permission of Congress become subject to the police power of the state. If the St. Paul dealers were not engaged in the business of selling or offering for sale within this state, they did not violate the law, and cannot be heard to question its validity. If they were engaged in that business, they cannot escape its consequences,³⁰ because such business was state, and not interstate, commerce, the selling or offering for sale of intoxicants in the original package or otherwise within this state being subject to state regulation. Any enactment the operation of which has a tendency to diminish the consumption of intoxicating liquors may, in a sense, be said to indirectly interfere with interstate com-

merce in that commodity, but all such enactments are not for that reason invalid. The provision of the law here involved does not retard the consumption of intoxicants within this state, and thus indirectly affect interstate commerce, to any greater extent than do the provisions which require persons engaged in the business at designated places to procure permits to maintain such places. Regulation of the retail traffic, when conducted by a traveling salesman, is certainly not less necessary or desirable than when it is carried on by saloon-keepers, who are constantly subject to the observation of the general public and the inspection of city and town officers. If the latter method of making sales is to be regulated, the former should be to the full extent of the state's police power. It is a universally accepted rule, frequently recognized by this court, that no legislative act should be declared unconstitutional unless the conflict between its provisions and some principles of constitutional law is so plain and palpable as to leave no reasonable doubt of its invalidity. Such a conflict certainly has not been shown in this case. On the contrary, the reasons for concluding that the statute, correctly construed, does not contravene the interstate commerce clause of the federal constitution, are clear and convincing.

Does it appear that the defendant violated the law? The legislature did not intend to regulate the business of selling or offering for sale of intoxicating liquors in other states. A license is required only where the business is done in this state. Does it appear from the conceded facts that Metzger & Co. were engaged in the business of selling or offering to sell intoxicating liquors in this state without having procured the required license, and was the defendant acting as their employé in conducting such business? They were engaged in the business of selling and offering to sell intoxicants without a license, and defendant was their employé. So much is certain. ³¹ Was the business conducted in this state or in Minnesota? Were they selling or offering to sell here or there? If here, defendant violated the law. If there, he was not guilty of the crime charged. "Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property"; Rev. Civ. Code, sec. 1299. The defendant was not authorized to make sales here or elsewhere. The orders or offers obtained by him were subject to the approval of Metzger & Co. No contract was made, the minds of the parties did not meet, until the offers were received and accepted at

St. Paul. It was expressly agreed that the goods should be delivered at that place. Title to the property was there transferred. Under these circumstances, it seems clear that the sales took place in Minnesota, and not in this state: *Shuenfeldt v. Junkermann* (C. C.), 20 Fed. 357; *Williams v. Feiniman*, 14 Kan. 288; *Frank v. Hoey*, 128 Mass. 263; *Kling v. Fries*, 33 Mich. 275. If, as has been shown, persons residing in this state may purchase intoxicants in another, and receive them in this for their own use, regardless of the laws of this state, they certainly have the right to order intoxicants by mail or through the soliciting agent of a non-resident dealer. In this case the nonresident dealers appear to have merely solicited persons to purchase goods at their place of business in another state, something the legislature did not attempt to regulate, unless it be assumed that the law-making power intended to enact an unconstitutional statute, and, of course, such an assumption cannot be tolerated. So I conclude that the law under which the defendant was convicted is valid, but that it does not appear that he violated such law. For this reason alone I think the judgment of the circuit court should be reversed, and a new trial ordered.

CORSON, P. J. I fully concur in the views expressed by Mr. Justice Haney as to the constitutionality of the license law of this state, but I am unable to concur in his conclusion that the defendant is not guilty of the offense charged, and the judgment of the trial court therefore should be reversed. In my judgment, when the conclusion was reached that the law is constitutional, it logically followed that the judgment of the court below was correct, and ³² should be affirmed, as the defendant was clearly doing business in violation of the law of this state without having first paid the license required by law. Section 2834, Revised Political Code, relating to the sale of intoxicating liquors, provides: "In all townships, precincts, towns and cities of the state, there shall be annually paid the following license, . . . upon the business of selling or offering for sale any spirituous, vinous, malt, brewed or fermented or other intoxicating liquors at retail, . . . four hundred dollars per annum; upon the business of selling or offering for sale any of the above-mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, two hundred dollars per annum." Section 2836 provides: "Every person engaged or intending to engage in any business mentioned in section 2834, and requiring the

payment of any license mentioned in such section, shall . . . pay to the county treasurer in advance the license required by section 2834 for such business for a year commencing on the first day of July and ending on the thirtieth day of June next thereafter." Section 2838 provides: "If any person or persons shall engage or be engaged in any business requiring the payment of license under section 2834, without having paid in full the license required by this article, . . . shall be punished by a fine of not less than fifty dollars, nor more than five hundred dollars and costs of prosecution, or by imprisonment in the county jail not less than ten days nor more than thirty days or by both such fine and imprisonment in the discretion of the court." It will be observed by the statement of facts in this case that the defendant was a traveling salesman employed by Lewis L. Metzger & Co., and that on the tenth day of February, 1904, he was engaged as such traveling salesman in soliciting orders for said company for the sale of intoxicating liquors in quantities less than five gallons from citizens and residents of and within the county of Potter, and that he had not paid any license nor procured any permit to sell the same as required by the provisions of section 2834. The question is asked by Mr. Justice Haney in his opinion, "Does it appear that the defendant violated the law?" In my judgment, that question can be answered in the affirmative. It appears from the statement of facts that the defendant was doing precisely what he was prohibited from ³³ doing without paying a license and obtaining a permit therefor. Great stress is placed upon the fact that the firm for which the defendant was soliciting orders was required to pass upon the orders, and, if accepted, the intoxicating liquors were delivered to a transportation company in St. Paul, and that that constituted a delivery to the parties who had given the orders outside of this state, and that for this reason the defendant had not violated any of the provisions of the law of this state. This construction of the law, it seems to me, is entirely unwarranted by the language of its provisions, the evident intention of the law-making power, and in conflict with decisions of the courts passing upon similar questions. When, as it appears by the statement of facts, the defendant was engaged in the business of offering for sale and soliciting orders for intoxicating liquors without the payment of the license fee and obtaining a permit to engage in such business, he was engaged in a business prohibited by the law-making power. In the view I take of the case, it is

immaterial as to whether the transaction is to be regarded as a sale of liquor or offering it for sale, or soliciting orders for the purchase of the same, as the doing of either act constitutes a violation of the provisions of the statute. Soliciting orders for the purchase of liquor constituted a part of the transaction in the sale of the same, and this was the view taken by the circuit court of the United States for the district of New Hampshire in *Lang v. Lynch*, reported in 38 Fed. 489, 4 L. R. A. 831, in which that court held: "Orders taken for the sale and delivery of liquors in violation of the law of the state are a part of the contract of sale, and as such render the entire transaction void, and no recovery thereon can be had." The learned circuit judge in his opinion says: "I am of opinion, therefore, that the taking of the order by the agent of the plaintiff was a part of the contract of sale so far as to forbid a right of recovery upon the contract, and that the statute of New Hampshire inflicting a penalty for the offense prohibits the right of recovery for the price of liquors sold." It is true this was an action to recover the value of the liquors sold and delivered in another state, but the court seems to take the view—and I think ³⁴ very properly—that taking an order by the agent was a part of the contract of sale. In this case it is not necessary to go so far as that court went, as our statute provides a penalty for offering for sale or for soliciting orders for the purchase of liquors. The case of *State v. Ascher*, 54 Conn. 299, 7 Atl. 822, is directly in point as to the offering for sale or soliciting orders. In that case that learned court held that the act of the state of Connecticut of 1882 forbids all persons without a license therefor to sell intoxicating liquors by sample, or by soliciting or procuring orders, and held that a contract for sale made in the state of Connecticut by a traveling agent of a firm in another state of liquors to be delivered in such other state is a violation of the statute. It appears in the statement of facts in that case, as in this, that a traveling salesman representing a firm of the city of New York was engaged in the state of Connecticut in soliciting orders for intoxicating liquors for his firm; that such orders were transmitted to the firm in New York City, and, if approved by the firm, the liquors ordered were delivered to a carrier in New York City for the party ordering the same. The court in the case in its opinion says: "The defendant was convicted, and appealed to this court. His grievance is that he was convicted of an unlawful sale, while, as he contends, he effected no sale within the meaning of the statute in this state. He says that he only solicited and obtained an order in this state, and that

the sale was completed by a delivery of the liquors by his employers to the purchaser in the state of New York. The statute of 1882, chapter 107, part 6, section 1 (Acts 1882, p. 185), provides that 'any person who, without a license therefor, shall, by sample, by soliciting or procuring orders, or otherwise, sell any spirituous and intoxicating liquors, shall be fined for the first offense not more than fifty dollars,' etc. . . . The question is, What did the legislature mean by selling by sample, or by soliciting or procuring orders? A majority of the court think that it intended to prohibit just such a sale as was made in this case. If the statute is to be so construed as to limit its operation to sales completed by delivery in this state, of course a vast majority of sales by soliciting orders will not be embraced in the statute. We think that the legislature, taking notice of the fact ³⁵ that wholesale dealers in New York and elsewhere out of the state generally sell their wares through agents going from place to place soliciting and procuring orders, intended to prohibit such sales; otherwise the facilities for making such sales are so great, extending to every town and hamlet in the state, that the efficiency of the license law would be materially impaired. Dealers in neighboring states, without license and without restriction, could sell and cause to be delivered in any and all parts of the state liquors to any extent. Hence the legislature was careful to guard against such a result by prohibiting, as it does in the eleventh section, all sales without a license and all sales in a no-license town." And the court, in concluding its opinion, says: "The claim that the legislature intended only such sales as should be consummated by a delivery in this state cannot be allowed. It is a matter of common knowledge that sales effected by drummers are usually, if not always, consummated by a delivery at the vendor's place of business to a common carrier; and while such delivery, for all civil purposes, completes the sale made by the drummer, vests the title in the purchaser, and gives the seller a right to the purchase money, yet for all police purposes it is competent for the legislature to say that the acts done by the drummers shall of themselves constitute a sale, and therefore an offense. And we think the legislature intended so to say, and to make all such acts an offense, whether the delivery was in or out of the state. By doing so the word 'sell' is used in the same sense in which it is generally used by business men in relation to this subject matter. In common language a drummer sells goods. He sells by sample. He sells by soliciting and procuring orders. The dealers sell by drummers as their agents.

Now, if the statute does not reach all such cases, then it falls short of reaching the evil aimed at, and the intended remedy is a failure." That court, in its opinion, evidently disregarded the claim made by the defendant that the orders taken by him were required to be passed upon and accepted by the firm in New York City before a sale could be made, and the claim that the interstate commerce law was violated as unworthy of notice, as it does not refer to them in the majority opinion. It will be observed that the provisions of the statute in this state are ³⁶ broader and more comprehensive than the provisions of the statute of Connecticut, and that they include not only the sale of intoxicating liquors, but the offering for sale and soliciting of orders.

Mr. Justice Haney places reliance upon the case of Bowman etc. Distilling Co. v. Nutt, 34 Kan. 724, 10 Pac. 163, but that was a civil action for the recovery of the value of a barrel of whisky delivered at Kansas City, in Missouri. In the later case of Westheimer v. Weisman, 60 Kan. 753, 57 Pac. 969, which was also an action to recover the value of certain liquor sold, the court, in its opinion, says: "The penalty of section 32, above quoted, is inflicted upon the very person who takes or receives an order from any person in this state not authorized to sell liquor, and hence the agent receiving an order for whisky here would be amenable to the penalties of the law." And again, in the same opinion, the court says: "The agent made no sale, and could only be liable under the statute for the taking of an order for intoxicating liquor. The statute, operating only on the agent, cannot prejudice the rights of Westheimer & Sons, who made the sale in another state. The agent did no more than make an offer of sale subject to the approval of his house. The final acceptance of the order and consummation of the sale occurred in Missouri, where such sales were lawful. Being lawful there, a recovery of the price of the whisky can be had in our courts." It will thus be seen that that court recognizes the fact that, while the sale of liquor may have been consummated in another state, the agent who procured the order was nevertheless liable to the penalty imposed for a violation of the statute. Clearly, the defendant in the case at bar was engaged in the business in Potter county, not only of selling, but offering for sale, and soliciting orders for the sale of, intoxicating liquors. The claim that the defendant had not committed the offense under the statute because the order had to be approved in St. Paul, and that the delivery was made there to the purchaser, and not in South Dakota, is clearly untenable. Such a construc-

tion is entirely unwarranted by the law itself or by the evident intention of the law-making power. In my judgment, it is entirely immaterial whether the liquors were delivered in this state or delivered at all. The offense was complete under the statute when the defendant solicited the order or offered the liquors for sale.

³⁷ It seems to me that the construction given to our statute is altogether too narrow and technical, and one entirely unwarranted either by the language of the statute, or by the clear intention of the legislature in passing the act; and that the interstate commerce law is not in any manner involved in this case. The law-making power, in adopting the license system for this state, sought, as far as possible, to minimize the evils of intemperance, and prevent the miseries resulting from the use of intoxicating liquors, by requiring all parties engaged in the business, before so doing, to pay a license, and obtain a permit therefor; and this policy it clearly carried out in the provisions of the statute. The legislature not only prohibited the sale of intoxicating liquors, but the offering for sale, or the soliciting of orders for the purchase of, the same by any person, unless he had paid such license and procured the permit. We may assume that the legislature knew all or nearly all traveling salesmen take orders subject to the approval of the houses represented by them, and that the delivery of the goods sold is usually made in other states. If our legislature simply meant to prohibit the offering for sale or soliciting of orders in cases where the goods were actually delivered by the agent in this state, it failed to accomplish anything beneficial by the enactment of the law, as, of course, it was known to them, as it is known to us, that few, if any, such sales would be made by agents in this state, but there would be, as in the case at bar, the form of submitting the order to the firm outside of the state, and that such firm would accept the order and deliver the liquors outside of our state. I understand that the power of the legislature to require the payment of such license before engaging in the business in this state of soliciting orders or offering for sale intoxicating liquors will be affirmed by the undivided court in holding the law constitutional.

In my opinion, the judgment of the court below should be affirmed.

FULLER, J. As self-preservation is a law of nature predominant in every organized community, the inherent right to guard against the introduction and traffic in commodities which endanger ³⁸ the health and corrupt the morals of our

citizens was never surrendered to the general government, and the statute confessedly violated by the accused in no manner interferes with any of the laws of the United States. From the opinion of Chief Justice Taney in the License Cases, 5 How. 504, 12 L. ed. 256, I quote as follows: "These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a state is bound to receive and permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." Assuming that our police system of regulating the liquor traffic by means of high license has a tendency to diminish interstate shipments, that result would constitute no infringement of the constitutional guaranty of commercial freedom among the states. Independently of any question of citizenship, and without the slightest discrimination, the solicitor of orders, as a person engaged in the business of offering intoxicating liquors for sale, must pay the license, or suffer the penalty provided by the statute; but no penalty, restriction or burden is imposed upon a nonresident engaged in interstate commerce.

As to the validity of the law under consideration, I concur with both my associates, and, with Presiding Judge Corson, agree in the conclusion that plaintiff in error was lawfully convicted. Consequently, the determination of all questions of law and fact at the trial below is sustained by the majority of this court, and the judgment of conviction is therefore affirmed.

The Principal Case was Affirmed by the Supreme Court of the United States in *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. Rep. 447, 51 L. ed. 725, Justice White rendering the following opinion therein:

"A firm established in St. Paul, Minnesota, which was engaged in dealing in intoxicating liquors, employed Delamater, the plaintiff in error, as a traveling salesman. As such salesman Delamater, in the state of South Dakota, carried on the business of solicit-

ing orders from residents of that state for the purchase, from the firm in St. Paul, of intoxicating liquors in quantities of less than five gallons. The course of dealing was this: The orders were procured in the form of proposals to buy, and when accepted by the firm the liquor was shipped from St. Paul to the persons in South Dakota who made the proposals, at their risk and cost, on sixty days' credit. At the time Delamater engaged in South Dakota in the business just stated the law of that state imposed an annual license charge upon 'the business of selling or offering for sale' intoxicating liquors within the state, 'by any traveling salesman who solicits orders by the jug or bottle in lots less than five gallons.' A violation of the statute was made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. Delamater, not having paid the license charge, was prosecuted under the statute. At the trial, although the uncontradicted proof established the carrying on of business within the state, as above mentioned, Delamater requested a binding instruction to the jury in his favor, on the ground that the statute did not apply, and if it did, that it was void because repugnant to the commerce clause of the constitution of the United States. Exception was taken to the refusal to give the instruction. The federal ground was reiterated in motions to arrest and for a new trial, and the supreme court of the state, to which the cause was taken, in affirming the judgment of conviction, expressly considered and disposed of such federal ground: 20 S. D. 23, ante, p. 907, 104 N. W. 537, 8 L. R. A., N. S., 774.

"All the assignments of error involve the proposition that the state statute, as construed and applied by the court below, is repugnant to the commerce clause of the constitution. It is manifest, as the subject dealt with is intoxicating liquors, that the decision of the cause does not require us to determine whether the restraints which the statute imposes would be a direct burden on interstate commerce if generally applied to subjects of such commerce, but only to decide whether such restraints are a direct burden on interstate commerce in intoxicating liquors as regulated by Congress in the act commonly known as the Wilson act: 26 Stats. at Large, 313, c. 728; U. S. Comp. Stats. 1901, p. 3177. For this reason we at once put out of view decisions of this court which are referred to in argument and which are noted in the footnote,* because they concerned only the

*Robbins v. Shelby Co. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694, 1 Int. Com. Rep. 45; Corson v. Maryland, 120 U. S. 502, 7 Sup. Ct. Rep. 655, 30 L. ed. 699, 1 Int. Com. Rep. 50; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. Rep. 1, 32 L. ed. 368, 2 Int. Com. Rep. 241; Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. Rep. 256, 32 L. ed. 637; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128, 3 Int. Com. Rep. 36; Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. Rep. 725, 34 L. ed. 150, 3 Int. Com. Rep. 143; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851, 35 L. ed. 649; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. Rep. 829, 38 L. ed. 719, 4 Int. Com. Rep. 658; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. Rep. 229, 47 L. ed. 336; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 24 Sup. Ct. Rep. 151, 48 L. ed. 254; Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. Rep. 159.

power of a state to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law.

"The general power of the states to control and regulate the business of dealing in or soliciting proposals within their borders for the purchase of intoxicating liquors is beyond question. With the existence of this general power we are not, therefore, concerned. We are hence called upon only to consider whether the general power of the state to control and regulate liquor traffic and the business of dealing or soliciting proposals for the dealing in the same within the state was inoperative as to the particular dealings here in question, because they were interstate commerce, and therefore could not be subjected to the sway of the state statute without causing that statute to be repugnant to the commerce clause of the constitution of the United States.

"It is well at once to give the text of the Wilson act, which is as follows (26 Stats. at Large, 313, c. 728): 'That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.'

"It is settled by a line of decisions of this court, noted in the footnote,* that the purpose of the Wilson act, as a regulation by Congress of interstate commerce, was to allow the states, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the states over intoxicating liquor, by the Wilson act adopted a special rule enabling the states to extend their authority as to such liquor shipped from other states before it became commingled with the mass of other property in the state by a sale in the original package.

"The proposition relied upon, therefore, when considered in the light of the Wilson act, reduces itself to this: Albeit the state of South Dakota had power within its territory to prevent the sale of

*In *re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. Rep. 664, 42 L. ed. 1088; *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. Rep. 674, 42 L. ed. 1100; *American Exp. Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. Rep. 182, 49 L. ed. 417; *Adams Exp. Co. v. Iowa*, 196 U. S. 147, 25 Sup. Ct. Rep. 185, 49 L. ed. 424; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 Sup. Ct. Rep. 552, 49 L. ed. 925; *Foppiano v. Speed*, 199 U. S. 501, 26 Sup. Ct. Rep. 138, 50 L. ed. 288; *Heyman v. Southern R. Co.*, 203 U. S. 270, 27 Sup. Ct. Rep. 104.

intoxicating liquors, even when shipped into that state from other states, yet South Dakota was wanting in authority to prevent or regulate the carrying on within its borders of the business of soliciting proposals for the purchase of liquors, because the proposals were to be consummated outside of the state, and the liquors to which they related were also outside the state. This, however, but comes to this: That the power existed to prevent sales of liquor, even when brought in from without the state, and yet there was no authority to prevent or regulate the carrying on of the accessory business of soliciting orders within the state. Aside, however, from the anomalous situation to which the proposition thus conduces, we think to maintain it would be repugnant to the plain spirit of the Wilson act. That act, as we have seen, manifested the conviction of Congress that control by the states over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose, the regulation expressly provided that intoxicating liquors coming into a state should be as completely under the control of a state as if the liquor had been manufactured therein, it would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one state can, by virtue of the commerce clause, go himself or send his agent into such other state, there, in defiance of the law of the state, to carry on the business of soliciting proposals for the purchase of intoxicating liquors.

"Passing from these general considerations, let us briefly more particularly notice some of the arguments relied upon.

"As we have stated, decisions of this court interpreting the Wilson act have held that that law did not authorize state power to attach to liquor shipped from one state into another before its arrival and delivery within the state to which destined. From this it is insisted, as none of the liquor covered by the proposals in this case had arrived and been delivered within South Dakota, the power of the state did not attach to the carrying on of the business of soliciting proposals, for, until the liquor arrived in the state, there was nothing on which the state authority could operate. But this is simply to misapprehend and misapply the cases and to misconceive the nature of the act done in the carrying on the business of soliciting proposals. The rulings in the previous cases to the effect that, under the Wilson act, state authority did not extend over liquor shipped from one state into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson act, even if it lawfully could have done so, to authorize one state to exert its authority in another state by preventing the delivery of liquor embraced by transactions made in such other state. The proposition here relied on is widely different, since it is that, despite the Wilson act, the state of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting pro-

posals for the purchase of liquors, because the proposals related to liquor situated in another state. But the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course, if the owner of the liquor in another state had a right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce. But, as by the Wilson act, the power of South Dakota attached to intoxicating liquors, when shipped into that state from another state, after delivery, but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other states, cannot be held to be repugnant to the commerce clause of the constitution, because directly or indirectly burdening the right to sell in South Dakota—a right which, by virtue of the Wilson act, did not exist.

"2. Nor is there merit in the arguments based on the ruling in *Vance v. Vandercreek*, 170 U. S. 438, 18 Sup. Ct. Rep. 674, 42 L. ed. 1100. The controversies in that case and the matters therein decided were recapitulated in *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 Sup. Ct. Rep. 552, 49 L. ed. 925, as follows:

"In *Vance v. Vandercreek*, 170 U. S. 438, 18 Sup. Ct. Rep. 674, 42 L. ed. 1100, the operation of a liquor law of South Carolina was considered. By the act in question the state of South Carolina took exclusive charge of the sale of liquor within the state, appointed its agents to sell the same, and empowered them to purchase the liquor which was to be brought into the state for sale. The fact was that, by the act in question, the state of South Carolina, instead of forbidding the traffic in liquor, authorized it, and engaged in the liquor business for its own account, using it as a source of revenue. The act, in addition, affixed prerequisite conditions to the shipment into South Carolina from other states of liquor to a consumer who had purchased it for his own use, and not for sale. Considering the Wilson act and the previous decisions applying it, . . . in so far as it took charge in behalf of the state of the sale of liquor within the state, and made such sale a source of revenue, was not an interference with interstate commerce. In so far, however, as the state law imposed burdens on the right to ship liquor from another state to a resident of South Carolina, intended for his own use, and not for sale within the state, the law was held to be repugnant to the constitution, because the Wilson act, whilst it delegated to the state plenary power to regulate the sale of liquors in South Carolina shipped

into the state from other states, did not recognize the right of a state to prevent an individual from ordering liquors from outside of the state of his residence for his own consumption, and not for sale.'

"It having been thus settled that under the Wilson act a resident of one state had the right to contract for liquors in another state and receive the liquors in the state of his residence for his own use, therefore, it is insisted, the agent or traveling salesman of a non-resident dealer in intoxicating liquors had the right to go into South Dakota and there carry on the business of soliciting from residents of that state orders for liquor, to be consummated by acceptance of the proposals by the nonresident dealer. The premise is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a state to prevent a resident from ordering from another state liquor for his own use, and the plenary authority of a state to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court. That a state may regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents is certain: *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. ed. 297, 5 Int. Com. Rep. 610. But that this power to prohibit does not extend to preventing a citizen of one state from making a contract of insurance in another state is also settled: *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832. In *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. Rep. 238, 46 L. ed. 324, the court was called upon to consider these two subjects—that is, the power of the state, on the one hand, to forbid the making within the state of contracts of insurance with unauthorized insurance companies, and the right of the individual, on his own behalf, to make a contract with such insurance companies in another state as to property situate within the state of residence. The case was brought to this court to review a conviction of Nutting, a citizen of Massachusetts, for having negotiated insurance with a company not authorized to do business in Massachusetts, contrary to the statutes of that state. Briefly, the facts were that Nutting, an insurance broker, solicited in Massachusetts a contract of insurance on property belonging to McKie situated in that state. The proposal was accepted outside of the state of Massachusetts and the policy also issued outside of that state. The contention of the plaintiff in error was that, as the contract was consummated outside of Massachusetts, the conviction was repugnant to the fourteenth amendment, because the acts done did not fall within the general principle announced in *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. ed. 297, but were within the ruling in *Allgeyer v. Louisiana*. The conviction was af-

firmed, not because the contract was consummated in Massachusetts, but upon the ground that the right of an individual to obtain insurance for himself outside of the state of his residence did not sanction the conduct of Nutting, as an insurance broker, in carrying on the business in Massachusetts of soliciting unauthorized insurance. After reviewing the Hooper and Allgeyer decisions and pointing out that there was no conflict between the two cases, the court said:

“‘As was well said by the supreme judicial court of Massachusetts: ‘While the legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons’: *Commonwealth v. Nutting*, 175 Mass. 154, 78 Am. St. Rep. 483, 55 N. E. 895.’

“The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the power of the state in respect thereto. As we have seen, the right of the states to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson act is absolutely applicable to liquor shipped from one state into another, after delivery, and before the sale in the original package. It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of nonresident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the state ‘would not have thought of making’ must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor.

“3. The contention that the law of South Dakota was a taxing law, and not a police regulation, and therefore not within the purview of the Wilson act, is in conflict with the purpose of that law as interpreted by the supreme court of South Dakota: *State v. Buechler*, 10 S. D. 156, 72 N. W. 114. Besides, the contention is foreclosed by the ruling of this court in *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 Sup. Ct. Rep. 552, 49 L. ed. 925.

“Affirmed.

“The chief justice dissents.”

McVAY v. TOUSLEY.

[20 S. D. 258, 105 N. W. 932.]

MORTGAGE—Writing in Form of Trust Deed.—An instrument by which land is conveyed to the grantee as trustee to secure the payment of a note given by the grantor to a third person, and which provides that "this trust deed or mortgage may be foreclosed," etc., and that a reconveyance shall be made on payment of the indebtedness, is a mortgage, governed by the rules of law applicable to mortgages. (p. 930.)

MORTGAGE — Unrecorded Assignment.—Purchasers and Encumbrancers for value, without notice other than is given by the records, are protected by the satisfaction of a mortgage executed by the mortgagee, where there is no assignment of the mortgage on record, though the debt was transferred prior to the recording of such satisfaction and the transferee has not been paid. (p. 931.)

MORTGAGE—Discharge of Record—Right of Assignee.—When a conveyance to secure the payment of a note provides, on payment of the indebtedness, for a reconveyance of the land by the grantee as trustee, a satisfaction of the indebtedness, recorded by the trustee, discharges the mortgage lien, although the mortgage and note are not surrendered to the grantor, and estops an assignee of the note and mortgage from claiming under the lien. (pp. 931, 932.)

MORTGAGE FORECLOSURE—Notice of Lis Pendens.—When a conveyance given to secure a note provides, on payment of the indebtedness, for a reconveyance by the grantee as trustee, and after the execution and recording of a reconveyance the assignee of the mortgage and note institutes foreclosure proceedings which he subsequently dismisses, the notice of lis pendens therein being canceled of record, subsequent purchasers of the land acquire it free of the mortgage lien as against a subsequent assignee of the note and mortgage. (p. 934.)

LIS PENDENS.—The Filing of a Statutory Notice of Pendency does not constitute constructive notice of anything more than the pendency of the action, and when the action has ceased to be pending under the law of lis pendens, the statutory notice ceases to be effectual for any purpose. (p. 935.)

W. Y. Quigley and N. J. Cranmer, for the appellants.

Gamble, Tripp & Holman, for the respondents.

261 HANEY, J. Early in 1886 the defendant, Frances L. Tousley, and R. C. Tousley, her husband, who resided in Turner county, Dakota Territory, now one of the counties of this state, and who owned certain real property therein, executed and delivered to J. M. Dunn, a loan broker, of Le Mars, Iowa, a note for one thousand dollars, payable to the order of P. M. Dunn, the wife of J. M. Dunn, at Boston on May 1, 1891, and the following instrument, which was duly acknowledged and recorded in the proper county: "This indenture, made this fifteenth day of March, 1886, by and between Frances L. Tousley and R. C. Tousley, her husband, of the county of Turner, territory of Dakota, party of the

first part, and J. M. Dunn, of Le Mars, and state of Iowa, trustee, party of the second part, and P. M. Dunn, party of the third part, witnesseth: That said party of the first part for and in consideration of the sum of one thousand dollars, in hand paid by the said party of the third part, the receipt whereof is hereby acknowledged, have granted and sold, and do by these presents, grant, bargain, sell, convey and confirm unto the said party of the second part, or his successor in trust, forever, a certain tract or parcel of land situated in the county of Turner and territory of Dakota, described as follows, to wit: Provided, always, and these presents are upon the following express conditions, to wit: That said party of the first part shall pay to the said party of the third part, his heirs or assigns, the sum of one thousand dollars, in gold coin of the United States, of present standard weight, value, and fineness, on the first day of May, A. D. 1891, with interest on said sum until paid, at the rate of seven per cent per annum, payable semi-annually, on the first days of November and May in each year, according to the tenor and effect of the promissory note and coupons attached, of the said first party dated March 15, 1886, payable at Boston, Mass. It is further agreed, that if the party of the first part shall fail to perform any of the covenants in the note or in this instrument, or do, or fail to do anything whereby the security of this loan of money may be lessened, then this mortgage or trust deed shall become due and collectible at once at the option of the holder, and may be foreclosed for the full amount, together with interest, costs, taxes, insurance, and any other sums advanced ²⁶² for expenses incurred on account of the party of the first part for whatsoever purpose and any advances so made shall draw interest at twelve per cent per annum. It is further agreed, that this mortgage or trust deed may be foreclosed by action, or by advertisement, as provided by chapter 28 of the Code of Civil Procedure of the Revised Code of Dakota, of 1877, and this paragraph shall be deemed as authorizing and constituting the power of sale as provided in said chapter; and it is agreed, should foreclosure be commenced, an attorney's fee of one hundred dollars shall be allowed for plaintiff's attorney and shall be collected as part of the costs of foreclosure. Finally, the said first party hereby expressly agrees to comply with and perform all the foregoing conditions, and upon compliance therewith these presents to be void, otherwise to be and remain in full force and effect, and in case of the death, absence, inability or refusal to act of said party of the second part, then David W.

Morris, of Grinnell, Iowa, shall be and is hereby appointed and made successor in trust to the trustee hereinbefore named, with like powers and authority. A reconveyance of the premises is to be made at the expense of the party of the first part on full payment of the indebtedness."

On December 9, 1887, the Tousleys paid J. M. Dunn \$1,074.10, to extinguish their obligation, receiving the following instrument, which was duly acknowledged and recorded in the proper county on December 12, 1887.

"RELEASE DEED.

"Know all men by these presents, that I, J. M. Dunn, trustee, of the county of Plymouth and state of Iowa, for and in consideration of one dollar, and for other good and valuable considerations, the receipt whereof is confessed, do hereby remise, convey, release and quitclaim, unto Frances L. Tousley and husband, of the county of Turner and territory of Dakota, all the right, title, interest, claim, or demand whatsoever I may have acquired in, through, or by a certain trust deed, bearing date the fifteenth day of March, A. D. 1886, and recorded in the recorder's office of Turner county, in the territory of Dakota, in Book K of Land Mortgages, page 23, to the premises herein described as follows, to wit: The northwest quarter of section No. fifteen, in township ninety-nine, north, of range No. fifty-four west, ²⁶³ of the 5th P. M., together with all the appurtenances and privileges thereunto belonging or appertaining. Witness my hand and seal this ninth day of December, A. D. 1887.

"J. M. DUNN, Trustee. [Seal.]"

Prior to the execution and recording of this instrument the note and trust deed or mortgage had been transferred by the Dunns to John Jeffries & Sons, by them to Michael O'Brien, and by him to Timothy O'Brien, the plaintiff's testator; all of such transferees being residents of Massachusetts. Subsequent to the execution and recording of the trustee's reconveyance of release—the instrument last above set forth—no assignment of the trust deed or mortgage having been recorded, the defendant Vander Wilt acquired title to the mortgaged premises, and the defendant Brown acquired title to a mortgage thereon for value, without notice of Jeffries & Sons', Michael O'Brien's, or Timothy O'Brien's rights, except as the same may have been disclosed by the records of the county where the land was situated. Thereafter this action was instituted to foreclose the trust deed or mortgage, re-

sulting in a judgment in favor of the plaintiff, from which, and an order denying their application for a new trial, the defendants Vander Wilt and Brown appealed.

This so-called trust deed is substantially the same in form as the one in *Langmaack v. Keith*, 19 S. D. 351, 103 N. W. 210. concerning which this court said: "The writing signed by the owner of the land is only evidence of what the parties intended. It is immaterial what name may have been given such writing. The parties made a contract. The contract was a mortgage, and it must be governed by the rules of law applicable to such a contract. The owner of the land was the mortgagor, the payee of the bond or original owner of the indebtedness was the mortgagee, and the transferee of the indebtedness must be regarded as the assignee of the mortgage." So in this case Mrs. Tousley must be regarded as the mortgagor, Mrs. Dunn as the mortgagee, Jeffries & Sons, Michael O'Brien and Timothy O'Brien as transferees in the order named, and J. M. Dunn as an unnecessary and unfortunate party to the paper, upon the extent of whose authority depends the solution of the perplexing problems presented by this and other actions resulting from his misconduct. When J. M. Dunn received the mortgagor's money ²⁶⁴ and executed the reconveyance or release, the indebtedness was owned by the plaintiff's testator, the note and mortgage were in his possession, and he neither knew of that instrument's execution nor did he or his personal representative ever receive the money so collected by the trustee. The Tousleys may have been negligent in paying Dunn without insisting upon a surrender of the note, but that is not material, if the appellants were protected by the record upon which they relied when their rights were acquired. "Where a mortgage is made, title remains in the mortgagor, and the rights of the creditors are to be enforced by foreclosure in one of the methods prescribed by the statutes": *Langmaack v. Keith*, 19 S. D. 351, 103 N. W. 210. Had the mortgagor in this case made default, her title could not have been extinguished otherwise than by one of those methods. The trustee was not authorized to sell and convey the premises upon the mortgagor's failure to perform her obligations. A lien was created, the enforcement of which was provided for by the law and no trustee was needed.

But what were his powers and duties in the event of payment? The mortgage declares: "A reconveyance of the premises is to be made at the expense of the party of the first part on full payment of the note." By whom? Evidently the

trustee. Though title did not pass, and no reconveyance was necessary, the mortgage lien was created by words purporting to convey the title, and authority to reconvey should be construed as authority to release the lien. Inapt and inappropriate language was employed to create the lien and to provide for its extinguishment, but there can be no doubt as to the real intent of the parties and the legal effect of the contract. A mortgage was made by the purported conveyance of the premises to a trustee, and was to be released by a purported reconveyance of the same. So it follows that the trustee was authorized by the terms of the mortgage to extinguish the lien upon full payment of the indebtedness, and, if the owner of the indebtedness had received the amount paid by the Tousleys, the mortgage certainly would have been properly satisfied. In other words, the mortgage lien was released of record in the manner authorized by the instrument which gave it existence, and the record upon which ²⁶⁵ the appellants relied when their rights were acquired disclosed that authority.

Can the assignee of the mortgage, the owner of the indebtedness, be heard to say, as against purchasers and encumbrancers for value, that the debt was not in fact paid? Purchasers and encumbrancers for value, without notice other than is given by the records, are protected by the satisfaction of a mortgage executed by the mortgagee, where there is no assignment of the mortgage on record, though the debt was transferred prior to the recording of such satisfaction and the transferee has not been paid: *Citizens' Bank v. Shaw*, 14 S. D. 197, 84 N. W. 779. This is because the record discloses a discharge of the mortgage by one appearing from the record itself to be authorized to discharge it. It is a just rule because the assignee of a mortgage may protect his rights by recording an assignment. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer": Rev. Civ. Code, sec. 2442. Any other rule would render the recording of satisfactions ineffectual and valueless. "Where the reason is the same, the rule should be the same": Rev. Civ. Code, sec. 2410. The record upon which appellants relied disclosed a mortgage which had been satisfied by the person and in the manner authorized by the instrument itself. Had Timothy O'Brien received the money paid to Dunn, the record would have been the same. It was not so received. Who shall suffer? Had no trustee been named, and P. M. Dunn, the mortgagee, had executed the

release, the assignee could not enforce the lien because he failed to record an assignment, because the mortgage was released by the person appearing to have authority to release it: *Langmaack v. Keith*, 19 S. D. 351, 103 N. W. 210. This plaintiff cannot enforce the lien, because it was discharged by the person appearing of record to have authority to discharge it. Having accepted security which clothed J. M. Dunn with authority to release it, and having provided the opportunity for him to make a record which induced the appellants to part with their property, the assignee of this mortgage should now be estopped from claiming any lien upon the premises in question. It is therefore immaterial whether the mortgagee in fact authorized the release, or whether ²⁶⁶ the note was negotiable in this state, Iowa, or Massachusetts. The right of the plaintiff to recover upon the note as against the makers is not involved. We are dealing with the effect of this recorded satisfaction, which must be determined by the law of this state. As against the appellants, such satisfaction extinguished the mortgage lien, and it should have been so adjudged in the court below, unless they are to be charged with record notice of plaintiff's rights by reason of an action instituted by Michael O'Brien on May 31, 1890.

It appears from the decision of the learned circuit court that the Tousleys, in consideration of \$1,650, conveyed the mortgaged premises by warranty deed to Truman Hall, December 8, 1887, which deed was recorded December 9, 1887; that Hall and wife, in consideration of \$3,000, conveyed the premises by warranty deed to Edward J. Gotthelf, May 6, 1899, which deed was recorded May 6, 1902; that Gotthelf and wife, in consideration of \$3,500, conveyed the premises by warranty deed to C. Van de Steeg, Jr., July 26, 1899, which deed was recorded August 9, 1899; that Van de Steeg, Jr., and wife, in consideration of \$2,750, mortgaged the premises to E. J. Gotthelf, July 26, 1899, which mortgage was recorded August 9, 1899; that Gotthelf, in consideration of \$2,750, assigned said mortgage to C. W. Davis, March 23, 1900, which assignment was recorded March 24, 1900; that Davis, in consideration of \$2,000, assigned said mortgage to the defendant and appellant Brown, March 15, 1901, which assignment was recorded March 15, 1901; that Van de Steeg, Jr., and wife, in consideration of \$3,500, conveyed the premises by warranty deed to H. Van Pelt March 14, 1900, which deed was recorded March 17, 1900; that Van Pelt and wife, in consideration of \$4,000, conveyed the premises by warranty deed to the defendant and appellant Vander Wilt, December

24, 1900, which deed was recorded December 29, 1900; and "that at the time the said Truman Hall and other grantees and mortgagees under him, above named, took their conveyances, mortgage, and assignments thereof, none of them had any notice of the rights of the said Michael O'Brien or his assigns, plaintiff's testator, other than as was disclosed by the public records of this ²⁶⁷ county." It also appears from the decision that Michael O'Brien commenced an action to foreclose the mortgage sought to be foreclosed in this action May 31, 1890, making the defendants Frances L. and R. C. Tousley parties defendant therein; that in said action on said date he filed a complaint in the proper court, and a notice of the pendency of said action in the office of the register of deeds of the proper county; and that, no trial of said action ever having taken place, on motion of the plaintiff's attorneys, the same was dismissed by an order filed and entered of record February 2, 1897. Though not alluded to by the circuit court in its decision, it appears from the evidence there are no marginal notations on the *lis pendens* record where notice of pendency of the O'Brien action is recorded, "but on the left-hand side of the page, said book being in the form of a double page, there is found this order of the court, under the title of the case: 'The above-entitled action having been dismissed by the plaintiff herein, now, on motion of N. J. Cramer, attorney for the defendants in this action, excepting J. M. Dunn, it is hereby ordered that the notice of pendency of said action, filed in the office of the register of deeds of the county of Turner and territory of Dakota, now state of South Dakota, be, and the same is, hereby canceled of record, and the register of deeds of said county of Turner is hereby ordered and directed to cancel of record said notice of pendency of said action in his office upon a certified copy of this order being filed in his office. Dated March 2, 1897. By the Court: E. G. Smith, Judge. Attest: R. J. Way, Clerk.' And then follows the certificate of the clerk, and the same appears to have been filed in the office of the register of deeds, March 10, 1897. Said order is a certified copy of the original order recorded in the clerk's office dismissing the *lis pendens*, and filed in the register of deeds office March 10, 1897, at 4 o'clock P. M."

Hall, the immediate grantee of the mortgagor, may not have been a bona fide purchaser because his rights were acquired prior to the executing and recording of the release, but the appellants and all the parties subsequent to Hall, through whom appellants' rights were derived, purchased

for value, relying upon the recorded release, without notice of the outstanding equity now sought to be ²⁶⁸ established other than what the law imputed to the pendency of the O'Brien action, which was commenced and dismissed before Hall's immediate grantee acquired the property. When Gotthelf and his grantees, including the appellants, purchased the premises, the record disclosed a canceled notice of pendency containing the names of the parties, the object of the action, and a description of the property affected. The object of the action was to cancel the Dunn release and foreclose the mortgage. If anyone had read the notice and pursued the inquiry it suggested, he would have found this order made by the court where the action was formerly pending: "Now, on motion of R. J. Gamble and R. B. Tripp, attorneys for the plaintiff in the above-entitled action, it is hereby ordered that the same action be, and the same is, hereby dismissed at the cost of the plaintiff, and with costs to the defendant, Truman Hall." Would he not have been justified in concluding that the O'Brien claim was either settled or abandoned? The dismissal was on motion of the plaintiff. Neither party could maintain an appeal. The right to bring another suit for the same cause, though it may have remained, was not expressly reserved. Everything indicated that the litigation was ended, and, if it was, an additional persuasive reason was disclosed by the record for believing that the mortgage was satisfied. This condition of the record had existed for more than two years when the appellants acquired their rights. Under the rules relating to constructive notice, this canceled notice of pendency should be regarded as strengthening rather than weakening appellant's position.

But the precise question here involved is not one of constructive notice. The notice of pendency of action provided for by our statute (Rev. Code Civ. Proc., secs. 108, 109) is merely intended to afford a convenient and effectual method of enforcing the common-law doctrine of *lis pendens*, the theory of which is "that there can be no innovation in the proceedings so far as to prejudice the rights of the plaintiff." *Lis pendens* is simply a rule to give effect to the rights ultimately established by the judgment: *Kohn v. Lapham*, ²⁶⁹ 13 S. D. 78, 82 N. W. 408; *Lamont v. Cheshire*, 65 N. Y. 30. It merely precludes any change in the subject matter to the prejudice of the plaintiff during the pendency of the action, and the filing of the statutory notice is designed to effect that result, not to give constructive notice of the plain-

tiff's claim, as does the recording of a deed or mortgage. Whatever effect actual notice of a pending action may have, it is clear that the filing of a statutory notice of pendency does not constitute constructive notice of anything more than the pendency of the action, and, when the action has ceased to be pending under the law of *lis pendens*, the statutory notice ceases to be effectual for any purpose. In a case analogous to the one at bar, the supreme court of Colorado correctly states the purpose and effect of such a notice thus: "The office it had to perform was to give constructive notice of the former suit to all purchasers *pendente lite*, and thereby bind them by any decree that might be rendered therein. In other words, its purpose was to prevent any alienation of the subject matter in litigation, pending the action, that could prejudice the plaintiff's rights, or impair or defeat any interest she should establish as against the defendants in the suit, and does not constitute such notice of plaintiff's equity as would affect the conscience of a purchaser": *Pipe v. Jordan*, 22 Colo. 392, 55 Am. St. Rep. 138, 45 Pac. 371. The former suit having been dismissed, and no final judgment rendered against the defendant therein, more than two years having elapsed when appellants acquired their rights, and as the present action cannot be regarded as a revival or continuation of the former one, it is clear that appellants cannot be affected by the record of the O'Brien action. So, in any view of the facts as found by the learned circuit court, we think the appellants were purchasers for value without notice, and that their rights are paramount to those of the plaintiff.

The judgment and order appealed from are reversed.

The Law of Lis Pendens is the subject of a note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 853. *Lis pendens* operates as notice only during the pendency of the suit in which it is filed: *Pipe v. Jordan*, 22 Colo. 392, 55 Am. St. Rep. 138. Either the plaintiff or the defendant may lose the benefit of the pendency of his *lis pendens* by failure to prosecute with due diligence: *Bridger v. Exchange Bank*, 126 Ga. 821, 115 Am. St. Rep. 118. And a voluntary abandonment or discontinuance of an action destroys the *lis pendens* filed therein: *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472.

An Assignee of a Mortgage Who Neglects to Record the Assignment may be estopped to assert the mortgage against persons without notice of the assignment. Hence the release of the mortgage of record by the original mortgagee protects a bona fide purchaser or encumbrancer having no notice of the assignment: *Bautz v. Adams*, 131 Wis. 152, 120 Am. St. Rep. 1030. To the same effect see *Marling v. Mommensen*, 127 Wis. 363, 115 Am. St. Rep. 1017, and cases cited in the cross-reference note thereto.

COMMERCIAL STATE BANK v. KENDALL.

[20 S. D. 314, 106 N. W. 53.]

HOMESTEAD—Fraudulent Conveyance.—If the transfer of the homestead by a husband to his wife is not colorable nor to enable him to withhold the same from his creditors in case of future abandonment, the conveyance is not rendered fraudulent by the fact that he soon afterward leaves his family in the occupancy of the premises, goes to a remote county, and after filing on a government homestead is joined by his family. (p. 936.)

HOMESTEAD—Fraudulent Transfer—Fraud on Creditors cannot be Predicated upon the Disposition of a Homestead.—The homestead of a debtor is not an asset susceptible of fraudulent transfer. (p. 937.)

Hosmer H. Keith and W. R. Holly, for the appellant.

A. C. Biernatski, for the respondents.

314 FULLER, P. J. This appeal is from a judgment for defendants in an action to set aside a warranty deed of the homestead from a husband to his wife, on the ground that such conveyance was made to defraud plaintiff, a creditor of the grantor, and the material facts established by the evidence, and found by the trial court, may be briefly stated as follows: In the year 1898 the premises in question, consisting of a house and two lots in the city of Salem, now worth sixteen hundred dollars, were purchased by the defendant Ponsonby Kendall, and had been continuously occupied as the homestead of himself and family for more than five years prior to January 18, 1904, when he conveyed the same to his wife, Mary M. Kendall, for the purpose of vesting in her an absolute fee simple title, and without any intention to defraud his creditors.

In view of the undisputed evidence plainly showing that the transfer of this homestead to the wife was not colorable, nor for **315** the purpose of enabling the husband to withhold the same from his creditors in case of future abandonment, such conveyance was not rendered fraudulent by the fact that he soon afterward left his wife and children in the occupancy of the premises, and went to a remote county to engage in the practice of his profession, and, after filing on a government homestead, was joined by his family several months later. The facts disclosed by this record fall far short of bringing the case within the doctrine announced in *Kettleschlager v. Ferriek*, 12 S. D. 455, 76 Am. St. Rep. 623, 81 N. W. 889, where an action was pending against the grantor when he executed a deed to his wife pursuant to a

confessedly secret agreement between the parties thereto that she was to hold the naked title for his exclusive benefit, so that they might defeat the claims of all existing and subsequent creditors after the premises had ceased to be impressed with the homestead character. According to the intention of both parties to that transaction, the property abandoned as a homestead still belonged to Ferriek, the subterfuge, and in recognition of the axiom that creditors are never injured by the transfer of exempt property we say in the opinion: "True it is, as a general rule, that creditors are not injured by the conveyance of the homestead without consideration; but when the transfer is such that the property has not ceased to belong to the grantor, and the homestead right thereto has been abandoned, both by the grantor and grantee, and another homestead acquired by them independently of the former, the statutory exemption right, thus fraudulently impressed with a secret trust, ceases to exist as to the premises first occupied, and a creditor made such by the wrongful acts of the parties to such deed has the right to interfere."

As fraud upon creditors cannot be predicated upon the disposition of the homestead, the husband had a right to vest the entire estate in his wife, and, such being his honest intention, a resulting trust in favor of plaintiff was not created by the conveyance: *Bates v. Callender*, 3 Dak. 256, 16 N. W. 506; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96; *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069; *Balz v. Nelson*, 171 Mo. 682, 72 S. W. 527; *Vaughan v. Thompson*, 17 Ill. 78; *Smith v. Rumsey*, 33 Mich. 183; *Skinner v. Jennings*, 137 Ala. 295, 34 South. 622; ³¹⁶ *Delashmut v. Trau*, 44 Iowa, 613; *Kvello v. Taylor*, 5 N. D. 76, 63 N. W. 889; *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907; *Roark v. Bach*, 116 Ky. 457, 76 S. W. 340; *Bank of Bladen v. David*, 53 Neb. 608, 74 N. W. 42; *Keith v. Albrecht*, 89 Minn. 247, 99 Am. St. Rep. 566, 94 N. W. 677. The homestead of the debtor not being an asset susceptible of fraudulent transfer, it was not incumbent upon the defendants to refute the allegation that the deed was executed to hinder and delay plaintiff in the collection of its unsecured claim against the grantor for office rent; but their testimony admitted over objection was competent as tending to prove an antecedent and steadfast purpose to alienate the property by vesting an absolute title in the wife.

This conclusion being decisive of the case, the judgment appealed from is affirmed.

The Transfer of a Homestead cannot ordinarily be fraudulent as to the grantor's creditors, for they have no legal claims upon it: *Davis v. Feltman Co.*, 112 Ky. 293, 99 Am. St. Rep. 289; *Keith v. Albrecht*, 89 Minn. 247, 99 Am. St. Rep. 566, and cases cited in the cross-reference note thereto.

A Husband may Convey a Homestead to his wife: *Johnson v. Brauch*, 9 S. D. 116, 62 Am. St. Rep. 857; *Kindley v. Spraker*, 72 Ark. 228, 105 Am. St. Rep. 32; *Lininger v. Helpenstell*, 229 Ill. 369, 120 Am. St. Rep. 264; and the property does not thereby lose its homestead character: *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58; *Turner v. Bernheimer*, 95 Ala. 241, 36 Am. St. Rep. 207. The fact that it was his purpose to place the home beyond the reach of his creditors does not preclude her from claiming the benefit of the homestead statute: *McPhee v. O'Rourke*, 10 Colo. 301, 3 Am. St. Rep. 579.

HANNICKER v. LEPPER.

[20 S. D. 371, 107 N. W. 202.]

ADJOINING OWNERS—**Removal of Lateral Support.**—The Negligence of a lot owner in making an excavation for buildings or leaving it exposed to inclement weather for an unreasonable time before putting in foundation walls renders him liable to adjacent proprietors for injuries to their buildings from the caving in of the bank. (p. 940.)

Taubman, Williamson & Herreid, for the appellants.

L. W. Crofoot, for the respondents.

372 FULLER, P. J. Plaintiff, the owner of a city lot and a two-story frame building situated thereon, brought this action against defendants to recover damages occasioned by their alleged negligence in excavating for the purpose of a building to be erected on a coterminous lot pursuant to a contract with the owner. The acts complained of are stated in the complaint as follows: "That on or about the first day of July, 1904, the defendants commenced work under said contract, and excavated said lot 1 to the depth of ten feet, said excavation covering the entire width of said lot 1, and **373** extending from Main street westward, beyond the rear of plaintiff's building on lot 2; and this plaintiff alleges that the said defendants performed their work under said contract in a negligent and unskillful manner, by making said excavation, and allowing the same to stand for a long period of time without constructing the foundation wall therein or taking any reasonable precaution to sustain the land of the plaintiff's lot, and without putting any props or other supports under said plaintiff's building, but left the natural

walls of dirt exposed for an unreasonable length of time to storms and rains and to floods of water shed from the adjoining building onto the walls of said excavation, whereby the south wall of said excavation became soft and caved into said excavation, carrying the dirt from said plaintiff's lot, and depriving the north sill of the plaintiff's building of the support of its foundation, whereby said sill settled and the entire building became racked out of shape, the timbers displaced and settled so that the said building could not be restored to its former condition, and the plastering and paper on the walls of said building were cracked and destroyed, the doors and windows twisted out of shape, and the building otherwise injured and damaged." That the want of ordinary prudence and the exercise of reasonable care in making the excavation and building the wall would render the defendants liable to respond in damages to plaintiff for any injury occasioned to his building as well as to the land itself was the theory upon which the action was tried. Over the objection of counsel for defendants, testimony tending to show that the building was damaged by reason of the removal of adjacent ground and negligence in failing to build the foundation wall within a reasonable time was introduced at the trial and submitted to the jury under the following instruction, which is urged as error: "The defendants had the right to make said excavation, and had the right to remove the dirt from the full length and breadth of the Workman lot, and were not liable to plaintiff, providing they used ordinary care and skill to prevent unnecessary injury to the lot and building of plaintiff; the rule of law being that every man must so use his property as not to unnecessarily injure the property of his neighbor, and if, in making an excavation, which a person has a right to make, he do it in a negligent manner, he will be liable for ³⁷⁴ the full consequences of his act, not only for injury to the soil itself, but also to the improvements and buildings thereon."

It is conceded that plaintiff had ample notice as to the time the work would begin, and it was shown by his own undisputed testimony that the lot was in practically the same condition and nearly as valuable as it was before the excavation was made. It is therefore evident that the verdict of two hundred dollars in favor of plaintiff was based principally on testimony relating to the damaged condition of the building and the evidence, if competent, is sufficient to sustain such finding by the jury and the judgment accordingly entered. In apparent conformity with the common-law rule,

section 291 of the Revised Civil Code is as follows: "Each co-terminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavation." It being thus undisputed that reasonable notice was given, and the excavation proper and for an authorized purpose, no damage was recoverable under the express terms of the foregoing statutory provision if the defendants used ordinary care and skill and took reasonable precaution to sustain plaintiff's adjoining land. In view of the fact that the word "land" is sometimes employed synonymously with the term "real estate" and considered broad enough to comprehend that which is placed thereon by human hands, our legislature has excluded buildings by adopting the following definition which apparently prevailed at common law: "Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance": Rev. Civ. Code, sec. 187; Bouvier's Law Dictionary. Manifestly the natural support of plaintiff's land by that of the adjoining proprietor is all that he can rightfully claim under section 291, *supra*, but in accordance with the universally recognized principle requiring every man to use his own property in a manner that will prevent unnecessary injury to that of his neighbor, it was the duty of the defendants to exercise ordinary care, ³⁷⁵ both as to the ground and the superstructure thereon. Consequently, if plaintiff's property, including the building, was injured without his fault and by reason of negligence on the part of defendants in making the excavation or leaving it exposed to inclement weather for an unreasonable time before putting in the foundation walls, their liability to respond in damages appears to be well settled: *Ulrick v. Dakota Loan & Trust Co.*, 2 S. D. 285, 49 N. W. 1054. The headnote, fully supported by the opinion, in *Larson v. Metropolitan Street Ry. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. 416, 16 L. R. A. 330, is as follows: "The right to remove the lateral support of adjacent property, carrying buildings, is subject to the qualification that the excavator shall use ordinary care and cause no unnecessary damages to such buildings." To the same effect are the following cases: *City of Quincy v. Jones*, 76

Ill. 231, 20 Am. Rep. 243; Davis v. Summerfield, 131 N. C. 352, 92 Am. St. Rep. 781, 42 S. E. 818; Myer v. Hobbs, 57 Ala. 175, 29 Am. Rep. 719; Cooley on Torts, 595; 3 Kent's Commentaries, 437. While twelve different men might not concur on the conclusion reached by the jury before whom the action was tried, it is clear from the evidence that the trial court would not have been justified in holding as a matter of law that defendants were not guilty of negligence, or that they were free from liability on account of contributory negligence on the part of plaintiff.

Being thus satisfied that the verdict cannot be disturbed, and that the case was properly tried and submitted to the jury under instructions of which the defendants have no just cause for complaint, the judgment appealed from is affirmed.

Every Owner of Real Estate is entitled to have the soil preserved and supported in its natural condition, and the privileges of adjoining owners are so far limited that they may not so excavate or otherwise change the position of their land as to leave that of their neighbor less firmly supported: Farandis v. Great Northern Ry. Co., 41 Wash. 486, 111 Am. St. Rep. 1027. The right of lateral support, however, applies only to the land itself, and not to the buildings or other artificial structures thereon: Schultz v. Bower, 57 Minn. 493, 47 Am. St. Rep. 630. But this does not permit a land owner to carelessly or negligently excavate his lot so as to injure the buildings of adjacent proprietors: Booth v. Rome etc. R. R. Co., 140 N. Y. 267, 37 Am. St. Rep. 552; Gerst v. City of St. Louis, 185 Mo. 191, 105 Am. St. Rep. 580; Davis v. Summerfield, 131 N. C. 352, 92 Am. St. Rep. 781.

BARRY v. STOVER.

[20 S. D. 459, 107 N. W. 672.]

BILLS AND NOTES—Conflict of Laws.—The Negotiability of a note is determined by the law of the place where it is payable. (p. 943.)

HUSBAND'S AUTHORITY to Make or Indorse Paper in Wife's Name.—A woman who has knowledge that her husband is making loans, taking securities, and indorsing them in her name, and makes no objection thereto, will be deemed to have authorized him so to do. (p. 944.)

MORTGAGE FORECLOSURE—Conflict of Laws.—In determining what constitutes a valid defense to an action to foreclose a mortgage the court administers the law of the forum, although the validity and interpretation of the contract are controlled by the law of another state. (p. 944.)

MORTGAGE FORECLOSURE—Assignee of Non-negotiable Note.—An action to foreclose a mortgage, given to secure a non-negotiable note that has been assigned to the plaintiff, is without

prejudice to any setoff or other defense existing before notice of the assignment. (p. 944.)

HUSBAND AND WIFE—Estoppel to Deny His Authority.—The wife of a loan broker, who permits him to take and transfer notes and securities in her name, is bound by his act in receiving payment from a mortgagor who gave a non-negotiable note and mortgage to her which her husband has transferred to another. (p. 945.)

MORTGAGE—Unrecorded Assignment.—Where a Purchaser of Land subject to a mortgage pays the same to an authorized agent of the mortgagor without notice of unrecorded assignment of the note and mortgage, the mortgage is not enforceable against him by the assignee. (pp. 945, 946.)

Fellows & Cook, for the appellants.

Gamble, Tripp & Holman, for the respondent.

460 HANEY, J. The plaintiff's cause of action is thus stated in the complaint: "(1) That on the first day of November, 1886, the defendants Ezra E. Stover and Eliza I. Stover executed and delivered to one P. M. Dunn their promissory note conditioned to pay to the order of said Dunn seven hundred dollars, on the first day of November, 1891, with interest thereon at seven per cent per annum, payable semi-annually until due, and ten per cent per annum on the principal and interest after maturity. (2) That for securing the payment of said note the said Ezra E. and Eliza I. Stover executed and delivered to the said P. M. Dunn a mortgage or trust deed of the same date upon certain real property in the county of Aurora, described as follows, to wit: The southeast quarter of section 35 in township 105 north of range 64 west. (3) That on the twelfth day of November, 1886, the said mortgage or trust deed was recorded in the office of the register of deeds of Aurora county, in book 16 of Mortgages, on page 479. (4) That on the twenty-first day of March, 1888, the said Ezra E. and Eliza I. Stover conveyed the said real estate, subject to said mortgage, to the defendant, Peter McGovern, who thereupon agreed that the said note and mortgage should be paid at maturity. (5) That no part of the principal or interest of the said note and mortgage or trust deed has been paid except interest for the first year. (6) That the said Peter McGovern has, or claims to have, some interest or lien upon said real property, but that the same is subject to the lien of the said mortgage. (7) That on the sixth day of November, 1886, for a valuable consideration, the said P. M. Dunn indorsed, assigned, and set over the said note and mortgage or trust deed to John Jeffries and sons, who immediately thereupon indorsed,

assigned and set over the same to this plaintiff. (8) That no proceedings have been had at law or otherwise for the recovery of the debt secured by said mortgage or any part thereof." Peter McGovern, the only defendant who answered, denies that the note was indorsed or transferred to Jeffries & Sons by or with authority from P. M. Dunn, ⁴⁶¹ the payee, alleges that it was non-negotiable, and alleges that the obligation was extinguished April 16, 1888, by payment and the execution of a release of the mortgage by J. M. Dunn, the trustee named therein, which was recorded April 21, 1888. The lien here sought to be foreclosed was created by an instrument of substantially the same import as those involved in *Langmaack v. Keith*, 19 S. D. 351, 103 N. W. 210. and *McVay v. Tousley*, 20 S. D. 258, ante, p. 927, 105 N. W. 932, and for the reasons stated therein must be regarded as a mortgage.

The learned circuit court found: That the note and mortgage were delivered to J. M. Dunn at Le Mars, Iowa. That they were transferred to Jeffries & Sons for a valuable consideration, in November, 1886, after this indorsement was placed on the back of the note by P. M. Dunn: "Pay to the order of ——— without recourse." That at the time the papers were transmitted to Jeffries & Sons, J. M. and P. M. Dunn were husband and wife, living together as such at Le Mars, Iowa, where the former was engaged in the business of a loan broker, at which time the latter knew her husband was taking such loans and papers in her name and transferring them as these were transferred. That the note was negotiable under the laws of Iowa. That it was not negotiable under the laws of Massachusetts, and "that under the laws of the state of Massachusetts, there was no obligation on the part of the said P. M. Dunn, Jeffries & Sons or this plaintiff to notify the defendants Stover or McGovern of the transfer of said papers to protect themselves or any of them as against any payment of this note, coupons or trust deed to said J. M. Dunn." The evidence conclusively proves that the note and mortgage were delivered at Plankinton, Dakota (now South Dakota), but that fact is not material, because the note, by its terms, was payable at Boston, and the question of its negotiability is to be determined according to the law of the place where it was payable: Rev. Civ. Code, sec. 1255; 22 Am. & Eng. Ency. of Law, p. 1345.

It is undisputed that the note and mortgage were delivered by J. M. Dunn to Jeffries & Sons, for a valuable consideration, November 6, 1886, and it is immaterial whether

the note was indorsed by the payee or her husband, as the trial court found and the evidence ⁴⁶² disclosed that the latter was authorized by his wife's conduct to make such indorsement. The statement in the circuit court's decision relative to plaintiff's obligation under the law of Massachusetts to give notice of the transfer is wholly immaterial and irrelevant. It might be conceded that if this action were pending in the courts of Massachusetts the plaintiff would prevail, but it would not follow for that reason that he must prevail in this jurisdiction. The validity and interpretation of a contract may be controlled by the laws of a sister state, but in determining what shall be good defenses to actions instituted in this state its courts must administer its own laws and not those of other states: *Williams v. Haines*, 27 Iowa, 251. Our legislature has thus declared what defense may be interposed in such actions as the one at bar: "In case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any setoff or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due": Rev. Code Civ. Proc., sec. 81. The thing in action in this case is not a negotiable promissory note or bill of exchange, and the action thereon is without prejudice to any setoff or other defense existing before notice of the assignment.

The trial court found that the note has never been paid to P. M. Dunn, Jeffries & Sons, or the plaintiff, but the finding is not sustained by the evidence. There is a clear preponderance against it. It is undisputed that McGovern paid J. M. Dunn the full amount due and one year's advance interest April 16, 1888, whereupon the latter executed and acknowledged a discharge of the mortgage, which was recorded April 21, 1888. Payment to J. M. Dunn was payment to his wife. If, as found by the court and clearly shown by the evidence, Mrs. Dunn was bound by the act of her husband when he transferred the note, she was bound by his act when he received payment from McGovern. It clearly appears that she had no interest in the note; that her connection with the transaction was merely nominal—the same as though the name of a fictitious person had been employed. As was said by this court in *Pickford v. Peebles*, 7 S. D. 166, 63 N. W. 779, "had the note not ⁴⁶³ been transferred, Mrs. Dunn would have been bound by the discharge made by her agent in the manner it was made, and she could not have

foreclosed the mortgage as against Peebles after the execution of the release." So in this case, had there been no transfer, she could not have recovered upon the note or have foreclosed the mortgage as against McGovern after payment to her husband in the manner in which such payment was made. Hence, the finding that payment was not made to P. M. Dunn was not justified by the evidence. Whether payment to J. M. Dunn was payment to Jeffries & Sons or to the plaintiff depends upon whether Dunn was clothed with actual or ostensible authority to make the collection, upon which issue it will be assumed the evidence was conflicting, and the decision, so far as it found that no payment was made to either of those parties, will not be disturbed.

So, for the purpose of this appeal, there was payment to the payee of a non-negotiable note after its assignment, and the vital question is whether such payment was made before notice of the assignment. No assignment of the mortgage was recorded until long after the payment was made, and the only finding as to notice is as follows: "That at and prior to the execution of the said release deed the said defendant Stover had notice of facts sufficient to put him upon inquiry with reference to the transfer of the papers herein involved to this plaintiff." This is a conclusion of law rather than a finding of fact, but assuming that it is sustained by the evidence and that constructive notice of the assignment to the maker of the note was sufficient to protect the assignee against payment by the maker to the payee, the finding is not relevant to any issue in this action. There is no presumption of law that Stover imparted his information to McGovern. The latter cannot be charged with notice merely because it was possessed by the former. McGovern purchased the mortgaged premises relying upon the records, which disclosed that the indebtedness was payable to P. M. Dunn and that the mortgage was to be satisfied by the trustee named therein. By reason of such purchase he was entitled to pay the debt to protect his property. This court has held: "Where a real estate mortgage, given to secure a non-negotiable note, is assigned to a purchaser of the same, who fails to put such assignment on record, and ⁴⁶⁴ the mortgagee, notwithstanding such assignment, forecloses such mortgage, sells the mortgaged premises, and the subsequent grantee of the mortgagor redeems the same within the statutory time, without notice or knowledge of such assignment, but in good faith relying upon the record and the right of the mortgagee to so foreclose, such grantee and redemp-

tioner takes the title to the mortgaged premises free from the lien of such mortgage": *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43. "Where the reason is the same, the rule should be the same": Rev. Civ. Code, sec. 2410. Certainly the position of one who purchases mortgaged property should not be less favorable when he pays the outstanding debt than it is when he redeems after a foreclosure of the mortgage. In the case at bar the assignee neglected to file an assignment of the mortgage, payment was made to the mortgagee, and, in the absence of any finding upon which McGovern can be charged with notice of the assignment, the decision of the learned circuit court cannot be sustained.

As to what constitutes notice of an assignment no opinion is expressed. It will be found that the authorities are conflicting. Nor do we at this time determine whether the provisions of the mortgage respecting the trustee's powers do not preclude the plaintiff from questioning the validity of trustee's release, notwithstanding McGovern may have had actual notice of the assignment.

The judgment is reversed and a new trial ordered.

Whether or not a Husband is the Agent of His Wife is a question of fact, and cannot be presumed from the marital relation alone: *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, 83 Am. St. Rep. 512; *Hartman v. Thompson*, 104 Md. 389, 118 Am. St. Rep. 422. Where the issue is whether a husband was the agent of his wife with authority to sign her name to a check upon her bank account, evidence that he frequently signed checks on her account with her knowledge and consent is competent: *Hawkins v. Windhorst*, 77 Kan. 674, 127 Am. St. Rep. 445.

When a Principal has Placed an Agent in Such a Situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it: *General Cartage etc. Co. v. Cox*, 74 Ohio St. 284, 113 Am. St. Rep. 959; *Antrim Iron Works v. Anderson*, 140 Mich. 702, 112 Am. St. Rep. 434. The authority of an agent to do a particular act in connection with a transaction may be inferred from proof that his principal authorized or ratified similar acts in connection with past transactions intrusted to him under similar circumstances: *Harrison Nat. Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639. See, also, *Union Stock Yard etc. Co. v. Mallory etc. Co.*, 157 Ill. 554, 48 Am. St. Rep. 341.

Estoppel Against Married Women is the subject of a note to *Trimble v. State*, 57 Am. St. Rep. 169.

KEATOR v. FERGUSON.

[20 S. D. 473, 107 N. W. 678.]

VENDOR AND VENDEE—Time as Essence—Waiver.—Provisions in a contract for the purchase of land that time is of the essence are binding upon both parties, but if either seeks to take advantage thereof upon failure of the other to perform strictly, he must do so promptly upon such failure. (p. 950.)

VENDOR AND VENDEE—Time as Essence—Waiver.—If a vendor receives payment some twelve days after it is due without objection, and permits the rent for one year to remain unpaid nearly two weeks after it is due before notifying the vendee of her election to terminate the contract, she waives the benefits of a provision making time the essence, to the extent at least that she is required to give the vendee notice of her intent to terminate the agreement and give him a reasonable opportunity to comply with the same. (p. 951.)

Hall, Lawrence & Roddle, for the appellant.

Cheever & Cheever, for the respondent.

473 CORSON, J. This is an action to enforce the specific performance of a contract for a quarter section of land in Hamlin county, entered into by the defendant as party of the first part and one Walklin as party of the second part, and through the latter **474** the plaintiff claims title as assignee of the contract. Findings and judgment being in favor of the defendant, the plaintiff has appealed.

The defendant in her answer set up that the plaintiff had not complied with the conditions of the contract, and that she had declared the same forfeited and terminated prior to the commencement of the action. The contract was made and executed on the twenty-first day of September, 1894, and by its terms provides that the defendant, as party of the first part, agrees to sell to the said Walklin the said premises for the consideration of nineteen hundred dollars, the said sum to be paid by delivering to the defendant one-half of the crops for each year or the value of the same after paying the interest on the principal sum, at the rate of six per cent per annum for the first year and eight per cent per annum thereafter, to be applied in payment of the principal; and upon the completion of the said payments said defendant agrees to convey the premises by a good and sufficient deed. There were numerous conditions in the contract not necessary to specifically notice except the following condition: "It is further mutually covenanted and agreed by and between the parties hereto that the said party of the second part may immediately enter on said land and re-

main thereon, and cultivate the same as long as he shall perform all the agreements hereinbefore mentioned on his part to be fulfilled and performed and no longer, and that if he shall at any time hereinafter violate or neglect any of said agreements, he shall forfeit all right or claim under this contract, and be liable to the said party of the first part for damages and shall also be liable to be removed from the said land in the same manner as provided by law for the removal of a tenant that holds over after the expiration of the time specified in his lease, and it shall be lawful for the said party of the first part at any time after the violation or nonfulfillment of any of the said agreements on the part of the said party of the second part to sell and convey the said land or any part thereof to any person whomsoever, and the said party of the first part shall not be liable in any way nor to any person to refund any part of the money which she may have received on this contract nor any damages on account of such sale, and it is hereby expressly understood and declared that time is and shall be deemed and taken as of the very essence of this contract, and that ⁴⁷⁵ unless the same shall in all respects be complied with by the said party of the second part at the respective times and in the manner above limited and declared, that the said party of the second part shall lose and be debarred from all rights and remedies and actions either in law or equity upon or under this contract. Fifth. This contract is declared to be binding on the respective representatives of the parties hereto."

Upon the execution of the contract the said Walklin entered into possession and remained in possession thereof until on or about October 1, 1899, when he assigned his contract to the plaintiff in this action, paying yearly one-half of the products raised upon the property as specified in the contract. The said plaintiff before taking an assignment of the contract, visited the defendant and informed her that he was intending to take an assignment of the same, and she made no objections thereto or stated or intimated to him that she intended to take advantage of the delay in the payment of the interest for the year 1899, which was then past due or for the nonpayment of the taxes which were then due and unpaid. The plaintiff sought to obtain in that interview a reduction of the interest, and subsequently wrote to her or her husband, who was agent of his wife, in regard to such reduction, to which the husband replied, with the knowledge and consent of his wife, refusing to make such reduction. In the interview between them above stated it

was agreed between them that there was seventeen hundred and twenty-one dollars and ninety-nine cents still due upon the contract, and of this sum the plaintiff, on October 5th, forwarded to her by draft the sum of two hundred and twenty-two dollars, leaving a balance then due of fifteen hundred dollars. The draft was accepted without objection. During the year 1900 the plaintiff made certain improvements on the property, repairing the buildings, etc., and entered into negotiations with the defendant for paying her the whole amount due her and taking a deed for the property. The defendant consented to this arrangement and the plaintiff was proceeding to obtain the money to make payment in full on the contract when he was notified by the defendant, on the 4th of October, 1901, that she elected to terminate the contract for his failure to perform the conditions of the same. Thereupon the plaintiff offered to pay to the defendant the amount due, and instituted this action. The court below seems to have ⁴⁷⁶ taken the view in its findings and conclusions of law that inasmuch as the plaintiff had failed to make the payments as prescribed in the contract as construed by the defendant and had failed to pay the taxes, the defendant had the right to terminate the contract without notice, and hence the judgment was rendered in her favor.

The appellant claims that the judgment should be reversed for the following reasons: (1) Time was not of the essence of this contract, because the provisions of the contract referring thereto and to a forfeiture is void under the statutes of this state. (2) The contract does not provide for a forfeiture at the time the same was attempted to be declared. (3) The defendant waived the right to declare a forfeiture, and therefore there was no default by the plaintiff upon which the defendant could base a declaration of forfeiture. (4) The defendant before declaring a forfeiture in this case was required to give the plaintiff a notice of intention to declare a forfeiture with opportunity to the plaintiff to comply with the contract. (5) If a forfeiture was legally declared, the plaintiff is entitled to be relieved therefrom under the circumstances of this case. (6) The evidence was insufficient to justify the judgment.

It is contended by the respondent that under the provisions of the contract the plaintiff and his assignor were bound to make the payment yearly on the twenty-first day of September, and that a failure to make the payments at the time stipulated entitled the defendant to declare the contract

forfeited. The respondent further contends that although the stipulation in the clause quoted above prohibiting the party of the second part from enforcing his rights under the contract might be void under section 1276 of the Revised Civil Code, still that part of the stipulation making time of the essence of the contract would be binding upon the parties. In the view we take of the case, it will not be necessary to determine these questions on this appeal, and for the purposes of this decision we may assume that the respondent's contention is correct, as we only deem it necessary to consider the third and fourth grounds upon which the appellant relies for a reversal of the judgment of the court below. We are of the opinion that the appellant is right in his contention, and that the defendant having permitted the time for making the yearly payments, namely, the twenty-first day of September, to expire ⁴⁷⁷ without objection for the years 1899, 1900, and 1901, and subsequently receiving the amount so due her in effect, constituted a waiver of a strict compliance with the terms of the contract, and if thereafter she sought to enforce the contract, she was required to notify the plaintiff of the fact and to give him a reasonable time in which to comply with the terms of the contract. While undoubtedly, under the terms of the contract, the defendant had the right to insist upon a strict performance of the terms thereof, as time was made of the essence of the contract, had she chosen to take advantage of that condition at the time the failure occurred, but having allowed the time to go by and accepted payment thereafter as stated, the plaintiff had a right to assume that she would not insist upon a strict compliance with the terms of the contract, and the contract could not thereafter be declared forfeited unless notice as before stated was given and a reasonable time afforded for the plaintiff in which to fulfill the conditions of the contract. As was stated by this court in *Pier v. Lee*, 14 S. D. 600, 86 N. W. 642, the provisions in the contract that time was of the essence of the same are binding upon both parties, and if a party seeks to take advantage of the provisions upon failure of the other to a strict performance, he must do so promptly upon such failure. This seems to have been the view of the supreme court of Minnesota (*O'Connor v. Hughes*, 35 Minn. 446, 29 N. W. 152; *Cummings v. Rogers*, 30 Minn. 317, 30 N. W. 892; *Mo v. Bettner*, 68 Minn. 179, 70 N. W. 1076) and of the supreme court of North Dakota (*Fergusson v. Talcott*, 7 N. D. 183, 73 N. W. 207; *Boyum v. Johnson*, 8 N. D. 306, 79 N. W. 149).

It seems eminently just and equitable that a party who has neglected to enforce the provisions of his contract providing that time shall be of the essence of the contract at the time the default is made, and accepts performance of the terms thereafter, should not be allowed, upon a subsequent default, to enforce the provision without giving the other party notice that he intends to enforce the same and a reasonable opportunity to comply with the terms of the contract. To hold otherwise would enable a party to take undue advantage of his contract by accepting payments after the time they were to be paid by the strict terms, and after having induced a party ⁴⁷⁸ to make a number of such payments, then, without notice and without giving the party an opportunity to comply with the terms of the contract, declare it terminated and the amount paid thereunder forfeited. In the case now before us the defendant had received four hundred dollars of her principal and certain improvements had been made upon the property; she had permitted the plaintiff to believe at least that she would not insist upon a strict performance of the terms of the contract by receiving the sum of two hundred and twenty-two dollars some twelve or thirteen days after the same was claimed to be due by her without objection, and had permitted the rent for the year 1900 to remain unpaid apparently without objection, and by waiting until the fourth day of October, thirteen days after she claimed the payment to be due, before notifying the plaintiff of her election, and she must therefore be regarded as having waived the benefits of the provision making time the essence of the contract, to the extent at least that she was required to give the plaintiff notice of her intent to terminate the contract, and give him a reasonable opportunity to comply with the same.

The judgment of the court below and order denying a new trial are reversed.

Time as the Essence of Contracts for the Sale of Land is the subject of a note to *State v. Hunter*, 104 Am. St. Rep. 265.

If the Parties to a Contract for the Sale of Land have so stipulated as to make the time of payment of the essence of the contract, a court of equity cannot relieve a vendee who has made default: *Souter v. Witt*, 87 Ark. 593, 128 Am. St. Rep. 40. But of course a vendor may waive his right to declare a forfeiture on the ground that payments are not made at the time stipulated for: *Phillips v. Herndon*, 78 Tex. 378, 22 Am. St. Rep. 59; *Alexander v. Jackson*, 92 Cal. 511, 27 Am. St. Rep. 158. Where a bond for a deed provides that in case of default in payments the vendor may declare the bond void and repossess himself of the premises, the mere default of the vendee does not work a forfeiture of their rights unless the vendor

elects to insist on a strict performance, in which case he is required to give timely notice of his intention to cancel the contract: *Higinbotham v. Frock*, 48 Or. 129, 120 Am. St. Rep. 796.

The Right of a Vendor to Recover Possession from His Vendee is the subject of a note to *Brixen v. Jorgensen*, 107 Am. St. Rep. 722.

SCHROEDER v. PEHLING.

[20 S. D. 642, 108 N. W. 252.]

EXECUTION—Time Limited for Return.—The sixty days within which an execution is returnable commences to run from the time of its delivery to the officer for service, rather than from the time of its preparation by the clerk. (p. 953.)

EXECUTION—Erroneous Description in Notice of Sale.—The fact that the description in the notice of an execution sale is erroneous during a part of the time of publication is not a jurisdictional defect, and does not render the sale open to collateral attack after confirmation and an express finding by the court that all the acts of the sheriff were regular and in conformity with the statute. (p. 953.)

EXECUTION—Conclusiveness of Confirmation.—Until reversed or set aside in a direct proceeding instituted for that purpose, the confirmation of an execution sale is conclusive as to everything found that is essential to its legality. (p. 953.)

EXECUTION—Issuance After Five Years.—When an execution has issued after the lapse of five years from the entry of judgment, it will be presumed in support of the action of the court that leave was obtained or rendered unnecessary pursuant to the statute in such cases provided. (p. 954.)

Sterling & Clarke, for the appellant.

N. P. Bromley, for the respondent.

644 FULLER, P. J. The only question presented on this appeal is the sufficiency of the findings of fact to sustain the conclusions of law and judgment awarding respondent possession of three hundred and twenty acres of Spink county land, of which appellant was formerly the owner. The proceedings leading up to the sheriff's deed, under which respondent claims to be the fee simple owner of the premises, are shown in substance as follows: The Plano Manufacturing Company, a creditor of appellant, obtained a judgment against him in circuit court on the third day of August, 1893, for five hundred and forty-four dollars and ninety-five cents, and sixty days later the same was duly entered in the office of the clerk of such court. An execution, prepared by the clerk in due form on the fourth day of December, 1899, was delivered to the sheriff on the

twenty-sixth day of December, 1901, and upon that date he levied upon the land in controversy, which, after the publication of a notice, was sold in satisfaction of the judgment to the Plano Manufacturing Company on the fourteenth day of February, 1902, and the writ was thereupon returned as required by statute. Three days later the sale was in all things duly confirmed by the judge of the circuit court. Respondent, having become the assignee of the certificate of sale, surrendered the same at the expiration of the redemption period and received the sheriff's deed, which is in all respects fair upon its face. Upon the theory that, when the execution was issued by the clerk on December 4, 1899, it was issued to the sheriff, although not delivered to that officer until nearly two years later, it is urged that the time within which the same was returnable had expired long before the levy was made; but section 335 of the Revised Code of Civil Procedure expressly provides that "the execution ⁶⁴⁵ shall be returnable within sixty days after its receipt by the officer," and it has been held by this court, so far as pertinent to the question here presented, that the issuance of an execution is not completed until the same is delivered to the officer for service: *McDonald v. Fuller*, 11 S. D. 355, 74 Am. St. Rep. 815, 77 N. W. 581.

Although notice of execution sale was published for the required time in an authorized newspaper, the description of the premises was erroneous, and not properly corrected until half the statutory period had elapsed; but the court having held such notice sufficient when the sale was confirmed, found at the trial that due and legal notice had been given. The objection now urged admits that a notice, though defective, was given, and no intimation is made that the respondent is not entirely free from fault. No attempt was ever made by appellant to set aside the sale or correct the error which he seeks to make available by collateral attack to defeat this action. As the court had jurisdiction of the person and subject matter and the judgment was in all respects regular, the error in describing the property was not a jurisdictional defect, rendering the acts of the officer absolutely void. An official report of all the proceedings, including the notice of sale, was before the court for adjudication at the time of confirmation, and it was expressly found upon examination that all the acts of the sheriff were regular and in conformity with the statute. Until reversed or set aside in a direct proceeding instituted for that purpose, the confirmation of an execu-

tion sale is conclusive as to everything found by the court that is essential to its legality: *Watson v. Tromble*, 33 Neb. 450, 29 Am. St. Rep. 492, 50 N. W. 331; *Voorhees v. Bank of United States*, 10 Pet. 449, 9 L. ed. 490; *Swiggart v. Harber*, 4 Scam. 364, 39 Am. Dec. 418; *Neligh v. Keene*, 16 Neb. 407, 20 N. W. 277; *Cooley v. Wilson*, 42 Iowa, 425; *Moore v. Neil*, 39 Ill. 256, 89 Am. Dec. 303.

It further appears that the execution was issued after the lapse of five years from the entry of judgment; but, in the absence of anything whatever to the contrary, it will be presumed in support of the action of the trial court that leave was obtained or rendered unnecessary, pursuant to section 329 of the Revised Code of Civil Procedure.

Finding no error in the record, the judgment appealed from is affirmed.

Defects in the Notice of an Execution Sale are usually not regarded as jurisdictional: See the note to *Maddox v. Sullivan*, 44 Am. Dec. 239; *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. Rep. 398. Consult, however, *Brock v. Berry, Demoville & Co.*, 132 Ala. 95, 90 Am. St. Rep. 896.

Every Presumption is Indulged in Favor of the Regularity and Validity of execution sales: *Neal v. Nelson*, 117 N. C. 398, 53 Am. St. Rep. 590; *Smith v. Crosby*, 86 Tex. 15, 40 Am. St. Rep. 818; *Tacoma Grocery Co. v. Draham*, 8 Wash. 263, 40 Am. St. Rep. 907; *Caswell v. Jones*, 65 Vt. 457, 36 Am. St. Rep. 879; *Bradley v. Sandilands*, 66 Minn. 40, 61 Am. St. Rep. 386; *Cronkhite v. Buchanan*, 59 Kan. 541, 68 Am. St. Rep. 379.

An Order Confirming a Judicial Sale Generally Cures All Irregularities in the proceedings under which the sale was made, and is not subject to collateral attack. Confirmation, however, cannot validate a void sale: See the note to *Watson v. Tromble*, 29 Am. St. Rep. 495; *Norton v. Reardon*, 67 Kan. 302, 100 Am. St. Rep. 459.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

**JACKSON v. BIG SANDY, EAST LYNN AND GUYAN
RAILROAD COMPANY.**

[63 W. Va. 18, 59 S. E. 749.]

MINING RAILROAD—Unauthorized Use as Common Carrier.—Railroad rights of way, annexed and subsidiary to mining rights, cannot be used for other purposes, such as the business of carrying passengers and freight generally. (p. 957.)

MINING RAILROAD—Enjoining Use as Common Carrier.—Equity has jurisdiction, independently of the constitutional inhibition of the taking of private property for public use, without payment of compensation or security therefor, to enjoin the operation of a railroad, built on a mining right of way, as a common carrier, no possessory remedy at law being available, for ejection from the premises. (pp. 958, 959.)

MINING RAILROAD—Enjoining Use as Common Carrier.—The constitutional inhibition of taking private property for public use, without compensation, gives equity jurisdiction to prevent such unauthorized use of a mining right of way or railroad, since the law affords no adequate remedy for the possession and use of the property, deprivation of which amounts in law to a taking thereof. (pp. 959, 960.)

EQUITY—Abatement for Want of Necessary Parties.—An answer to a bill, seeking abatement for want of necessary parties, which fails to aver facts showing an interest, on the part of the absent party, in the subject matter of the bill, that will be affected by the achievement of the object of the suit, is insufficient for the purpose. (p. 961.)

(Syllabi by the court.)

Holt & Duncan, for the appellant.

William Fry and Campbell, Heffley & Davis, for the appellee.

19 POFFENBARGER, J. The questions presented here are whether a railroad built on a right of way granted only

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for a railroad for the transportation of minerals of the grantee, to be taken from the land over which the right of way is, can be operated as a common carrier, and, if not, whether equity will enjoin such use thereof.

The plaintiff, owner of a small tract of land, containing about three acres, which came to her out of a tract of sixty-two and seven-eighths acres once owned by Samuel Osburn, and another tract, the two having an aggregate area of sixty-two and one-half acres, obtained from the judge of the circuit court of Wayne county, on the sixth day of May, 1903, an injunction, restraining and inhibiting the Big Sandy, East Lynn and Guyan Railroad Company from proceeding further to enter upon said tracts, on a bill alleging that said company, without having in any way acquired a right of way over the same, and without her consent and over her protest, had entered upon and taken possession of a portion of her land and was then, and had been for some time, engaged in building and constructing its railroad thereon.

On February 24, 1905, the defendant filed an answer, denying that it had built, was building, or intended to build any railroad on any portion of any of plaintiff's land, and also that any railroad had been built on the larger of the two tracts; but averring that a railroad had been built by the East Lynn Coal Company over said three acre tract, on a right of way, granted by said Samuel Osburn to C. Fry and B. J. Pritchard, by deed dated the eighth day of May, 1890, by which Osburn had conveyed to said Fry and Pritchard all metals, coals, iron ores, fireclay, stone for building purposes, gas and oil, in, under and upon said sixty-two and seven-eighths acre tract of land, which then included plaintiff's said three acre tract, together "with the right of way for railroads or other roads over and through the surface thereof for the transportation to market of said minerals and mineral substances and products, whether in the raw or manufactured state," which deed was exhibited with the answer. It was further averred that the minerals and rights of way so granted had become the property of said East Lynn Coal Company. On the eighth day of May, 1905, a supplemental ²⁰ bill, alleging the completion of said railroad and its operation as a common carrier, and praying that the defendant be enjoined from operating the same over and through said lands, or in any manner entering thereon, until it should have acquired the right of way by purchase or condemnation, was filed in court and an injunction, in conformity with the

prayer thereof, was awarded. To this bill an answer was filed, admitting the completion of the railroad and its operation by the defendant as alleged, but denying that said company had built it or owned it, and averring that the same had been built by the East Lynn Coal Company and was operated by the defendant, under an agreement or arrangement with the coal company, as a common carrier, as well as a carrier of coals from the mines of the East Lynn Coal Company on said tract of land, and claiming the right to so operate it. This appeal is from an order refusing to dissolve said last-mentioned injunction.

Conceding the right of the coal company, after having constructed its railroad, to lease the same to the appellant, which seems to be admitted by counsel for the appellee, it does not follow that the lessee may use or operate it for a purpose other than that for which the way was granted. The coal company could not vest in the railroad company, by lease or otherwise, any greater right or interest in the land, or subject it to a heavier burden or more extensive easement than the clause in the deed, granting the easement, passed or authorized. It could vest in another only such right as it had acquired. The easement granted is defined and limited by the terms of the grant. It authorizes the construction, maintenance and operation of railroads on the land for the transportation to market of the mineral and mineral substances and products granted by the deed, and nothing more, in the absence of circumstances, not here disclosed, calling for an interpretation or construction, accordant with the true intent and meaning of the parties, giving a greater right of use. A railroad to be used merely as an instrumentality in the marketing of the coal granted would impose a burden upon the land, shorter in duration and lighter in character than a railroad operated as a common carrier. In point of time the operation of the road ²¹ would be coextensive with the working of the mines, commencing with the opening of the mines, ceasing temporarily while they are closed, and terminating altogether upon the exhaustion of the mines; and, while in operation, the number of cars and trains run over the land would depend upon the extent of the mining operations and the quantity of the output. On the other hand, a common carrier road is in constant operation, doing a regular and a much heavier traffic, carrying, in addition to the output of the mines, a large amount of freight not emanating from them, as well as passengers, all of which necessitates the running of

heavier and more numerous trains, and this burden would be indefinite in point of time. It might, and probably would, be permanent. Moreover, such a railroad requires better construction and maintenance, a better roadbed, grade, equipment and speed, involving graver injury to the surface and more frequent interruptions, in divers forms, to the occupancy and use of the land for other purposes. To the earnest contention of counsel for the appellant that the grant of a right of way for mining purposes, impliedly or otherwise, authorizes the use of it for general railroad purposes, the considerations just mentioned seem to respond sufficiently, but the conclusion to which they unerringly lead has long ago found expression in a canon of interpretation and judicial precedents. "Rights of way annexed to rights to mine, or granted for the purpose of removing and transporting minerals from and materials to the mine, may not be used for other purposes, as for general railroad purposes": Barringer and Adams on Mines and Mining, 584. "It being clear, from the above facts that the purpose of the provisions in the decree, relating to the building of branch railroads, was to afford to the owners of the coal property facilities for removing and marketing the coal upon it, said provisions did not justify the attempt to build a branch railroad, not necessary, and not to be used as an appurtenance to the coal property": Republic I. Works v. Burgwin, 139 Pa. 439, 21 Atl. 386. "The grant of a private right to quarry rock from the lands of the grantor, with a right of way to remove the same, is not a grant of the exclusive possession of the land, or any possession, except for the sole purpose of enjoying the license and easement created by the grant. ²² Such grantee cannot authorize a railroad operated for the general public to be constructed over the land, even though the major part of its business be the transportation of the rock quarried under the license; if he does, the grantor, as the owner in fee, may maintain ejectment against it": Snell v. Wasatch etc. Ry. Co., 3 Utah, 192, 2 Pac. 193.

The observation just expressed respecting the consequences of the perversion of the right of way to purposes aside from and beyond those specified in the grant, taken in connection with the character of the defendant, it being a corporation organized for the carrying on of business of a public nature, the transportation of passengers and freight generally, have important bearing on the question of remedy, plainly demonstrating that the result is the subjection of private prop-

erty to a public use without compensation, in violation of the constitution of the state. Such use of the right of way is not, and cannot be, a mere incident of its use in connection with mining. To hold that it is would make the incident broader than the thing to which it is said to be incident, both in respect to its nature and the burden it imposes upon the land; and this is true notwithstanding the duration of the burden would be limited to correspond with the operation of the road for mining purposes. The character of the use is not determined by the length of time. It depends upon the interest affected, the rights or advantages of which the land owner is deprived, on the one hand, and those bestowed upon the general public, on the other. Neither a railroad corporation nor a railroad is required to be perpetual, and whether it operates as a common carrier for ten years or fifty years, the nature of its business is the same. Subjection of private property to the uses and purposes of a common carrier amounts to a taking thereof within the meaning of the constitution, for prevention of which equity interposes by injunction: *Foley v. County Court*, 54 W. Va. 16, 46 S. E. 246; *Spencer v. Point Pleasant etc. R. R. Co.*, 23 W. Va. 406; *Arbenz v. Wheeling etc. R. R. Co.*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; *Taylor v. Baltimore & O. R. R. Co.*, 33 W. Va. 39, 10 S. E. 29; *Watson v. Fairmont & S. R. R. Co.*, 49 W. Va. 528, 39 S. E. 193. All these decisions say an action sounding in damages, such as assumpsit or trespass on the case, is not an adequate remedy for the taking of private property for public use.²³ This is obvious, since assumpsit would treat the land as sold, given up by its owner without having been paid for it, in exchange for a right of action for money which might prove worthless, owing to insolvency of the corporation or person taking it or other adventitious circumstances. The constitution inhibits the taking of land for public use until compensation therefor shall have been paid or secured, from which it is plain that no remedy allows the land to be used for such purpose before payment of compensation is adequate. In order to enforce the mandate of the constitution the courts must give a remedy that will secure to the citizen the possession and use of his land until compensation is paid or payment thereof secured.

Independently of this inhibition of the constitution, calling for injunction to protect the possession, there is equity jurisdiction on another ground. Possession of the right of

way for mining purposes under the grant precludes resort to ejection or unlawful entry and detainer. The relation subsisting between the parties is analogous to that of landlord and tenant. In attempting to use the railroad, rightfully constructed for a limited purpose—transportation of coal from the mines—as a common carrier, the railroad company, as tenant, subtenant, licensee or sublicensee, is doing an act on the premises which the license or grant of privileges does not authorize. It is an act in excess of the rights conferred upon the tenant. In all such cases equity has jurisdiction to restrain and confine the tenant or licensee within the scope of the tenancy or license: *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 56 W. Va. 402, 49 S. E. 548; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; *West Virginia etc. Co. v. Vinal*, 14 W. Va. 637.

In view of this relation of parties, the principles here adverted to and the promptness with which the plaintiff sought relief, she having filed her original bill before the railroad was built and her supplemental bill on completion thereof, and vigorously and diligently prosecuted the suit, the action of the court in overruling the motion to dissolve the injunction in respect to the operation of the railroad as a common carrier was manifestly proper and right, unless failure to make the East Lynn Coal Company ²⁴ a party was cause for dissolving it, as has been suggested in argument. The right to build the railroad and use it for mining purposes only is not contested. The bill takes no notice of its character as a mining road. It proceeds against the defendant as the operator of a common carrier and against the road as a railroad constructed and used for general purposes. Its character as a mining road is brought into the case by the answers, but no affirmative relief is asked in respect thereto. They are merely defensive answers against bills seeking prevention of the use of the road for general purposes, a matter outside of, and beyond, any rights conferred by the grant, and therefore a matter in which the East Lynn Coal Company has no interest whatever. As determined by the allegations of the bills, admitted in the answers, the defendant is a trespasser, in that it has acted in excess of the rights conferred upon the party under whom it claims. Neither it nor the East Lynn Coal Company has obtained from the land owner a right of way for general railroad purposes. If it be conceded that the

answer sets up a claim of right on the part of the coal company to lease the railroad built by it, for use in the manner in which the appellant is using it, by the averment that it has leased the same for such a purpose, both lessor and lessee are thus shown to be wrongdoers, for no acquisition of the right claimed is shown. On the contrary, it is thus revealed that the basis for the claim is a granted right of an entirely different character. To obtain abatement or suspension of proceedings in equity in the nature of an abatement on the ground of want of necessary parties, it must appear that the absent party has an interest in the subject matter of the suit that will be affected by the achievement of its object. It is not enough to show that he merely claims an interest. Facts must be disclosed from which the court can see that he has such an interest, if the statements of fact are true. Though want of necessary parties in equity may not constitute ground for abatement in the common-law sense of the term, it operates to suspend or delay the suit until the defect is cured, and the plea or answer setting it up for this purpose ought to be tested as to its sufficiency by the rules of pleading. The statement of a mere conclusion of law ²⁵ is not sufficient in a declaration, plea, bill, answer or any other paper known in pleading. In order to avail himself of a legal principle for an abatement or any purpose, a party must set forth sufficient facts to bring himself within that principle: *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Hortons v. Townes*, 6 Leigh, 47; *Patton v. Elk River N. Co.*, 13 W. Va. 259; *Hogg's Eq. Pr.* 277.

As the bill seeks an injunction to the operation of the railroad as a common carrier and not otherwise, and the injunction follows the prayer of the bill strictly, and no complaint is made here on the ground of failure to so modify the order as to permit the operation of the road as a mining road or except such use thereof from its terms, the argument on both sides being confined to the contention as to the right to use the road for general purposes, we deem it unnecessary to inquire whether the order should be modified. As it is merely interlocutory, the court below can so modify it any time to prevent interference with any rights the appellant possesses under the easement granted to Fry and Pritchard and now held by the East Lynn Coal Company.

Seeing no error in the order complained of, we affirm it.

As to Whether an Injunction Will Lie against the taking or injuring of private property for a public use, before compensation has been made, see *Harman v. Caretta Ry. Co.*, 41 W. Va. 356, 123 Am. St. Rep. 985; *Town of New Decatur v. Scharfenberg*, 147 Ala. 367, 119 Am. St. Rep. 81; *Elser v. Village of Gross Point*, 223 Ill. 230, 114 Am. St. Rep. 326; *Clemens v. Connecticut Mut. Life Ins. Co.*, 184 Mo. 46, 105 Am. St. Rep. 526.

FERRELL v. SIMMONS.

[63 W. Va. 45, 59 S. E. 752.]

JUSTICE'S COURT—**Informality in Proceedings.**—In relieving justices' proceedings from formality courts cannot dispense with substance and by amendment supply a substance not present. (By the editor.) (p. 963.)

EXECUTION—**Stay Bond.**—When a Judgment is Void the stay bond given in the proceedings is also void. (By the editor.) (p. 963.)

JUDGMENT—**When Void for Uncertainty.**—A judgment that does not show for and against whom it is, is void for uncertainty. A judgment must show in what case it was rendered, else it is void. (p. 963.)

(Syllabi by the court except when otherwise stated.)

Wm. A. Parsons, Wm. O. Parsons and Walter Pendleton, for the appellants.

Schilling & Harper and R. G. Linn, for the appellee.

45 BRANNON, J. A. D. Ferrell filed a bill against G. B. Simmons and others stating that the firm of Tylee & Helwig had recovered judgment before a justice in Roane county against said Simmons; that Simmons gave a stay bond, in which Ferrell was surety, and that execution issued on the bond and Ferrell had paid it; and the bill, claiming that Ferrell was entitled to be subrogated to the lien of the judgment, sought to sell certain realty of G. B. Simmons. The bill alleged that G. B. Simmons had transferred his real estate and a large amount of personalty to his brother T. R. Simmons; but while it avers that before such transfer T. R. Simmons had notice of the judgment, it does not aver any notice on his part of his brother's fraudulent intent. A copy of the judgment was exhibited with the bill. The bill averred that T. R. Simmons had later reconveyed to G. B. Simmons some of the real estate; likely we may say all that had been conveyed to him. A decree subjected real estate of G. B. Simmons to renting, and G. B. Simmons and T. R. Simmons unite in an appeal.

The bill seeks subrogation to the lien of a judgment. There is no judgment. The only exhibit to prove the judgment ⁴⁶ is so uncertain and incomplete that we cannot make a judgment out of it. It contains no captions to show the parties. There is on the margin the word "Tyree & Helwig vs. G. B. Simmons," and under it a taxation of plaintiff's costs. That is not a caption to the judgment giving parties. We may *guess* it is an action between the parties, but it is guess or surmise. But worse yet, waive that, as we might, if there were no other objections. The judgment does not show for or against whom it is. It says: "I therefore render judgment on the note filed in this action for the sum of one hundred and twenty-seven dollars and ninety-six cents and costs of this action." The record does not show in whose favor the summons was. Except for forced inference we cannot say for or against whom the judgment is. "A judgment not designating in whose favor it is rendered is void for uncertainty." "The judgment must designate with certainty the party against whom it is rendered": 11 Ency. of Pl. & Pr. 949, 951. "Judgment without parties, however perfect in form, is not attended with any of the consequences of a judgment, and is void": Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66. In this vital feature we can neither guess a judgment nor guess its parties. Courts have gone far in relieving justices' proceedings from formality; but they have gone far enough. They cannot dispense with substance, and by amending supply a substance not present. There should be some show of compliance with law even in justice's courts. Reference to the note and summons cannot be made, as they were not before the circuit court as parts of the record. The transcript of the justice appearing in the record shows no note, though the judgment paper says that a note was filed. We cannot base an estoppel to deny the judgment on the stay bond, first, because it is not in the record, and next, we do not know its recitals, unless we presume that it recited the judgment, as likely we could do; but the judgment being void, so would the stay bond be void. We do not think that a stay bond can alone create from the first a judgment: White v. Foote Lumber & M. Co., 29 W. Va. 385, 6 Am. St. Rep. 650, 1 S. E. 572; Boslow v. Shenbarger, 52 Neb. 164, 66 Am. St. Rep. 487; Ex parte Cheatham, 1 Eng. 531, 44 Am. Dec. 525. If a judgment is void, would not a forthcoming bond on it also be void? Upon demurrer

and on hearing the bill should have been held bad as to subrogation. It could not be ⁴⁷ supported as against G. B. Simmons on the simple contract arising from payment by the surety. I thought at first that it might be a bill to set aside a fraudulent transfer of realty and personalty, and have a decree against T. R. Simmons for the personalty; but this view cannot be sustained, as there is no charge in the bill of notice on the part of T. R. Simmons of fraud.

Decree reversed, demurrer sustained and bill dismissed.

A Judgment Without Parties, however perfect in form, is not attended with any of the consequences of a judgment, and is void: *Wilcoxson v. Burton*, 27 Cal. 228, 87 Am. Dec. 66.

When an Execution Issues Without a Judgment, the writ is without authority of law and its levy gives no right of possession: *Boslow v. Shenberger*, 52 Neb. 164, 66 Am. St. Rep. 487, and cases cited in the cross-reference note thereto.

STATE v. HOOD.

[63 W. Va. 182, 59 S. E. 971.]

DYING DECLARATION—Disbelief in God.—It is no ground for excluding a dying declaration that it does not appear that the declarant believed in God and rewards and punishment after death. (p. 965.)

DYING DECLARATION—Whether may Include Inadmissible Evidence.—A dying declaration must be such as would be admissible if the party were living and giving evidence. Therefore hearsay evidence cannot be rendered admissible by being included in a dying declaration. (By the editor.) (p. 967.)

DYING DECLARATION—Hearsay Evidence—Objection.—A written dying declaration contains matter that is admissible, and other matter not admissible, because hearsay. There is a general objection to the admission of the paper and one item thereof, but no specific objection to matter of hearsay. It was the duty of the objector to specify the objectionable matter, and there is no error in overruling the objection to the admission of the paper for such hearsay. (p. 967.)

EVIDENCE—General Objection to Admission.—When a party moves the court to exclude testimony he must specify the particular evidence to be excluded; when some of it is proper the motion may be overruled on account of its generality. (By the editor.) (p. 967.)

INSTRUCTION.—An Erroneous Instruction may be Withdrawn from the jury with a direction from the court that it is withdrawn and is to be disregarded by the jury. (p. 968.)

SELF-DEFENSE—Duty to Retreat Before Taking Life.—In case of affray, where retreat is necessary before taking the adversary's life in self-defense, that retreat must be in good faith, not as a cover to execute a fixed design to kill. (p. 969.)

HOMICIDE—Reasonable Doubt.—It is not Error to Instruct that the oath of a juror imposes upon him no obligation to doubt where no doubt would exist if no oath had been administered. (By the editor.) (p. 969.)

(Syllabi by the court unless stated to be by the editor.)

J. G. St. Clair and Freer & Robinson, for the plaintiff in error.

Clarke W. May, attorney general, and S. M. Hoff, for the state.

183 BRANNON, J. This is a writ of error from a judgment of the circuit court of Ritchie county sentencing Hezekiah Hood to the penitentiary for four years upon a verdict finding him guilty of voluntary manslaughter upon an indictment against Hezekiah Hood and Henry Hood for the murder of John Barnes.

It is claimed that the court erred in allowing the dying declaration of Barnes reduced to writing to go before the jury. One objection to the dying declaration is, that it does not appear that Barnes believed in a God and rewards and punishment after death. By the common law of England want of such belief makes a witness incompetent on the principle that one who does not have such religious faith will not consider himself bound by an oath. This was so strongly imbedded in the common law that it was said in a very well-considered opinion in *Atwood v. Welton*, page 66 of 7 Conn., that there is no adjudged case and hardly a dictum in the English books to the contrary. We may say so virtually in America, save where statute or constitution changes the rule: 2 Elliott on Evidence, sec. 773; 1 Greenleaf on Evidence, sec. 369; 2 Wigmore on Evidence, sec. 1443; 30 Am. & Eng. Ency. of Law, 2d ed., 936; 92 Am. Dec. 473, note. In *Perry's Case*, decided by the general court of Virginia in 1846, 3 Gratt. 632, such seems to be the tacit admission, as a rule of the common law; but the court, by reason of the Virginia Bill of Rights and the Virginia Act of Religious Freedom, held that this ground for the exclusion of a witness had been abrogated. It stated the broad proposition that, "No person is incapacitated from being a witness on account of his religious belief." That case quotes this language of those acts as abrogating the common-law rule: "No person shall be enforced or otherwise restrained, molested or burdened ¹⁸⁴ in his body or goods, or otherwise suffered on account of his religious opinions and belief; but all men shall be free to profess,

and by argument maintain their opinions in matters of religion; and the same shall in no wise, affect, diminish, or enlarge their civil capacities. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence." The West Virginia Bill of Rights must have the same effect from the following language: "No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment." "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be enforced, restrained, molested, or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess, and by argument, to maintain their opinions in matters of religion; and the same shall in no wise affect, diminish or enlarge their civil capacities; and the legislature shall not prescribe any religious test whatever, or confer any particular privileges or advantages on any sect or denomination." These wide provisions plainly speak religious freedom, and forbid the disfranchisement of a person from giving evidence in the public courts in the administration of justice. The courts are a part of the government; they perform functions in such administration, and they call witnesses in doing so as indispensable to their procedure; and it is to the interest of the state that persons shall not be excluded for such a cause. The right is valuable to the citizen, a great right to bear testimony for his protection and the protection of his state or neighbor. The right is a civic right of a laudable and worthy distinction and of high value; its denial a brand of inferiority and disgrace. In *Perry's Case*, 3 Gratt. 632, we find the question, "The constitution declares that all men shall be free to profess, and by argument to maintain their religious opinions. Is the man who is stigmatized by the law as unworthy of belief, one who, in the language of Lord Coke, is in the condition of those who have lost 'liberam legem,' because of his opinions, as ¹⁸⁵ free to avow and defend those opinions as one who can fearlessly enter a court of justice, and offer his testimony to protect the property, the reputation or the life of his neighbor? The proscribed man may suffer in his property, or in the persons of the members of his family, His goods may be stolen, his dwelling broken into by the

midnight robber, or burned by the incendiary; his child may be beaten, or his wife murdered before his face, and the offender escape because of the incapacity of the injured man to give evidence against him. This very incapacity may have caused the calamity, and can he be told that he lives under a government of equal laws? That he has suffered nothing on account of his opinions?" Church and state are separate in America. The old rule prevailed when the government adopted and cruelly enforced one religion, indeed one church, as the only true one; but where the state has no religion and religious freedom dominates, such a rule cannot, and ought not, live. It is too late in these days of liberalism to assert it. It is entirely against the spirit and letter of American constitutional law.

But as Greenleaf on Evidence, section 370, says, defect of religious belief is never presumed, but, to the contrary, there is a presumption that everyone reared in a Christian land has such belief. Nothing is shown as to the belief of Barnes. So says Underhill on Criminal Evidence, page 129.

There can be no question that this dying declaration was admissible; but it is argued here that it contained hearsay. In his declaration Barnes stated that he started to the place where he was shot by Hood and said: "On crossing the hollow just beyond where I had started I met Raymond Hanes and Archie Hanes, and they said that the Hoods, that Hezzie Hood swore that if I, meaning John F. Barnes, came up there to clean out them holes that he would kill me." It may be conceded that this was inadmissible, because hearsay. A dying declaration must be such as would be admissible if the party were living and giving evidence: *State v. Burnett*, 47 W. Va. 731, 35 S. E. 983; 4 Elliott on Evidence, sec. 3033. Therefore hearsay cannot be rendered admissible by being included in a dying declaration: 4 Ency. of Ev. 992. But the defendant made a general objection to the introduction of the written dying declaration and he did not put ¹⁸⁶ his finger upon that clause. He did specify one clause, but not that matter. This will not do: *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611; *Warren v. Warren*, 93 Va. 73, 24 N. E. 913. Except as to another clause, his objection was general. Some of the dying declaration was plainly admissible. Where a deposition contains some matter admissible and other matter not admissible, the party objecting must specify the particular portion to which he objects: *Richardson v. Donehoo*, 16 W. Va. 685. If a record

is offered in evidence, a part of which is objected to, the objector must specify the part objected to, or his objection is properly overruled: *Parsons v. Harper*, 16 Gratt. 64; *Trogon v. Commonwealth*, 31 Gratt. 862. When a party moves the court to exclude evidence he must specify the particular evidence. Where some of it is proper, the motion may be properly overruled on account of the generality of the motion: *Friend v. Wilkinson*, 9 Gratt. 31. "Where evidence is offered, a portion of which is admissible and a portion not, and the objection is general, the objection must be overruled": *Washington S. R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834. Since writing to this point I meet with the case of *Stansbury v. Stansbury's Admrs.*, 20 W. Va. 23. In that case a will was given in evidence over a general objection. The court held that, "Where a paper is offered in evidence to the jury, and a general objection is made to its being read, and the objection is overruled, this court will not hold such ruling to be error, if such paper could be properly read as evidence for any purpose."

The case in hand involves a large number of instructions. The court gave one, and it was before the jury while two counsel, one on each side, argued the case, and before two other counsel, one on each side, made their arguments to the jury, the court withdrew that instruction and charged the jury to disregard it entirely as if it never had been given. We must take it that jurymen are intelligent men, and can understand the direction of the judge, and have capacity not to be influenced by an instruction afterward eliminated from the case. If this is not so, why any instructions? Judge Holt, in *Osborne & Co. v. Francis*, 38 W. Va. 312, 45 Am. St. Rep. 859, 18 S. E. 591, cited authority for the statement that a court may cure errors in instructions by withdrawing, explaining or correcting them. So do Hughes on Instructions and ¹⁸⁷ *Shackelford v. State* (Tex. Cr. App.), 53 S. W. 884. This power, or I should say duty, of withdrawal of a bad instruction is recognized in *McKelvey v. Chesapeake & O. Ry. Co.*, 35 W. Va. 500, 14 S. E. 261. 2 Thompson on Trials, section 2326, sustains this power in a court. If it did not exist, it would be a misfortune. The rule contended for by counsel would frustrate tedious, costly trials and obstruct the administration of justice. Substance must not always yield to technicality.

Complaint is made of refusal of defendant's instruction 6 bearing on self-defense. It leaves out in connection with

retreat the element of good faith, and in saying that the defendant may kill when he has reasonable ground to believe that there are designs to destroy his life or commit a felony, it omits the words "and does believe." The "good faith" feature was important in the case, because evidence showed that when Hood backed some steps from Barnes he told his son to get his gun, and told his son to shoot Hood, and he was shot just then, tending to show that such retreat as there was was not in good faith: *State v. Zeigler*, 40 W. Va. 543, 21 S. E. 763. Other instructions given practically cover this instruction so far as the case demanded.

Complaint is made of the refusal of instruction No. 8, saying that "if they are satisfied from the evidence that when Hezekiah Hood retreated from the post hole Barnes, armed with a revolver, fired the same off one or more times, thereby assaulting the defendant, and that the defendant had cause to believe, and did believe, that great bodily harm was about to be inflicted upon him, and that under such belief and fear he fired the shot with intent to protect himself," then he was not guilty. It is said that this court approved that instruction in *State v. Hobbs*, 37 W. Va. 812, 17 N. E. 380. I suppose instruction No. 4 is referred to. Perhaps that instruction was right in that case; but the instruction under consideration differs from that in the *Hobbs* case, because it assumes that Hood retreated, which is not an element of the instruction in the *Hobbs* case. And it leaves out the words "retreated in good faith," and it assumes that by firing the pistol Barnes assaulted Hood. Other instructions cover self-defense.

Complaint is made of the giving of an instruction for the state defining reasonable doubt and containing the clause, 188 "The oath of a juror imposes upon him no obligation to doubt, where no doubt would exist if no oath had been administered." It is said that this is plain error, as telling the jury that the oath imposed no obligation. It is instruction 4 in *State v. Bickle*, 53 W. Va. 597, 45 S. E. 917, and was held no error in that case. We do not think this is error. We find this test in many of the cases. It is put in note on page 491 of 12 Cyc. An oath does not compel a juror to doubt when he would not doubt on the same evidence as an honest man acting in a grave matter. The great Chief Justice Gibson, a polar star in judicial decisions, said that a juror is "not at liberty to disbelieve as a juror while he believed as a man": *Commonwealth v.*

Harman, 4 Pa. 269. Of course, he meant on the evidence, not outside the evidence. Also I find that in *State v. Kellison*, 56 W. Va. 690, 47 S. E. 166, it was held that the giving of such instruction is no error. The jury in this case were told over and over again that the state must prove Hood guilty beyond a reasonable doubt. I will add for myself, that as the verdict found Hood not guilty of murder in either degree, but guilty of voluntary manslaughter, and as there was no question that Hood shot and killed Barnes, and so stated himself as a witness, I do not see how the matter of reasonable doubt is involved in the case.

There are other instructions in the case, but they involve no principles of law not settled by numerous decisions in Virginia and West Virginia binding us, so that a discussion of these instructions would only be a rehash of law fixed and settled by them. If the case were to go back for another trial, it would be proper to say which instructions were good and which bad; but as the case does not go back, why write pages and pages to restate settled law? We have carefully examined the instructions and do not find any error therein.

Counsel discuss the evidence in this case and ask the court to pass on it and determine whether the accused was guilty of manslaughter or excusable on self-defense. As there was no question as to Hood's shooting Barnes, the question of self-defense was one peculiarly for the jury. Witness after witness proves that, and the circumstances of the shooting. The deceased made his statement as to the ¹⁸⁹ facts; the prisoner gave evidence as to the facts. Other witnesses gave evidence as to the facts of the homicide. The evidence is of much volume. The prisoner moved to strike out the state's evidence as being insufficient. By no means could that motion prevail. It was a case peculiarly proper to go before the jury. Of course, that motion could not prevail in the circuit court nor in this court. In this court it involves only the question whether Hood was entitled to the excuse of self-defense. That was peculiarly a jury question. The trial was fair and the verdict supported by the evidence. The proper function of this court, except in rare cases, is not to discuss facts, but lay down law principles for public guidance. It is not a jury to weigh and balance evidence.

Judgment affirmed.

The Law of Self-defense is considered in the notes to *State v. Gordon*, 109 Am. St. Rep. 804; *State v. Sumner*, 74 Am. St. Rep. 717.

Religious Belief as Disqualifying a Witness is the subject of a note to *Bowlin v. Commonwealth*, 92 Am. Dec. 473. The general rule is that whether a person's religious training has been so developed that he comprehends his responsibility to God for lying does not affect his competency as a witness. The question is one of credibility and not of competency: *Bright v. Commonwealth*, 120 Ky. 298, 117 Am. St. Rep. 590. See, also, *Hronek v. People*, 134 Ill. 139, 23 Am. St. Rep. 652; *Percy v. Powers*, 51 N. J. L. 432, 14 Am. St. Rep. 693.

TOWN OF POINT PLEASANT v. GREENLEE & HARDEN.

[63 W. Va. 207, 60 S. E. 601.]

JUDGMENT.—If Process in a Suit is Defective or Irregular, but not to the extent of being substantially worthless, a judgment by default thereon will be irregular and liable to be corrected or set aside on motion, or reversed above, but not absolutely void, and hence not open to collateral attack. (pp. 973, 976.)

JUDGMENT—Recital of Due Process.—If the writ, inspected as part of the record to overthrow the adjudication or recital in the judgment of due process, is an absolute contradiction thereof, an irreconcilable contradiction and denial, the invalidity of the judgment may be declared collaterally; but if the contradiction may be reconciled by a construction of the writ not absolutely at variance with reason and sound policy, a construction by the recital so given cannot be assailed collaterally. (pp. 974, 976.)

PROCESS—Return Day—Misstatement and Correction.—A writ tested on the first day of August, and made returnable "on the first Monday in August next," is not absolutely void, since, read in the light of the law as to issuance and return of process, the error is self-correcting, and it appears that the first Monday of the month there mentioned was intended. (pp. 974, 976.)

JUDGMENT—Collateral Attack for Misstatement in Return of Process.—Where the record shows that such writ has been held by the court to which it was returnable to be due process, by a recital in the judgment thereon, such judgment cannot be collaterally assailed. (pp. 974, 976.)

SURETYSHIP—Effect of Judgment Against Principal.—Where the effect of the undertaking of a surety is that he shall be liable for the result of a suit against his principal, he is conclusively bound by the judgment in such suit, even though he is not a party to it and have no notice of it. (p. 976.)

SURETYSHIP—Conclusiveness of Bond.—The fair and voluntary execution of a bond is conclusive upon all who seal it of everything admitted therein. (p. 977.)

SURETYSHIP—Estoppel to Question Bond.—When a bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure, and breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such defense. (p. 977.)

SURETYSHIP—Estoppel Against Surety.—That in a bond which concludes or estops the principal operates likewise on the surety therein. (p. 977.)

SURETYSHIP.—The Plea of Nul Tiel Record is a Proper Plea to test the existence of a judgment, in a suit on a bond with collateral conditions the breach of which assigned is the nonpayment of such judgment. (pp. 977, 978.)

(Syllabi by the court.)

Rankin Wiley and F. P. Moats, for the plaintiff in error.

John L. Whitten and Somerville & Somerville, for the defendant in error.

208 ROBINSON, J. A judgment for five hundred dollars having been rendered by default March 24, 1905, in favor of Annie Varian against John Greenlee and John Harden, partners as Greenlee & Harden, liquor dealers at Point Pleasant, for damages caused by selling drink to her husband, under provisions of section 26, **209** chapter 32 of the Code, and said judgment not being paid, this action was brought on the license bond given by said liquor dealers to the town of Point Pleasant at the time the license under which such drink was sold was granted by said municipality, the breach thereof assigned being nonpayment of said judgment. The bond, the one necessary to be given by such licensed dealers, dated April 22, 1904, executed by said licensees, with a surety, contains, among the other required conditions, "the further condition that they will pay all such damages and costs as may be recovered against them under any of the provisions of chapter 32 of the Code of West Virginia, as amended." To this action said dealers and their surety appeared and tendered the special pleas hereinafter mentioned, all which were rejected except that of nul tiel record, which was received, issue joined thereon, and, being tried by the court, was found not sustained, and there was judgment thereon accordingly; and said defendants failing further to plead, and neither party requiring a jury, the court, proceeding to hear the evidence and ascertain the amount due, found there was owing to the plaintiff from the defendants five hundred and fifty-four dollars and fifteen cents, and judgment was rendered in pursuance of such finding. Proper exceptions were taken to the action of the court in rejecting said special pleas, and the finding and judgment that the plea of nul tiel record was not sustained, and these exceptions are made the basis of this writ of error.

The first and third special pleas, one by Greenlee & Harden and the other by all the defendants, were intended to attack said judgment as obtained without due process of law, in that the process in the action in which the judgment was obtained was void because it was issued and tested on August 1, 1904, which was a Monday, and made returnable "on the first Monday in August next," which defendants say was a year hence from the issuance thereof and far beyond the time permitted by statute. The second special plea, by all the defendants, was to the effect that the bond sued upon was void, because the municipality had no authority to grant the license in relation to which the bond was executed and had no authority to take such bond. The fourth and fifth special pleas, by the surety, were to the effect that, if any cause of action accrued to the plaintiff in the former suit, upon which said judgment therein is based, it did not accrue within one ²¹⁰ year next preceding the commencement of this suit. The sixth special plea, by all the defendants, was that of nul tiel record, received and disposed of as hereinbefore stated.

In disposing of the propositions that arise as to the admissibility of the foregoing pleas rejected we must keep in mind that this suit is on the bond, not on the judgment. It is based on a bond with collateral conditions, and the nonpayment of the judgment is declared as a breach of such conditions. The consideration of the aforesaid pleas and the argument in the briefs may be reduced to the following questions: (1) Was it competent collaterally to attack said judgment? (2) If so, was the summons void and the judgment a nullity? (3) If the judgment was valid, was it conclusive against said surety? (4) Were defendants estopped to deny the recitals in and validity of the bond? (5) Was the plea of nul tiel record appropriate and responsive in this action?

The first two of said questions call for consideration together. If the judgment was void, it was open to collateral attack: *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959, 46 S. E. 603. It was void, if defendants were not duly served with valid process to answer the action: *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260; 4 Minor, 3d ed., pt. 1, p. 648. The judgment being by default, the writ was a part of the record, and could be inspected for the purpose of ascertaining whether the court acquired jurisdiction of the defendants: *Nadenbush v. Lane*, 4 Rand. 413;

Staunton Per. B. & L. Co. v. Haden, 92 Va. 201, 23 S. E. 285; *Black on Judgments*, sec. 273. And notwithstanding recital in the judgment, as in this case, that there was due process upon which to base it, the writ or return thereon could be inspected to overthrow such recital, and show the absolute want of valid process: *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110.

We must therefore consider whether the process upon which said judgment was based was absolutely void or whether it came within the rule "that if the notice is defective or irregular, but not to the extent of being substantially worthless, a judgment by default entered thereon will be irregular and liable to be corrected or set aside on motion, or reversed above, but not absolutely void, and hence not open to collateral attack": *Black on Judgments*, sec. 83. The defect claimed is that the process was tested on August 1, 1904, which was the first Monday of that month, and was made returnable ²¹¹ "on the first Monday in August next." It is said this made it returnable more than ninety days from its date, and therefore so violative of the statute as to be void. It cannot be questioned that if it was so returnable in more than ninety days it was void: *Kyles v. Ford*, 2 Rand. 1; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548. But it must be noted that the terms so fixing the return day are, at the least, open to two constructions, and not so plainly violative of the statute in relation to return day, when read in light of that statute, as to be absolutely void. We cannot say it is void, because it can consistently be said to relate, in reasonable and practical construction, to the first Monday in August on which it was issued and to the two days following that Monday. Being no more than of doubtful construction, can we say that it is absolutely void when a construction that may in good sense be given it makes it valid? Does not this character of the process bring it within the rule above quoted from Mr. Black, and simply make the judgment by default liable to be corrected or set aside on motion in the court below, or reversed above, but not absolutely void, and hence not open to collateral attack? We are constrained so to view it. The process is not substantially worthless, not absolutely nor clearly void. The recital of due process is not absolutely contradicted by inspection of the writ; it depends on construction to say otherwise. The contradiction is not explicit and irreconcilable, as it must be to

overthrow the recital: Black on Judgments, sec. 273. The court wherein judgment was rendered on this writ having given to it a construction that makes it valid, and one not wholly inconsistent with reason and judicial precedents, and recited in the judgment that the process was valid, such determination must stand, unless successfully assailed directly. Enforcement of such principle is necessary to stability and sanctity of judicial findings. "Where it appears that there was notice, though defective, and service, though imperfect, a decision of the court to which the process was returnable that such notice and service were sufficient will not be held void in a collateral proceeding": Black on Judgments, sec. 223. The same author further says, at section 274, that "when a notice which is defective, or service of which is informal, has been adjudged sufficient, the judgment rendered thereunder will not be held void in a collateral proceeding."

²¹² We perceive the line of distinction to be that if the writ, inspected as part of the record to overthrow the adjudication or recital in the judgment of due process, is an absolute contradiction thereof, an irreconcilable contradiction and denial, the invalidity may be declared collaterally; but if the contradiction may be reconciled by a construction not absolutely at variance with reason and sound policy, a construction by the recital so given cannot be assailed collaterally. The court rendering the judgment had authority in its very constitution and being to pass upon the sufficiency of this writ, as it did by the recital in the judgment, and thereby to determine its jurisdiction in the premises, and such determination, not being at direct and irreconcilable variance with the record, but a judicial construction of the writ, is not assailable collaterally: Van Fleet on Collateral Attack, sec. 1; St. Lawrence B. & M. Co. v. Holt, 51 W. Va. 352, 41 S. E. 351.

In support of the province of the court so to construe the terms of the writ, a judicial determination which was in its inherent power to make and only assailable directly, is the fact that we are of opinion such construction as was there given it, that of being due process, was a proper and reasonable one, and that the writ was not void. The defendants against whom that process issued, and upon whom it was regularly served, are presumed, as all men are, to know the law—that process must be returnable within ninety days, that it may be issued on a rule day and be

made returnable to the same day, and that after that first Monday to which process is made returnable there are the two succeeding days in which to enter appearance. No reasonable man would suppose that the clerk of a court meant to do a void and useless act in the issuance of process. The process upon its very face told defendants that an action in a certain court was begun against them, and the process, read in the light of the law, told them that they were required to appear thereto at a rule day within ninety days, which could only be construed to be the rule day on which this process issued or the two following days. To view the command of the process otherwise would be to give credence to the merest strained technicality for the defeat of judicial proceedings, which will always be given construction to support their regularity and validity where reasonable to do so. Public policy demands such liberal construction. ²¹³ No law-respecting citizen believes, upon receipt of such process as the one before us, a vain thing is meant by it. He construes it to mean something; so does the attorney to whom he takes it; so do the courts. These defendants could well understand, and reason and right so told them, that the word "next" following the month was a mere clerical error of the clerk, in good sense correcting itself to the word "instant." The least diligence, by examination at the clerk's office, would clear any doubt, if indeed any could exist. This is an age of enlightened reasoning; and it would be a reflection on our intelligent citizenship to say any of its members would take the language of the process in question to mean a vain and useless mission, or would in good faith disregard its command upon such pretense. Authority is not necessary to sustain this view; good sense applies and is sufficient.

But looking at the process collaterally, as the present suit called upon the court below and now calls upon this court to do, we can well adopt the authority of Van Fleet on Collateral Attack, section 329, "that the true rule concerning process and service, collaterally, both at law and in equity, is that if information be given sufficient to warn defendant that a judicial proceeding is pending against him in a particular court, and the proof of service is sufficient for the court to infer that he has such information, the proceeding by default will not be void." The author says that he deduces this rule from all the cases; and at section 347 he says: "It being impossible to avoid errors, and the

law having prescribed a method of correction by motion to quash or set aside the process, it would seem, on principle, that where process is sufficient to inform the person that a proceeding has been instituted against him in a special judicial tribunal, that method ought to be exclusive."

Coming, then, to the third question, it is clearly answered in the affirmative by authority. It is foreclosed by the holding of this court in *State v. Nutter*, 44 W. Va. 385, 30 S. E. 67, and *State v. Abbott*, 63 W. Va. 189, 61 S. E. 369, decided at this term. The bond sued upon in this action plainly guaranteed the payment of the judgment, since that judgment was for damages recovered under chapter 32 of the Code. "Where the effect of the undertaking of the surety is that he shall be liable for the result of a ²¹⁴ suit against his principal, he is conclusively bound by the judgment in such suit, even though he is not a party to it and have no notice of it": *Brandt on Suretyship and Guaranty*, sec. 802.

The fourth question is answered in the affirmative by so uniform an array of authorities that it is useless to extend discussion upon it here. "There is no exception to the rule that the fair and voluntary execution of a sealed instrument is conclusive, upon all who seal it, of everything admitted in it": *Hoke v. Hoke*, 3 W. Va. 561; *Monteith v. Commonwealth*, 15 Gratt. 172; 4 Minor, 3d ed., pt. 2, p. 1121, and authorities there cited. And the defendants having enjoyed the benefits of the bond, even if founded on an illegal license to sell liquor, they are further estopped to deny its validity. In *United States v. Hodson*, 10 Wall. 395, 19 L. ed. 937, and *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187, the supreme court of the United States holds: "When a bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure, and breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such defense." And that which estops the principal also estops the surety: *Brandt on Suretyship and Guaranty*, sec. 52.

We conclude, therefore, that all the foregoing special pleas were properly rejected. This brings us to the last question. While the proper plea to issue in a suit of this character, upon a bond with collateral conditions, is that of "conditions performed," yet we deem the special plea of nul tiel record applicable here, as testing merely the exist-

ence of the record and judgment averred in the declaration, as to the nonpayment of which breach is therein assigned. It did no more than test the existence of such record. By it, from what we have hereinbefore said, there could be no collateral attack of the judgment. The record being produced upon trial of this plea, verity thereof was imported, and could not be questioned thus collaterally; and it was proper to find the plea of no record not sustained. The defendant had opportunity, after trial of this special plea, to plead to issue, the general plea of the conditions performed, but chose not to do so. There properly followed judgment for plaintiff herein.

There is no error, and the judgment of which plaintiffs in error complain is affirmed.

Defects in the Service or Return of Process as affecting jurisdiction are discussed in the notes to *Sanford v. Edwards*, 61 Am. St. Rep. 485; *Reiger v. Mullins*, 124 Am. St. Rep. 756. A defective service may be sufficient to invest the court with jurisdiction so that its judgment, while erroneous, will not be void and open to collateral attack: *Westmeyer v. Gallenkamp*, 154 Mo. 28, 77 Am. St. Rep. 747; *Kalb v. German Sav. etc. Soc.*, 25 Wash. 349, 87 Am. St. Rep. 757; *Manternach v. Studt*, 230 Ill. 356, 120 Am. St. Rep. 310. But a judgment without notice, either by personal or substituted service, is void: *Thornily v. Prentice*, 121 Iowa, 89, 100 Am. St. Rep. 317.

A Judgment, However Erroneous, cannot be Collaterally Assailed unless the court exceeded its jurisdiction: *Fraaman v. Fraaman*, 64 Neb. 472, 97 Am. St. Rep. 650; *Spencer v. Spencer*, 31 Ind. App. 321, 99 Am. St. Rep. 260; *Younger v. Hehn*, 12 Wyo. 289, 109 Am. St. Rep. 986; *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 120 Am. St. Rep. 132; *Staats v. Wilson*, 76 Neb. 204, 124 Am. St. Rep. 806; *Randall v. Snyder*, 214 Mo. 23, 127 Am. St. Rep. 653. But a judgment void because without jurisdiction of the court may be denied or contested at any time in any proceeding, direct or collateral: *Flowers v. King*, 145 N. C. 234, 122 Am. St. Rep. 444; *Omaha Nat. Bank v. Robinson*, 73 Neb. 351, 119 Am. St. Rep. 903; *Sache v. Wallace*, 101 Minn. 169, 118 Am. St. Rep. 612; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959; *Thornily v. Prentice*, 121 Iowa, 89, 100 Am. St. Rep. 317.

LA RUE v. LEE.

[63 W. Va. 388, 60 S. E. 388.]

HOLOGRAPHIC WILL.—The Only Requisites of a Holographic Will are that it must be wholly written by the testator and signed by him in such a manner as to make it manifest that the name is intended as a signature. No dating, attesting witnesses, or particular custody is required. (By the editor.) (pp. 981, 983.)

HOLOGRAPHIC WILL.—Erasures by Hand of Testator in a holographic will is legal revocation of such portions as are so erased, since it is in the manner required for a will of that character to be executed; and, for the same reason, new portions written into

such will by hand of testator, his name remaining in such manner as to make it manifest that it is intended as a signature, may make the whole as changed a complete and valid new holographic will of such testator. (p. 981.)

WILL.—The Use of Pencil in Writing a Will.—Otherwise duly executed, or in making alterations in such will, raises no presumption that testator was only deliberating and that the will is not final. The use of such instrument may be as final and conclusive as to intent of testator as the use of any other. (p. 982.)

WILL.—Contemplated Changes.—Evidence to show that testator, in a will duly executed, contemplated changes therein, cannot affect its validity, in its integrity, or in any of its parts. Until there is a change in the legal mode, the presumption is that the result of such contemplation was a determination to adhere to the will as executed. (p. 982.)

WILL.—Parol to Invalidate or Revoke.—The spirit of the statutory law in regard to the making and revocation of wills is to restrain parol testimony on the subject within the narrowest practicable limits. (By the editor.) (p. 983.)

WILL.—Conduct and Declarations of the Testator, after a will is duly executed, manifesting ignorance of its existence, are not competent to question the validity or existence of such will. (p. 983.)

TRIAL.—Duty of Court to Direct Verdict.—It is the duty of a trial court, if requested, to direct a verdict for the party who has adduced evidence sufficient to warrant a verdict in his favor, and no evidence appreciably tending to overthrow the case so made has been adduced by the opposite party. (p. 984.)

(Syllabi by the court except when otherwise stated.)

Oliver S. Marshall, for the plaintiffs in error.

John R. Donehoo, for the defendants in error.

389 ROBINSON, J. A writing propounded as the last will and testament of William Griffith, deceased, was admitted to probate, and upon appeal therefrom to the circuit court an issue of *devisavit vel non* was submitted to the jury. The evidence offered by the contestants was excluded and a verdict directed for proponents, which being returned, judgment accordingly followed, and upon proper exceptions this writ of error prosecuted.

This writing is in testamentary form, and was duly proved to be wholly in the handwriting of the testator and signed by him. While it is crude in expression, and not a standard of orthographical and grammatical construction, it is quite intelligible. The writing is plain and easily read. It appears to have been originally written with a purple indelible pencil, and to contain some erasures and interlineations by a black graphite pencil. Upon its face and by all its terms it is a will. It is in the formal language of a will, and can be read completely, with the changes made therein. We have been favored with the original document, and find it to be

of no unusual type, but such as appears daily in the affairs of old-fashioned, sensible, but illiterate men. It is written on two sheets of note, or small sized letter paper. It contains four pages, each plainly numbered. The document is regularly dated and signed. On a separate and unnumbered sheet, of the same size and quality of paper, in black graphite pencil writing, evidently by the same hand as that of the other sheets, there is a separate writing, signed by the ³⁹⁰ testator, but not dated, which states: "I may *chang* my will"; and then proceeds to set forth what changes might be made, ending with these words: "If I don't make *theas* changes my will must stand as I *hav* it now *Root*." After testator's death all this writing was found, by one of the executors named therein, in a drawer of a bureau in testator's house, and this executor took possession thereof and produced it for probate as aforesaid.

It is well to note that this proceeding can relate only to probate, and in no wise to the construction of the writing. Viewing the whole record, we observe that the case turns entirely upon the sufficiency of the evidence introduced by contestants to invalidate this writing as a will. This is true, because (1) the paper itself, upon its face, is clearly a legal testamentary disposition of property; (2) the evidence of proponents is sufficient to establish such writing as a holographic will of the decedent under our statute. Since these propositions are convincingly true, the question presented is, Was the evidence on behalf of contestants of sufficient weight to overthrow the case so made? If it was not of such weight, there was no error in excluding it from the jury and directing a verdict for proponents. In *Kuykendall v. Fisher*, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A., N. S., 94, this court held: "When the evidence adduced by one of the parties to a civil action is sufficient to warrant a finding in his favor, and no evidence appreciably tending to overthrow the case so made has been adduced by the opposite party, it is the duty of the court to direct a verdict in favor of the former, if requested so to do." We find this principle to be the most applicable and controlling in the case before us.

It is argued that the erasures and interlineations invalidate the writing as a will, or, in other words, work a revocation of the same. Further contentions of the contestants are that the writing is only deliberative; that the same appears from the writing itself and the parol evidence introduced; and, therefore, that lack of testamentary intent is shown. These contentions appeared to be based upon the following: That

the writing is in pencil, with changes made by a different pencil; that said writing on the unnumbered sheet evidenced a probability that testator might change his will; that the writing was not found in a box containing testator's other ³⁹¹ valuable papers and money; that testator, a month or so before his death, stated that he had blocked out a will, and that on his death-bed he said that he did not have his business attended, but perhaps the court could do it as well.

Alterations in this writing have not the effect insisted upon by contestants. No presumption arises from them to be overcome by proponents. The will is presumed to have been in the same condition when executed as it was when found after testator's death: Rood on Wills, sec. 248. In this state one may make a valid will without the same being attested by witnesses. He may make a holographic will, as this man did. The only requisites of such will are that it shall "be wholly written by the testator," and signed by him "in such manner as to make it manifest that the name is intended as a signature." No dating is required. It need not be attested by witnesses, says the statute. The writing before us is unquestionably established as such, looking only to its face and the evidence of proponents. Do the erasures and changes affect it as they would a will not holographic unless the same was properly reattested after the changes were made? Our statute settles this, wherein it provides that a writing declaring an intention to revoke, and executed in the manner in which a will is required to be executed, is the legal method of revocation. So we say that erasures in a holographic will, made by the hand of testator himself, is legal revocation of such portions as are so erased, since it is in the manner required for a will of that kind to be executed; and new portions written into such will by the same hand to take the place of erasures, or new portions otherwise written therein by the same hand, being thereby executed in the manner which justifies the validity of a holographic will originally, so long as the signature of the testator remains in such manner as to make it manifest that it is intended as a signature, do not in any sense invalidate the will or affect its finality, since it is then a complete new holographic will, and needs no re-execution or republication before witnesses, because it did not originally demand execution and publication before them. To say that the whole must be rewritten and again signed by testator is simply to say that which is neither reasonable nor practicable. There was alteration in the mode provided by law, since it is ³⁹² proved that such alteration

was made in the handwriting of testator: *Sharp v. Sharp*, 2 Leigh, 249. We think that these considerations sufficiently dispose of the proposition that the erasures and interlineations on their face affect this writing as a will or its finality as such.

The proposition that writing in pencil is presumptive of deliberation, and no intent of finality, is so foreclosed by authority that but brief reference to it is merited here. "Statutes requiring wills to be made in writing are fully satisfied by printing from plates or type, by typewriting, or by writing made with a lead pencil": Rood on Wills, sec. 246. And in *Estate of Tomlinson*, 133 Pa. 245, 19 Am. St. Rep. 637, 19 Atl. 482, it is held: "A will wholly written in lead pencil is as valid as if written in ink; and the cancellation of legacies in lead pencil, though in a will written in ink, may be as final and conclusive as to the intent of testator as if made in ink." Such is the American authority: Underhill on Wills, 183.

No suspended intention appears in this writing; it is complete, and there is no breaking off in its dispositions. The writing on the unnumbered sheet, saying that he may change his will shows no suspended intention of testator, for it is therein distinctly stated that if changes are not made the will shall stand as written. It appears that some of the changes therein contemplated were made legally, as we have held above. But testator, by his language in the memorandum on the unnumbered sheet, made it clear that his will was to stand as written, except as to such changes as he might make therein; and that, changes being made, it was to stand as changed. In *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831, there is an applicable holding that meets with our approval, since good reason and stability of proper papers as testamentary dispositions justify it: "A will having been duly executed, evidence to show that the testator entertained thoughts of or contemplated changes, alterations or revocations thereof cannot affect the validity of such will, in its integrity or in any of its parts. Until there is a change, alteration or revocation in the mode appointed by law, the legal presumption is that the result of all thought and contemplation was a determination to adhere to the will as executed."

The finding of the will in the drawer instead of in the testator's ³⁹³ tin box is a mere circumstance, so slight as to have no appreciable weight. Our statute law provides no particular custody to be necessary in the case of a holographic will, as do the statutes of some other states, nor, in fact, as to any will.

Where is the absence of testamentary intent shown, as urged for contestants? Not from the writing itself, for such intent there appears. And, says Rood on Wills, section 62: "Usually no proof of testamentary intent is required, for it sufficiently appears on the face of the paper. But if there be any doubt on the matter, the circumstances under which the will was executed may be shown in detail." But where is the doubt shown? Shall we say that it is shown by the slight parol evidence that the testator said he had blocked out a will, and, later, that his business was unattended, as hereinbefore recited? Can this prevail against the plain testamentary form and intent shown by the writing in question? The law does not overthrow a testamentary writing on the weight of mere parol declarations by testator. If it did, why require testamentary dispositions to be in writing? Why not establish them by parol? Said Judge Baldwin, in *Malone's Admr. v. Hobbs*, 1 Rob. 346, 39 Am. Dec. 263: "The spirit of our statute law in regard to the making and revocation of wills is to restrain parol testimony on the subject within the narrowest practicable limits. Hence the solemnities of writing, signature, attestation." The same spirit has been constantly maintained, and is apparent in our present statute on wills.

The inadmissibility of such oral declarations of a testator as are relied upon to invalidate the will we find to be fully sustained by authorities cited and principles discussed in *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346. To admit such declarations inconsistent with the will would be to establish a doctrine which would render useless the precautions which the law requires in making a will, for if such evidence were allowed, witnesses would constantly be produced to set aside the most solemn testamentary instruments. Testator having shown a settled purpose that such writing as is before us should be his will, there must be shown something more than declarations inconsistent with its existence, since the paper, in his own handwriting and under his control, was permitted ³⁹⁴ to remain undisturbed by him until his death. The law describes the requisites for a valid will, and when these are complied with in strict conformity thereto can it be allowed, upon reason, to defeat them by mere declarations, unaccompanied by any act? The true principle in regard to declarations by testator, affecting his will, is this: "The conduct and declarations of the testator, both before and after he executed the will, are competent evidence to show his capacity, at time the will was executed, when the issue is

upon the sanity of the testator; but after the will is made, such conduct and declarations manifesting ignorance of the existence of the will are not competent to show that the testator never had made the will in question": Redfield on Wills, 557; Meeker v. Boylan, 28 N. J. L. 274; Leslie v. McMurtry, 60 Ark. 301, 30 S. W. 93; Wells v. Wells, 144 Mo. 198, 45 S. W. 1095.

It follows from what we have said that refusal of the instructions requested by contestants and exclusion of their evidence were proper. The proposed instructions were unwarranted by a correct legal view of the case, as expressed by us herein. The evidence adduced by proponents was sufficient to warrant a finding in their favor, and no evidence appreciably tending to overthrow the case made by them having been adduced by contestants, it was the duty of the court, as requested by proponents, to direct a verdict in their favor. There is no error, and the judgment is affirmed.

Holographic Wills are discussed in the note to Estate of Fay, 104 Am. St. Rep. 22. For subsequent decisions on the subject, see Brogan v. Barnard, 115 Tenn. 260, 112 Am. St. Rep. 822; Kerr v. Girdwood, 138 N. C. 473, 107 Am. St. Rep. 551; Buffington v. Thomas, 84 Miss. 157, 105 Am. St. Rep. 423; Estate of Clisby, 145 Cal. 407, 104 Am. St. Rep. 58.

The Effect of Attempted Alterations of a Will and Interlineations Therein are discussed in Re Knapen's Will, 75 Vt. 146, 98 Am. St. Rep. 808, and cases cited in the cross-reference note thereto.

MATHENY v. ALLEN.

[63 W. Va. 443, 60 S. W. 407.]

BOUNDARIES—Controlling Circumstances in Locating.—It is a general rule that, in locating boundaries of land, resort is to be had first to natural landmarks, next to artificial monuments, then to adjacent boundaries, and last to courses and distances. (p. 990.)

BOUNDARIES—Repugnancy Between Calls for Adjoiners and for Monuments.—Calls for adjoiners must yield, generally, to calls for monuments, where there is repugnancy between them in a description of land. (pp. 986, 989.)

BOUNDARIES—Rejection of Call.—A call irreconcilable and incongruous with another call of a grant which appears to have been inserted by mistake may be wholly rejected and disregarded. (pp. 986, 989.)

(Syllabi by the court.)

M. F. Matheny and Ashton File, for the plaintiffs in error.

A. D. Preston and John W. McCreery, for the defendant in error.

444 ROBINSON, J. This action of ejectment was heard upon an agreed statement of facts by the court in lieu of a jury. The issue is so defined between the parties that both concede that a single question is involved; and, therefore, all matters not affecting this question are precluded from recital or consideration in this opinion. That question relates to a construction of the grant under which plaintiffs claim, and abstractly is this: Do calls in a grant or deed for trees as corners prevail over further call therein that a line between such trees is with an old established line of an adjoining tract or survey, when it is found that such calls are inconsistent? In other words, in a description of land, in a conveyance, when there is repugnancy between them, which yields—calls for natural objects or calls for adjoiners?

Plaintiffs claim under a grant from the commonwealth to Richard Toler, and defendant claims under an older patent. Plaintiffs are vested, by regular conveyances and payment of taxes, with title to the Toler grant, and defendant is a tenant of those likewise vested with title to the older grant. Neither plaintiffs nor defendant, nor those under whom they respectively claim, had actual possession of the strip of land in controversy until defendant moved thereon about two months before the institution of this suit. Actual and adverse **445** possession under the Toler grant existed from the date of that grant, August 11, 1829, while actual and adverse possession of the tract claimed by those under whom defendant holds dates only from September 4, 1849. Plaintiffs' title, notwithstanding junior to the other, therefore, by such possession became good as against the title of the senior grant, not so occupied for that period of twenty years, to so much land as is included by the description in the grant to Toler, since such possession inures to the extent of the boundaries called for by the paper under which one claims. But this brings us directly to the point at issue: What are the boundaries to the extent of which plaintiffs can claim by reason of such adverse possession, ripened into good title against the senior grant as aforesaid? If the contention of plaintiffs as to construction of the calls of the Toler grant is well founded, then the boundary called for in the deed of those under whom defendant claims, based upon title from the senior patent, interlocks with that of plaintiffs. There having been no actual adverse possession of land embraced in the interlock, except for the brief period aforesaid, the case turns solely on a construction of the description in the Toler grant.

The description in the Toler grant, construction of which, as contended by plaintiffs, will cause interlock with the tract owned by those under whom defendant holds and will take from them the strip of land in controversy, is as follows: "Beginning at a white oak and pine near Preston's corner . . . S. 10. W. 116 poles to two white oaks and gum; & thence S. 83 W. 160 poles with Preston's line to the beginning." The survey and plat in this case show that this beginning corner is several hundred feet from the Preston line; that the gum and two white oaks are at even greater distance from it; and that, to extend the line running to the gum and two white oaks to the Preston line, thence following that line to Preston's corner, and thence to the white oak and pine, makes the boundary of the land in controversy, sought to be recovered by the plaintiffs. From this it will readily be observed that plaintiffs seek recovery of the land that lies between the Preston line and the line running from the two white oaks and gum to the white oak and pines, the former of which is south of the latter, but not quite parallel thereto. To put it in different phrase, plaintiffs claim that they have a ⁴⁴⁶ right to go to the Preston line, thereby proceeding several hundred feet beyond the corner called for in the Toler grant, two white oaks and gum, then to follow the Preston line to Preston's corner, and then to connect, by a line several hundred feet in length, Preston's corner with the beginning corner called for in the Toler grant, white oak and pine. Virtually, the result of this would be to add three lines to the description of the grant. True, "with Preston's line" is called for in the grant, but survey shows that it is not the line between the two white oaks and gum and the white oak and pine, and that you cannot run "with Preston's line" between those corners, as the description in the grant seems to imply. Between the last line of the grant and Preston's line there is a wide strip of land. Can plaintiffs recover this strip? Does it belong to them by reason of the title they have acquired under the Toler grant? Shall they be compelled to stop at these corner trees, for which their title papers call, or may they go southward beyond them, several hundred feet, to Preston's line, which their title papers may mistakenly suppose is between these two corners marked by the trees?

Intention to make the call for the Preston line one of the outside boundaries is argued on behalf of plaintiffs. But upon the present inquiry we can only look to the language of the grant for such intention, as nothing on this score is

contained in the agreed statement of facts. Mistake is also argued; but, to discover it, we are confined to the same. We are therefore bound in our consideration to the face of the description, and whatever may have been the intention at the time, we cannot now say that anything other was intended than that which is the result of the language employed, as measured by the rules of construction which the law would have us apply.

The general rule, applicable to the case we find here, is stated in 5 Cyc. 915, as follows: "As a rule, lines marked on the ground for the survey or adopted by the surveyor are to be regarded rather than call for adjoiners, and when there is a discrepancy such lines govern." The same book, at page 921, says: "In case of conflict calls for adjoiners will, as a rule, yield to calls for artificial monuments and marks." The authorities generally support this principle. ⁴⁴⁷ It seems founded on reason, and deserves sanction. The result of its application is to follow the particular and certain items of description in preference to the general or mistaken. This court has long recognized the rule. In *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335, it is held: "The descriptive calls in a survey such as, 'near the land' of a named person, must yield in locating a survey to established corners as well as to locative calls." This is only an application of the reasonable and sensible principle that the more fixed and certain is to control over that which is less fixed and certain. In the case before us, the beginning corner of plaintiff's boundary is a white oak and pine "near Preston's corner," not necessarily on Preston's line. And the last line is one running from a fixed place, two white oaks and gum, to another fixed place, the said beginning corner. But this line, according to the grant, it may be said, is to run "with Preston's line." Is not this uncertain, when "near Preston's corner" may not be on that line at all? If the beginning corner was not on the Preston line, the last line could not possibly run with it. And certain it is that the survey made in this case shows that neither of the designated corners was on the Preston line, but each quite a distance from it. The recent survey, made by order of the court, stands before us as true, no exception to its accuracy appearing; and it is referred to and relied upon by both plaintiffs and defendant in the briefs. The general call "with Preston's line" is shown by it to be an erroneous and mistaken one. Is it to prevail over the fixed monuments, about the location of which there appears no dispute herein? The very expression, "near Preston's cor-

ner," gives an element of uncertainty to the call, "with Preston's line," and both expressions, being merely descriptive, must yield to the locative calls. As said in *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798: "The land sold was the land as run off and surveyed, which satisfies the calls of the deed, and calling for one of the division lines was a false description which creates no uncertainty and works no injury." Whenever a call is irreconcilable and incongruous with the other calls of a grant by which the survey may be located, and which call appears to have been inserted by mistake, it may be wholly rejected and disregarded: *Smith v. Chapman*, 10 Gratt. 445; *Hamilton v. McNeil*, 13 Gratt. 389. The ⁴⁴⁸ expression "with Preston's line" is shown by the survey herein to be irreconcilable with the line between the fixed corners, and we must infer that it was inserted by mistake, and disregard it. There is no rule by which we can disregard locative calls of the grant, when they can be found, as they have been here. Though the surveyor, in running for the grant originally, may have believed that he was on the Preston line, yet since it is now shown that he was not, claimants under the grant cannot profit by mistaken description which is in conflict with the actual survey. We must presume that the commonwealth intended only to grant to the trees, since they are fixed and certain. There should be no mistake as to their location; there could be, and was, as to the Preston line. Even though it was intended to grant to that line, most certainly it was not done, for the trees are not on it. While a vendor may intend to convey to certain objects and yet plainly does not do so, can we, in ejectment, correct the deed to conform to such intention?

In line with the principle above applied, that locative calls prevail over calls for adjoining tracts, when there is repugnancy between them, is *Burnett v. Burriss*, 39 Tex. 501, the holding in which is in conformity to the weight of authority. It is there announced: "The location of the lines of a survey is to be determined by the lines as actually run upon the ground, where this can be ascertained; nor will this rule be varied by the fact that an adherence to it would give to the locator less land than he was entitled to by his certificate. Nor is the rule varied by the fact that a call is made to run to the line of an older survey, if that line was never reached in the survey actually made, but the surveyor stopped at another line which was mistaken for it." Likewise, in the case of *Cleveland v. Smith*, 2 Story, 278, Fed. Cas. No. 2874, wherein it appeared that in a grant of land from the common-

wealth of Massachusetts to the towns of Taunton and Rayn-haven, the land was described as "beginning on the north line of the million acres, at a yellow birch tree, six miles east from the southeast corner," etc. (the said birch tree being marked as a monument in the original survey of the land) whereas the birch tree did not, in fact, stand upon the said north line, as happened, but was so situated that a gore of land was left between it and the said north line, the court held that the birch tree, and not ⁴⁴⁹ said north line, was to be taken as the boundary of the land granted. And as stated in *Jackson v. Loomis*, 18 Johns. 81: "If there is a contradiction in a description, that part of it is to be taken which gives most permanence and certainty to the location."

It must not be overlooked that the calls of the Toler grant do not, in fact, call for the Preston line. They call for objects, certain trees, but these are not described as located on the Preston line. The beginning corner and the trees there named are expressly stated to be "near Preston's corner"; but as to this beginning corner, there is no call for the Preston line. And the call for the two white oaks and pine does not say that they are on that line. True, the call from there to the beginning says "with" that line. But since the line of that call is nearly parallel with the Preston line, may it not be said that "with" means in the same general direction, as there has been no direct call for the Preston line? In no place do we find the words "to Preston's line" or "on Preston's line." Then how can we infer that the footsteps of the surveyor went "to Preston's line," or were ever on "Preston's line," and construe the description as making that line one of the boundaries? And particularly, how can we so construe it as one of the boundaries, when the survey herein shows that, to follow the corners adopted by the original survey and named in the grant, it cannot possibly be one of the boundary lines? By the plat, we must conclude the words "with Preston's line" are mistaken description added by the original surveyor to fixed and certain description. If a man writes us a letter, saying that he is in a city situated at the confluence of the Schuylkill and Delaware rivers; that there he saw Independence Hall; and in that same letter calls the place New York, must we not, in sense, believe it Philadelphia, notwithstanding the mistaken name he has applied? "Where several particulars descriptive of the land conveyed by the deed are named therein, some of which are false, if the true are sufficient to designate the land, the false will be rejected":

Tyler on Boundaries, 129; Abbott v. Abbott, 53 Me. 356; Robinson v. Braiden, 44 W. Va. 183, 28 S. E. 798.

It is also argued on behalf of plaintiffs that the presumption is against the construction of a description that will leave a narrow strip of land next to one of the lines. But ⁴⁵⁰ does this apply to a grant from the commonwealth, especially as to a junior patent? However that may be, we cannot apply such presumption to overthrow the definite location of the trees, and thereby do violence to the well-recognized rule of the law. Such presumption is not fitted to the facts submitted in this case, however applicable it may be in some instances.

Upon the whole, it convincingly appears to us that we can here only apply the doctrine long recognized in this jurisdiction, as plainly announced in Gwynn v. Schwartz, 32 W. Va. 487: "In the description of lands as to questions of boundaries the rule is settled in Virginia and West Virginia that natural landmarks, marked lines and reputed boundaries will control mere courses and distances or mistaken descriptions in surveys and conveyances." The phrase "with Preston's line" is the recital of a mere course, shown to be mistaken at that, which must yield to the definite calls for monuments—the corner trees. In this case, we see no reason to depart from the general rule, known to all versed in the law, that in locating boundaries of land resort is first to be had to natural landmarks, next to artificial marks, then to adjacent boundaries, and last to courses and distances.

Therefore, we find no error, and affirm the judgment.

GENERAL RULES FOR THE LOCATION OF BOUNDARIES.*

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II. Necessity for Intent of the Parties, as Shown by the Grant or Conveyance, to be Followed, 991.

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*REFERENCES TO MONOGRAPHIC NOTES.

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I. Scope of Note.

In this note we shall include merely those cases which discuss the various elements going to make up the general rules governing the locating of boundaries and the controlling force of these elements taken separately and in combination with each other. We shall not consider cases which involve the question what constitutes any such elements of boundary. The general subject of boundaries was considered in the notes attached to *Heaton v. Hodges*, 30 Am. Dec. 734, and *Le Compte v. Lueders*, 30 Am. St. Rep. 453.

II. Necessity for Intent of the Parties, as Shown by the Grant or Conveyance, to be Followed.

In locating a boundary line, the intent of the parties to the conveyance, as shown by the description of the land therein, should be followed: *Serrano v. Rawson*, 47 Cal. 52; *Liddle v. Blake*, 131 Iowa, 165, 105 N. W. 649; *Chapman v. Hamblet*, 100 Me. 454, 62 Atl. 215; *Schultz v. Lindell*, 40 Mo. 330; *Ball v. Woodward*, 46 N. H. 315; *Buffalo etc. R. Co. v. Stigeler*, 61 N. Y. 348; *Tucker v. Satterthwaite*, 123 N. C. 511, 31 S. E. 722; *Waterman v. Andrews*, 14 R. I. 589; *Hull v. Fuller*, 7 Vt. 100; *King v. Watkins*, 98 Fed. 913. The calls for monuments and other elements of boundary which control are those mentioned in the conveyance or which by reference are deemed a part thereof: *Kashman v. Parsons*, 70 Conn. 295, 39 Atl. 179; *Hunter v. Lank*, 1 Harr. 10; *Kuhns v. Fennell* (Pa.), 15 Atl. 920; *Missouri etc. Ry. Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 781. In determining boundaries none of the calls in the conveyance

should be disregarded if they can be fulfilled by any reasonable manner of running the lines: *Miller v. Bryan*, 86 N. C. 167. Nor should any of the calls be disregarded if all of the descriptive parts of the deed can consistently stand together: *Herrick v. Hopkins*, 23 Me. 217.

III. Under What Circumstances Calls in the Conveyance may be Disregarded or Corrected.

a. Preference of Definite and Certain Calls Over Indefinite and Uncertain Ones.—Where there are two calls or descriptions of land in a conveyance which are inconsistent, that one should be retained and given effect which is the most certain and least liable to mistake: *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149, 22 South. 910; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491; *Herrick v. Hopkins*, 23 Me. 217; *Ricker v. Barry*, 34 Me. 116; *Friend v. Friend*, 64 Md. 321, 1 Atl. 865; *Maryland Const. Co. v. Keeper*, 90 Md. 529, 45 Atl. 197; *White v. Gay*, 9 N. H. 126, 31 Am. Dec. 224; *Hall v. Davis*, 36 N. H. 569; *Upton v. Santa Rita Min. Co. (N. M.)*, 89 Pac. 275; *Jackson v. Loomis*, 18 Johns. 81; *Moore v. McClain*, 141 N. C. 473, 54 S. E. 382; *Johnson v. McMillan*, 1 Strob. 143; *Funa v. Manning*, 11 Humph. 311; *Bolton v. Lann*, 16 Tex. 96; *Matheny v. Allen*, 63 W. Va. 443, ante, p. 984, 60 S. E. 407; *Martin v. Carlin*, 19 Wis. 454, 88 Am. Dec. 696; *Ulman v. Clark*, 100 Fed. 180.

b. Preference of Particular Over General Descriptions.—All parts of a description in a conveyance should be allowed to stand if possible, but if they cannot be harmonized, the particular description will control the general description of the land to be conveyed: *Gano v. Aldridge*, 27 Ind. 294; *Tolleston Club v. Clough*, 146 Ind. 93, 43 N. E. 647; *Moseley v. Jamison*, 1 A. K. Marsh. 606; *Booth v. Buras*, 104 La. 614, 29 South. 260; *Moore v. Griffin*, 22 Me. 350; *Haynes v. Young*, 36 Me. 557; *Cannon v. Emmans*, 44 Minn. 294, 46 N. W. 356; *Conover v. Wardell*, 22 N. J. Eq. 492; *Wharton v. Brick*, 49 N. J. L. 289, 8 Atl. 529; *Jones v. Smith*, 73 N. Y. 205; *Masten v. Olcott*, 101 N. Y. 152, 4 N. E. 274; *Scull v. Pruden*, 92 N. C. 168; *Davidson v. Arledge*, 97 N. C. 172, 2 S. E. 378; *Miller v. Cramer*, 190 Pa. 315, 42 Atl. 690; *Bratton v. Clawson*, 3 Strob. 127; *Wright v. Mabry*, 9 Yerg. 55; *Bell v. Hickman*, 6 Humph. 398; *Lutcher etc. Lumber Co. v. Hart (Tex. Civ. App.)*, 26 S. W. 94; *Hunter v. Hume*, 88 Va. 24, 13 S. E. 305; *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335; *Wilson v. Hunter*, 14 Wis. 683, 80 Am. Dec. 795; *Howell v. Saule*, 5 Mason, 410, Fed. Cas. No. 6782.

c. Effect Where Some of the Calls are Ambiguous or Inconsistent with Other Calls.—Where one of the calls in the description of the land is inconsistent with the other calls, it may be rejected if by doing so the other calls are reconciled and thereby made to identify the land with certainty: *Stevens v. Wait*, 112 Ill. 544; *Pawling v. Merewether's Heirs*, *Hughes* (1 Ky.), 26; *Vose v. Handy*, 2 Me. 322, 11 Am. Dec. 101; *Bond v. Fay*, 12 Allen, 86; *Cooley v. Warren*, 53

Mo. 166; *West v. Bretelle*, 115 Mo. 653, 22 S. W. 705; *Driscoll v. Green*, 59 N. H. 101; *Upton v. Santa Rita Min. Co. (N. M.)*, 89 Pac. 275; *Robinson v. Kime*, 70 N. Y. 147; *People v. Hall*, 43 Misc. Rep. 117, 88 N. Y. Supp. 276; *Browning's Admx. v. Atkinson*, 37 Tex. 633; *Gates v. Lewis*, 7 Vt. 511; *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Croghan v. Nelson*, 3 How. 187, 11 L. ed. 554. But where all of the calls made by the locating surveyor cannot be strictly followed, as few should be disregarded as is possible: *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079. Where two descriptive calls of equal dignity are given, preference should be given to that one which is most consistent with the intention disclosed by the whole description: *Harrell v. Morris (Tex.)*, 5 S. W. 625. Where all of the calls except one may be applied to the ground, making a correct and intelligible description of the premises, the one call not so applicable will be controlled by the others: *Chandler v. Green*, 69 Me. 350. Thus where the description of the property calls for the beginning to commence at a well and concludes with a call to the place of beginning, but the whole description applied to the ground will not end at the beginning, and the probabilities for error in the last call are greater than a supposed error in another call, the manifest error in the last call may be extended so that by following the remaining calls for courses and distances, it will end at the place of beginning: *Richardson v. Watts*, 94 Me. 476, 48 Atl. 180. "Courts will give effect to every part of the description of premises in a deed or grant if it is possible, consistently with the rules of law; but if this cannot be done, they reject that which is repugnant to the general intent of the instrument. It appears by the plat that, following the courses and distances of the survey, portions of the sea will be included in the lines of the rancho. This is inconsistent with the calls of the decree of confirmation, which confirms a tract bounded by the seashore. It is a general rule in the construction of grants and deeds of conveyance, containing descriptions of the premises, one part of which is inconsistent with or repugnant to another, that visible local objects or monuments mentioned in the conveyance will control both courses and distances. The survey mentions the seashore as the termination of the fourth course, and the twelfth course commences at the seashore, but at the intermediate stations no visible objects, nor any monument, either natural or artificial, is mentioned. The call for the seashore as the southern boundary must be regarded as the more definite and certain, 'and will prevail over a call for a mere station,' and over the courses and distances": *More v. Massini*, 37 Cal. 432. And where the beginning point is ambiguous, it will be controlled by the other calls of the description, which are certain: *Stevenson v. Erskine*, 99 Mass. 367.

d. Effect Where a Mistake Exists in Respect to Some of the Calls.—Whenever a call is irreconcilable and incongruous with the other calls of a grant, and it appears to have been inserted by mistake, it may be wholly rejected and disregarded: *Hamilton v. Mc-*

Neil, 13 Gratt. 389; Matheny v. Allen, 63 W. Va. 443, ante, p. 984, 60 S. E. 407. If a call be impracticable, it may be rejected as surplusage on the ground that it was made through mistake, since the intention of the person making it is to be chiefly regarded: Holmes v. Trout, 7 Pet. 171, 8 L. ed. 647. The fact that a call is a mistake is naturally to be shown by a consideration of the whole description: Slater v. Rawson, 1 Met. (Mass.) 450. A line actually run by the surveyor will control a mistaken description of the land in a grant or deed: Riley v. Griffin, 16 Ga. 141, 60 Am. Dec. 726; Cherry v. Slade's Admr., 7 N. C. 82; Hill v. Dalton, 140 N. C. 9, 52 S. E. 273. The boundaries of land as actually marked on the ground by the surveyor will control a call in his field-notes for the boundary of another tract erroneously supposed by him to be identical with the one marked by him: Busk v. Manghum, 14 Tex. Civ. App. 621, 37 S. W. 459. Where from the whole description of land it is apparent that a call for a lot number, block, or section is a mistake, such mistaken description may be rejected: Murray v. Hobson, 10 Colo. 66, 13 Pac. 921; Ives v. Kimball, 1 Mich. 308; Union Ry. etc. Co. v. Skinner, 9 Mo. App. 189; Jackson v. Loomis, 18 Johns. 81. So, also, where a stream is found where called for, but of a different name from that called for in the field-notes, the call may be regarded as a mistake, and a call for course and distance be followed instead of the stream: Jones v. Burgett, 46 Tex. 284. In other words, although monuments will generally prevail over all other calls, still if it is apparent that the calls for monuments are erroneous, they will be controlled by the other elements of description, such as course and distance: Jamison v. Fopiano, 48 Mo. 194; Robinson v. Doss, 53 Tex. 496; Johnson v. Archibald, 78 Tex. 96, 22 Am. St. Rep. 27; Hamilton v. Blackburn, 43 Tex. Civ. App. 153, 95 S. W. 1094.

If the courses and distances cannot be otherwise reconciled with the controlling monument in the description, a line in a survey which has evidently been omitted may be supplied by intendment: Serrano v. Rawson, 47 Cal. 52. The fact that one line of a survey is left open does not render the survey invalid where the beginning and end of that line are given: Alford v. Dewin, 1 Nev. 207.

Courses laid down in a deed which are inconsistent with the remainder of the description may be rejected if the remainder is sufficient to uphold the evident intention of the parties: Beal v. Gordon, 55 Me. 482; Cooper v. White, 46 N. C. 389. Thus, where the courses and distances from the last line "to the place of beginning" would not bring it to that point nor inclose any land, the course and distance may be rejected and the call "thence to the place of beginning" followed: Owings v. Freeman, 48 Minn. 483, 51 N. W. 476. So, also, where there are two descriptions of the place of beginning, only one of which can be accurately ascertained and the rest of the description show it to be correct, it will be followed: Maryland Const. Co. v. Kuper, 90 Md. 529, 45 Atl. 197. And where it is apparent, from calls for monuments or other locative calls, that the call for course is a mistake and that it should be some other point of the

compass in order to close the survey or inclose the land, the court may reject the course given and substitute the correct one, such as substituting "east" for "west," or the like: *Morriss v. Coghill*, Ky. Dec. 322; *Woods v. Kennedy*, 5 T. B. Mon. 174; *Maryland Const. Co. v. Kuper*, 90 Md. 529, 45 Atl. 197; *Upton v. Santa Rita Min. Co.* (N. M.), 89 Pac. 275; *Wiseman v. Green*, 127 N. C. 288, 37 S. E. 272; *Talkin v. Anderson* (Tex.), 19 S. W. 350; *Barnard's Admr. v. Russell*, 19 Vt. 334; *White v. Luning*, 93 U. S. 514, 23 L. ed. 938.

Where it is necessary to disregard one of two sets of calls in the field-notes of an office survey, calls which were made under a mistake as to the relative position of an adjoining survey may be disregarded and effect given to the real intention of the person who made the field-notes: *Sellman v. Sellman* (Tex. Civ. App.), 73 S. W. 48. And where it is reasonably apparent that the surveyor, in calling for lines of an older survey, was mistaken in assuming that he had reached that point when he ran the course and distance called for, the calls for the latter should be given preference: *Aransas Pass etc. Co. v. Flippen* (Tex. Civ. App.), 29 S. W. 813.

IV. Order of Preference in Respect to the Various Methods of Evidencing Boundaries.

Where the calls for boundaries are inconsistent with each other, the general rule is that resort is to be had, first, to natural objects or landmarks, next, to artificial marks, then to adjacent boundaries, and then to courses and distances: *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149, 22 South. 910; *Goodbub v. Scheller*, 3 Ind. App. 318, 29 N. E. 610; *Allen v. Kersey*, 104 Ind. 1, 3 N. E. 557; *Brashlars v. Joseph*, 32 Ky. Law Rep. 1139, 108 S. W. 307; *Yanish v. Tarbox*, 49 Minn. 268, 51 N. W. 1051; *Kleven v. Gunderson*, 95 Minn. 246, 104 N. W. 4; *Simpson v. Wabash R. Co.*, 145 Mo. 64, 46 S. W. 739; *Avery v. Baum*, Wright, 576; *Lehigh Valley Coal Co. v. Beaver Lumber Co.*, 203 Pa. 544, 53 Atl. 379; *Wash v. Holmes*, 1 Hill, 12; *Fulwood v. Graham*, 1 Rich. 491; *Thatcher v. Matthews* (Tex. Civ. App.), 105 S. W. 317; *Ridgell v. Atherton* (Tex. Civ. App.), 107 S. W. 129; *Wilkins v. Clawson* (Tex. Civ. App.), 110 S. W. 103; *Matheny v. Allen*, 63 W. Va. 443, ante, p. 984, 60 S. E. 407; *Racine v. Case Plow Co.*, 56 Wis. 539, 14 N. W. 599; *Ulman v. Clark*, 100 Fed. 180. The designation of quantity is the lowest in the scale of importance: *Goodbub v. Scheller*, 3 Ind. App. 318, 29 N. E. 610. This general rule of relative importance of the evidences of boundary is not an inflexible one, and when it is apparent that a mistake exists in respect to the calls, an inferior means of location may control a higher one. That rule should be adopted which is most consistent with the intent of the grant: *Luckett v. Scruggs*, 73 Tex. 519, 11 S. W. 529; *Ulman v. Clark*, 100 Fed. 180. The early case of *Fulwood v. Graham*, 1 Rich. 491, in stating that the general rule was laid down by the early cases, observed: "They all maintain that in locating lands we are to resort: 1st. To natural boundaries; 2d. To artificial marks; 3d. To adjacent boundaries; 4th. To course and

distance; but it has never been said that each of these occupied an inflexible position. It sometimes might occur that an inferior means of location might control a higher, when it was plain there was a mistake. As where a tract of land is represented as lying on one great stream, and the artificial marks or other circumstances show that it lies upon another. All that is meant is, that the evidences of location which I have mentioned are resorted to in their order, unless it appears that the representation in the plat depending upon them is a mistake. In that event, the mistake is to be corrected."

In *Goodson v. Fitzgerald*, 40 Tex. Civ. 619, 90 S. W. 898, it was contended that several rules stating the controlling effect of certain calls over other calls were absolute rules of law, but the court in denying the contention said: "At most, they are rules of evidence, and are relative in their application. Calls for rivers and well-defined streams are held to be of the highest dignity. Next in order are calls for artificial objects. Next are calls for course and distance. Standing thus to each other their relative force as evidence is defined, but by the aid of other facts the weakest may in a given case overcome the force of the call of highest dignity. The purpose of the inquiry, and the end to which all evidence is addressed, in a boundary suit, is to find the footsteps of the original surveyor. If, notwithstanding a call for a river, it is shown by other evidence that the surveyor did not reach the stream, but by mistake supposed a tributary of the stream was the stream itself, the call for the river will yield. So of a call for a marked line of an older survey."

V. To What Extent Calls for Monuments, Natural or Artificial, and Lines Marked on the Ground Control.

a. *Controlling Effect of Monuments in General.*—The general rule is that monuments, natural or artificial, will control all other calls in case of a conflict: *Crampton v. Prince*, 83 Ala. 246, 3 Am. St. Rep. 718, 3 South. 519; *Hess v. Rudder*, 117 Ala. 525, 67 Am. St. Rep. 182, 23 South. 136; *Piercy v. Crandall*, 34 Cal. 334; *Tognazzini v. Morganti*, 84 Cal. 159, 23 Pac. 1085; *Anderson v. Richardson*, 92 Cal. 623, 28 Pac. 679; *Cullacott v. Cash Gold etc. Min. Co.*, 8 Colo. 179, 6 Pac. 211; *Belden v. Seymour*, 8 Conn. 19; *Nichols v. Turney*, 15 Conn. 101; *Nivin v. Stevens*, 5 Harr. 272; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139, 14 South. 805; *Harris v. Hull*, 70 Ga. 831; *Leverett v. Bullard*, 121 Ga. 534, 49 S. E. 591; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Lull v. Chicago*, 68 Ill. 518; *Simonton v. Thompson*, 55 Ind. 87; *Richwine v. Jones*, 140 Ind. 289, 39 N. E. 460; *Moreland v. Page*, 2 Iowa, 139; *Walrod v. Flanigan*, 75 Iowa, 365, 39 N. W. 645; *Dows R. E. & Trust Co. v. Emerson*, 125 Iowa, 86, 99 N. W. 724; *Preston's Heirs v. Bowmar*, 2 Bibb, 493; *Johnson v. Gresham*, 5 Dana, 543; *Esmond v. Tarbox*, 7 Me. 61, 20 Am. Dec. 346; *Chadbourn v. Mason*, 48 Me. 389; *Tyler v. Fickett*, 73 Me. 410; *Carroll v. Norwood's Heirs*, 5 Har. & J. 155; *Wilson v. Inloes*, 6 Gill, 121; *Howe v. Bass*, 2 Mass. 380, 3 Am. Dec. 59; *Frost v. Spaulding*, 19 Pick. 445, 31 Am. Dec. 150; *Olson v. Keith*, 162 Mass. 485,

39 N. E. 410; Diehl v. Zanger, 39 Mich. 601; Brown v. Morrill, 91 Mich. 29, 51 N. W. 700; Yanish v. Tarbox, 49 Minn. 268, 51 N. W. 1051; Newman v. Foster's Heirs, 4 Miss. 383, 34 Am. Dec. 98; Jacobs v. Moseley, 91 Mo. 457, 4 S. W. 135; Peterson v. Beha, 161 Mo. 513, 62 S. W. 462; Johnson v. Preston, 9 Neb. 474, 4 N. W. 83; Peterson v. Skjelver, 43 Neb. 663, 62 N. W. 43; Terry v. Berry, 13 Nev. 514; Smith v. Dodge, 2 N. H. 303; Hall v. Davis, 36 N. H. 569; Cunningham v. Curtis, 57 N. H. 157; Jackson v. Perrine, 35 N. J. L. 137; Curtis v. Aaronson, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886; Wendell v. Jackson, 8 Wend. 183, 22 Am. Dec. 635; Town v. Needham, 3 Paige, 545, 24 Am. Dec. 246; Drew v. Swift, 46 N. Y. 207; Norwood v. Cranford, 114 N. C. 513, 19 S. E. 349; Alshire's Lessee v. Hulse, 5 Ohio, 534; Lewis v. Lewis, 4 Or. 177; Kanne v. Otty, 25 Or. 531, 36 Pac. 537; Hall v. Powell, 4 Serg. & R. 456, 8 Am. Dec. 722; Grier v. Pennsylvania Canal Co., 128 Pa. 79, 18 Atl. 480; Sumpter v. Bracey, 2 Bay, 515; Nelson v. Frierson, 1 McCord, 232; Lewis v. Oakley, 10 Heisk. 483; Gerald v. Freeman, 68 Fed. 201, 4 S. W. 256; Johnson v. Archibald, 78 Tex. 96, 22 Am. St. Rep. 27, 14 S. W. 266; Church v. Stiles, 59 Vt. 642, 10 Atl. 674; Herbert v. Wise, 3 Call, 239; Stangair v. Roads, 41 Wash. 583, 84 Pac. 405; Strunz v. Hood, 44 Wash. 99, 87 Pac. 45; Lampe v. Kennedy, 49 Wis. 601, 6 N. W. 311; Thompson v. Fuhrmann, 130 Wis. 375, 110 N. W. 236; Garrard v. Silver Peak Mines, 82 Fed. 578; McEwen v. Bulkley, 24 How. 242, 16 L. ed. 672; Bartlett Land etc. Co. v. Saunders, 103 U. S. 316, 26 L. ed. 546.

Thus the rule that a call for courses and distances will yield to one for a natural object or permanent monument in case of a conflict has been so frequently affirmed that it is one of the settled rules of boundaries: Beaudry v. Doyle, 68 Cal. 105, 8 Pac. 694; Adair v. White, 85 Cal. 313, 24 Pac. 663; Pollard v. Shively, 5 Colo. 309; Higley v. Bidwell, 9 Conn. 447; Quillen v. Betts, 1 Penne. (Del.) 53, 39 Atl. 595; Nevin v. Disharoon (Del. Super.), 66 Atl. 362; Daggett v. Willey, 6 Fla. 482; Riley v. Griffin, 16 Ga. 141, 60 Am. Dec. 726; Kamphouse v. Gaffner, 73 Ill. 453; Sayers v. Lyons, 10 Iowa, 249; Brockman v. Rose, 28 Ky. Law Rep. 673, 90 S. W. 539; Hightower v. Berden (Ky.), 112 S. W. 675; Leonard v. Forbing, 109 La. 220, 33 South. 203; Robinson v. White, 42 Me. 209; Hill v. McConnell, 106 Md. 574, 68 Atl. 199; Turner v. Holland, 65 Mich. 453, 33 N. W. 283; Yanish v. Tarbox, 49 Minn. 268, 51 N. W. 1051; Clamorgan v. Hornsby, 13 Mo. App. 550; Bock v. Porterfield, 80 Neb. 523, 114 N. W. 597; Rix v. Johnson, 5 N. H. 520, 22 Am. Dec. 472; Hannon v. Delaware etc. R. Co., 37 N. J. L. 276; Yates v. Van De Bogert, 56 N. Y. 526; Bowen v. Gaylord, 122 N. C. 816, 29 S. E. 340; McCoy's Lessee v. Galloway, 3 Ohio, 282, 17 Am. Dec. 591; Johnson v. Archibald, 78 Tex. 96, 22 Am. St. Rep. 27, 14 S. W. 266; Fentress v. Pocohontas Fowling Club, 108 Va. 159, 60 S. E. 633; Teass v. St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; Du Pont v. Davis, 30 Wis. 170; Belding v. Hebard, 103 Fed. 532, 43 C. C. A. 296; Holmes v. Trout, 7 Pet. 171, 8 L. ed. 647.

Natural landmarks, such as large bodies of water, rivers, creeks and well-known streams, constitute monuments of a very permanent character, and will control inconsistent calls for course and distance, quantity, metes and bounds and mistaken descriptions in a survey: *Lewen v. Smith*, 7 Port. 428; *Spring v. Hewston*, 52 Cal. 442; *Shepherd v. Nave*, 125 Ind. 226, 25 N. E. 220; *Jefferson Seminary v. Wagnon*, 1 A. K. Marsh. 243; *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Bailey v. McConnell* (Ky.), 14 S. W. 337; *Myers v. St. Louis*, 82 Mo. 367; *Campbell v. Laclede Gaslight Co.*, 84 Mo. 352; *Slade v. Neal*, 19 N. C. 61; *Kelly v. Graham*, 9 Watts, 116; *Whiteside v. Singleton*, Meigs, 207; *Turnage v. Kenton*, 102 Tenn. 328, 52 S. W. 174; *Phillips v. Ayres*, 45 Tex. 601; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; *Matheny v. Allen*, 63 W. Va. 443, ante, p. 984, 60 S. E. 407; *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166; *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. 171; *Newsom v. Pryor*, 7 Wheat. 7, 5 L. ed. 382; *Brown v. Huger*, 21 How. 305, 16 L. ed. 125.

In *Brown v. Dunn*, 135 Wis. 374, 115 N. W. 1097, the court said: "It is established as a general rule of law both in our own court and in the courts of the United States that, where by the original survey and government plat a tract of land appears to have as its boundary a body of water, such body of water is a natural monument, and will constitute the boundary, however distant or variant from the position indicated for it by the meander line, and hence will control as a call of the survey over either distances or quantity of land designated in the conveyance or on the government plat: *St. Paul etc. R. R. Co. v. Schurmeier*, 7 Wall. (U. S.) 272, 19 L. ed. 74; *Mitchell v. Smale*, 140 U. S. 406, 414, 11 Sup. Ct. Rep. 819, 35 L. ed. 442; *Shufeldt v. Spaulding*, 37 Wis. 662; *Lyon v. Fairbanks*, 79 Wis. 455, 24 Am. St. Rep. 732, 48 N. W. 492. This rule is subject to some exceptions, as where the lake or body of water is so remote from the premises that it cannot in reason be supposed that the plat indicates a purpose to make it the boundary of the premises, but such exception can have no restrictive effect to the present case, where the contour of the lake shore is so nearly similar to that shown by the meander line, and where no other lands are surveyed or conveyed by the United States which, even by projection of their lines to the lake shore, can interfere with the projection of plaintiffs' lines. Nor can we, as courts have done in some cases, assume either fraud in the survey or so gross a mistake in the location of the lake as to force the conclusion that the United States government did not, under the rule above stated, intend to convey to its shore, for the reason that no such body of water as indicated existed to serve as a natural monument or boundary: See *Security L. & E. Co. v. Burns*, 87 Minn. 97, 94 Am. St. Rep. 684, 91 N. W. 304, 63 L. R. A. 157; *Grant v. Hemphill*, 92 Iowa, 218, 223, 59 N. W. 263, 60 N. W. 618."

The top of a mountain, an island or a state line are monuments to which course and distance must yield: *Clarke v. Wagner*, 76 N. C. 463; *Redmond v. Stepp*, 100 N. C. 212, 6 S. E. 727; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

Natural monuments are of higher value in determining boundaries than artificial ones: *Brockman v. Rose* (Ky.), 90 S. W. 539; *Burnham's Heirs v. Hitt*, 143 Mo. 414, 45 S. W. 368; *Weston v. Meeker* (Tex. Civ. App.), 109 S. W. 461.

Where the actual location of corners fixed by government surveyors is shown, it will control the field-notes of the survey, where a discrepancy exists between the field-notes and such corner as marked on the ground: *Tarpenning v. Cannon*, 28 Kan. 665; *Woods v. West*, 40 Neb. 307, 58 N. W. 938; *Canavan v. Dugan*, 10 N. M. 316, 62 Pac. 971; *Radford v. Johnson*, 8 N. D. 182, 77 N. W. 601; *Tyler v. Haggart*, 19 S. D. 167, 102 N. W. 682; *Unzelmann v. Skelton*, 19 S. D. 389, 103 N. W. 646; *Randall v. Gill*, 77 Tex. 351, 14 S. W. 134; *Thayer v. Spokane County*, 36 Wash. 63, 78 Pac. 200. But where the government corner cannot be located by clear and satisfactory evidence, the field-notes are taken as prima facie evidence of the location of such corner: *Knoll v. Randolph* (Neb.), 94 N. W. 964.

Indeed, original corners as established by the government surveyors, if found or the places where originally established can be determined, are conclusive without regard to whether they were located correctly or not: *Washington Rock Co. v. Young*, 29 Utah, 108, 110 Am. St. Rep. 666, 80 Pac. 382, and monographic note attached thereto. Such a corner must be accepted as the true corner without regard to whether or not it was located with mathematical exactness: *Arneson v. Spawn*, 2 S. D. 269, 39 Am. St. Rep. 783, 49 N. W. 1066. Hence where the location of a corner as originally established on the ground is shown, it will control courses and distances which are inconsistent with its actual location: *Sayers v. Lyons*, 10 Iowa, 249; *McAlpine v. Reicheneker*, 27 Kan. 257; *McCormick v. Applegate*, 25 Ky. Law Rep. 914, 76 S. W. 511; *Creech v. Johnson*, 116 Ky. 441, 76 S. W. 185; *Huff v. Woosley*, 29 Ky. Law Rep. 150, 92 S. W. 572; *Jackson v. Jackson*, 33 Ky. Law Rep. 68, 109 S. W. 299; *George v. Wood*, 7 Allen, 14; *Britton v. Ferry*, 14 Mich. 53; *Granby Min. etc. Co. v. Davis*, 156 Mo. 422, 57 S. W. 126; *Hurn v. Alter*, 80 Neb. 183, 113 N. W. 986; *Buford v. Gray*, 51 Tex. 331; *Galloway v. State Nat. Bank* (Tex. Civ. App.), 56 S. W. 236; *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898; *Clements v. Kyles*, 13 Gratt. 468. So, also, descriptive calls in a survey, such as "near the land" of a named person, must yield to established corners: *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335.

As to the controlling force of a stake, it was said in *Thatcher v. Matthews* (Tex.), 105 S. W. 317, that: "The lines as actually run and the corners as actually established, when consistent with other locative calls, fix the true boundaries of the survey. The locations of such corners may be proved by any admissible evidence sufficient to lead to a belief of the fact. It may be that surveyors are careless in setting stakes at corners in a prairie where there are no natural objects to mark their exact locality, or that it is customary with them to use a stake for marking corners of a very unstable character. Yet, in the absence of proof to the contrary, it must be presumed

that they have done their duty, and have marked the corners with some object of reasonable permanence. Where a stake is once placed it fixes the corner as conclusively as if marked by natural objects. Owing to the fact that it may be removed or obliterated, its location may be more difficult of proof; but if proved, it fixes the corner with the same certainty as where it is marked by a permanent object."

A stake is, however, not a natural boundary: *Tate v. Johnson*, 148 N. C. 267, 61 S. E. 741. Where town lots are purchased and taken possession of in reliance of stakes set by the plat of the lots, they govern notwithstanding any errors in locating them: *Le Compte v. Lueders*, 90 Mich. 495, 30 Am. St. Rep. 450, 51 N. W. 542.

A marked tree called for in a survey as being on a marked line or at a certain corner will control a call for course and distance: *Hopkins v. Paxton*, 4 Dana, 36; *Johnston v. House*, 3 N. C. 301; *Laughter v. Biddy*, 46 N. C. 469; *Wash v. Holmes*, 1 Hill (S. C.), 12; *Dogan v. Seekright*, 4 Hen. & M. 125; *Ulman v. Clark*, 100 Fed. 180. And where a corner is marked by a bearing tree, the call for the tree will control a description of the same corner by reference to an adjoining tract of land: *Mitchell v. Burdett*, 22 Tex. 633.

A fence erected on a surveyed line shortly after the land has been surveyed will control courses and distances or a subsequent survey made after the stakes of the original survey had disappeared: *Breakey v. Woolsey*, 149 Mich. 86, 112 N. W. 719; *Norcom v. Leary*, 25 N. C. 49.

Public roads, streets and alleys, when designated as a boundary, will control an inconsistent call for course and distance: *Chatham v. Brainerd*, 11 Conn. 60; *Hunt v. Francis*, 5 Ind. 302; *McCutecheon's Heirs v. Rawleigh*, 25 Ky. Law Rep. 549, 76 S. W. 50; *Newhall v. Treson*, 8 Cush. 595, 54 Am. Dec. 790; *McKenzie v. Gleason*, 184 Mass. 452, 100 Am. St. Rep. 566, 69 N. E. 1076; *Hough v. Horne*, 20 N. C. 369. But streets which are only undefined portions of land dedicated to public use, and the location of which is required to be established, are uncertain guides in determining the boundaries of other lands: *Saltonstall v. Riley*, 28 Ala. 164, 65 Am. Dec. 334. Though where the location of an extension of a street into an unplatted tract of land cannot be doubted and land is sold as if it had been so extended, it will control courses and distances: *Potts v. Canton Cotton W. Co.*, 70 Miss. 462, 12 South. 147.

b. Controlling Effect of Lines Marked on the Ground.—In the sale of land in sections or subdivisions thereof, including lots, according to the government survey, the survey as actually made controls if the monuments, corners or lines actually established can be located or proved. Courses and distances yield to such corners and lines: *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139, 14 South. 805; *Campbell v. Clark*, 8 Mo. 553. The location of the lines of a survey is to be determined by the lines as actually run upon the ground, where that fact can be ascertained, regardless of whether it will increase the quantity of land described in the grant. Nor is the rule

varied by the fact that a call is made to the line of an older survey if that line was never actually reached: *Burnett v. Burriss*, 39 Tex. 501. So, also, a marked line will control a call for a beginning corner which is evidently not on the true boundary line and which was in all probability located after the survey: *Deaton v. Feazle* (Tex. Civ. App.), 90 S. W. 534. A line run and marked on the ground in making a survey will govern calls found in the surveyor's field-notes: *Stetson v. Adams*, 91 Me. 178, 39 Atl. 575; *Hanson v. Rice*, 88 Minn. 273, 92 N. W. 982; *Killgore v. Carmichael*, 42 Or. 618, 72 Pac. 637; *Platt v. Vermillion*, 99 Fed. 356, 39 C. C. A. 555. Lines actually marked on the ground will control lines designated on a map: *Wheeler v. Benjamin*, 136 Cal. 51, 68 Pac. 313; *Jackson v. Smith*, 9 Johns. 100. Where the beginning point is established, a call to the beginning must prevail regardless of its course or distance: *Simpkins' Admr. v. Wells*, 19 Ky. Law Rep. 881, 42 S. W. 348; *Cowles v. Reavis*, 109 N. C. 417, 13 S. E. 930.

Where lines are actually run and marked on the ground, they constitute the survey, and where found, will control both course and distance: *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Bolden v. Sherman*, 110 Ill. 418; *Rowell v. Weinman*, 119 Iowa, 256, 97 Am. St. Rep. 310, 93 N. W. 279; *Willoughby v. Willoughby*, 20 Ky. Law Rep. 1061, 48 S. W. 427; *Johnson v. Harris*, 24 Ky. Law Rep. 449, 68 S. W. 844; *Sullivan v. Hill*, 33 Ky. Law Rep. 962, 112 S. W. 564; *Mosher v. Berry*, 30 Me. 83, 1 Am. Rep. 614; *Flagg v. Thurston*, 13 Pick. 145; *Kronenberger v. Hoffner*, 44 Mo. 185; *Richardson v. Chickering*, 41 N. H. 380, 77 Am. Dec. 769; *Seneca Nation of Indians v. Hugaboom*, 132 N. Y. 492, 30 N. E. 983; *Hough v. Horne*, 20 N. C. 369; *Trinwith v. Smith*, 42 Or. 239, 70 Pac. 816; *Wharton v. Garvin*, 34 Pa. 340; *Fuller v. Weaver*, 175 Pa. 182, 34 Atl. 634; *Fly v. East Tennessee College*, 2 Sneed, 689; *McGown v. Hill*, 26 Tex. 359; *Shelton v. Bone* (Tex. Civ. App.), 26 S. W. 224; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69; *Doyan v. Seekright*, 4 Hen. & M. 125; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; *Newsom v. Pryor*, 7 Wheat. 7, 5 L. ed. 382.

c. When Monuments will not Control Other Calls.

1. **Mistake or Inadvertence.**—Although the general rule is that preference is given to a call for monuments over other calls, the rule is not inflexible, and in a case of clear mistake an inferior means of location may be given a preference. Where it is apparent from the instrument that the boundaries are to be determined by course and distance, quantity, or some other means of location, the monuments will be disregarded: *Ferris v. Coover*, 10 Cal. 589; *Preston's Heirs v. Bowmar*, 2 Bibb, 493; *Davis v. Rainsford*, 17 Mass. 207; *Murdoch v. Chapman*, 9 Gray, 156; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Mattlage v. New York etc. R. Co.*, 14 Misc. Rep. 291, 35 N. Y. Supp. 704; *Christenson v. Simmons*, 47 Or. 184, 82 Pac. 805; *Linney v. Wood*, 66 Tex. 22, 17 S. W. 244; *Utley v. Smith* (Tex. Civ. App.), 32 S. W. 906; *Security Land etc. Co. v. Burns*, 193 U. S. 167, 24 Sup.

Ct. Rep. 425, 48 L. ed. 662. The rule that monuments control courses and distances will not be enforced where by so doing the instrument would be defeated, and the rejection of the monuments would reconcile the other parts of the description and leave enough to identify the land: *White v. Luning*, 93 U. S. 514, 23 L. ed. 938. In other words, monuments may be controlled by course and distance when the identity of the land can be ascertained from other parts of the description, such as distance and quantity or other corroborative circumstances: *Hostetter v. Los Angeles Terminal Ry. Co.*, 108 Cal. 38, 41 Pac. 320; *Kimball v. McKee*, 149 Cal. 435, 86 Pac. 1089. Such calls for monuments will likewise be disregarded where they were inadvertently placed or mistakenly described: *Jaggers v. Stringer* (Tex. Civ. App.), 106 S. W. 151. Likewise where it is shown that the surveyor was ignorant of the location of the monuments called for and of the local geography of the mountainous territory in which he was locating the survey: *King v. Watkins*, 98 Fed. 913.

2. Failure to Establish Existence and Location of the Monuments Called for.—While natural objects usually control courses and distances still the rule will not be applied where such objects are not fixed, stationary and well defined: *Smith v. Hutchison*, 104 Tenn. 394, 58 S. W. 226. The law, however, does not specify the material substance out of which monuments shall be made: *Cullacott v. Cash Gold etc. Min. Co.*, 8 Colo. 179, 6 Pac. 211. Where monuments, natural or artificial, which are called for in a grant or conveyance, cannot be found or the place where they originally stood or were placed cannot be ascertained, the calls for courses and distances will be given preference: *Bell County etc. Coal Co. v. Hendrickson*, 24 Ky. Law Rep. 371, 68 S. W. 842; *Whitehead v. Atchison*, 136 Mo. 485, 37 S. W. 928; *Echerd v. Johnson*, 126 N. C. 409, 35 S. E. 1036; *Proffer v. Wohlwend*, 16 N. D. 110, 112 N. W. 967; *Christenson v. Simmons*, 47 Or. 184, 82 Pac. 805; *Pruner v. Brisbin*, 98 Pa. 202; *Hanson v. Township of Red Rock*, 4 S. D. 358, 57 N. W. 11; *Duff v. Moore*, 68 Tex. 270, 4 S. W. 530; *Washington Rock Co. v. Young*, 29 Utah, 108, 110 Am. St. Rep. 666, 80 Pac. 382; *Bagley v. Morrill*, 46 Vt. 94; *Mays v. Hinchman*, 57 W. Va. 602, 50 S. E. 823; *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073. The rule that monuments control courses and distances does not apply where the monuments were not placed by some authorized person. In the case of a survey, the reference is to the monuments made upon the original survey: *Woodbury v. Venia*, 114 Mich. 251, 72 N. W. 189. The monuments should be sufficiently known and certain to indicate the supposed intent of the parties: *Church v. Steele*, 42 Conn. 69. In order for the well-known and established objects to have a controlling effect as indicating the footsteps of the surveyor, there should be calls in the deed for such objects: *Brodibent v. Carper* (Tex. Civ. App.), 100 S. W. 183. In order that a call for a marked boundary line may control a call for courses and distances, it must be identified on the ground. But if this is done, it is immaterial that the marked corner has been destroyed: *Goodson v. Fitzgerald* (Tex. Civ. App.), 90

S. W. 898. Where a monument does not exist at the time a deed is made, if the parties afterward erect a monument with intent to conform to the call in the deed, the monument will have a controlling effect: *Blaney v. Rice*, 20 Pick. 62, 32 Am. Dec. 204; *Lerned v. Morrill*, 2 N. H. 197.

d. Reason for the Superior Dignity of Calls for Monuments Over Other Calls.—The presumption is that all grants or conveyances are made with reference to an actual view of the premises by the parties thereto: *Green v. Horn*, 128 App. Div. 686, 112 N. Y. Supp. 993. A call for a fixed object naturally affords a more certain means of locating land than a call for course and distance: *Hill v. McConnell*, 106 Md. 574, 68 Atl. 199. Artificial objects called for in a description should prevail over calls for course and distance, for the reason that they have been set up by the surveyor and serve to mark his footsteps: *Holdsworth v. Gates* (Tex. Civ. App.), 110 S. W. 537. In other words, natural or artificial monuments are awarded the highest probative force in the location of boundaries, because they furnish the greatest certainty of description and afford the least liability for mistake: *Bruce v. Morgan*, 1 B. Mon. 26; *Carroll v. Norwood's Heirs*, 5 Har. & J. 155; *Seaman v. Hogeboom*, 3 Barb. 215; *Disney v. Coal Creek Min. etc. Co.*, 11 Lea, 607; *Matheny v. Allen*, 63 W. Va. 443, ante, p. 984, 60 S. E. 407; *Newsom v. Pryor*, 7 Wheat. 7, 5 L. ed. 382.

In *White v. Luning*, 93 U. S. 514, 23 L. ed. 938, the court said: "The reason why monuments, as a general thing, in the determination of boundaries control courses and distances is, that they are less liable to mistakes; but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant."

Natural monuments are generally easily found and are, with few exceptions, indestructible, while course and distance are usually descriptive of the designated monuments and depend for their accuracy upon the skill and experience of the surveyor: *Watkins v. King*, 118 Fed. 524, 55 C. C. A. 290.

Mr. Justice Clifford, in *Higuera v. United States*, 5 Wall. 827, 18 L. ed. 469, said: "Measurements of distances and the direction of the lines in reference to the points of the compass mentioned in a deed may be made a part of the description of the premises intended to be granted, and in some cases, where the lines are so short as evidently to be susceptible of entire accuracy in their measurement, and are defined in such a manner as to indicate an exercise of care in describing the premises, such a description is regarded with great confidence as a means of ascertaining what is intended to be conveyed. But ordinarily, surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in

questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land: *Purinton v. Sedgley*, 4 Me. 286; *Washburn on Real Property*, 2d ed., 673; *Preston's Heirs v. Bowmar*, 6 Wheat. 582, 5 L. ed. 336; *Marshall v. Currie*, 4 Cranch, 176, 2 L. ed. 585; *Howe v. Bass*, 2 Mass. 380, 3 Am. Dec. 59; *Bosworth v. Sturtevant*, 2 Cush. 392; *Jackson v. Ives*, 9 Cow. 661. Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences or buildings: *Newsom v. Pryor*, 7 Wheat. 7, 5 L. ed. 382; *Rix v. Johnson*, 5 N. H. 524, 22 Am. Dec. 472."

Another reason for the general rule is that monuments actually found or placed on the ground, are always, as long as they exist, in the same direction and at the same distance from each other, whereas courses and distances, being merely descriptive of the facts, are liable to be erroneous through imperfect measurement, estimation or calculation: *King v. Watkins*, 98 Fed. 913. In many instances the inability to reach the monuments called for by following the courses and distances is because the land has not been actually surveyed between the various natural monuments or where it has been, variances have arisen through the roughness of the country: *Newsom v. Pryor*, 7 Wheat. 7, 5 L. ed. 382.

In discussing this subject in *Weston v. Meeker* (Tex. Civ. App.), 109 S. W. 461, the court said: "It is true the rules prevailing in this state which govern in determining the boundaries where there are conflicting calls are: (1) Natural objects; (2) artificial objects; and (3) course and distance. That is to say, calls for course and distance must, in case of conflict in the calls, yield to either of the two first. The reason given for these rules is that the surveyor may fall into error in making field-notes both as to course and distance (the former no more than the latter), and the commissioner of the general land office, or the scrivener who draws a deed to a subdivision of an original survey, may fall into like error by omitting lines and calls, or inserting south for north, east for west, or vice versa. 'But, when the surveyors points out to the owner rivers, lakes, creeks, marked trees, and lines on the land, for the lines and corners of his land, he has the right to rely upon them as the best evidence of his true boundaries, for they are not liable to change and the fluctuations of time, to accident, or mistake, like course and distance; and hence the rule that when course and distance, or either of them, conflict with natural or artificial objects called for, they must yield to such objects, as being more certain and reliable: *Stafford v. King*, 30 Tex. 268, 94 Am. Dec. 304; *Gerold v. Freeman*, 68 Tex. 201, 4 S. W. 256; *Thatcher v. Matthews* (Tex.), 105 S. W. 317."

Mr. Chief Justice Beasley, in *Kalbfleisch v. Standard Oil Co.*, 43 N. J. L. 259, in speaking of this subject, observed: "In the very nature of things, fixed monuments must, of necessity, be more trustworthy evidence of the grantor's intention as to the length of a line described in his conveyance, than any measurements therein designated can be, even though we assume that such measurements

were made with a measure corresponding to an established standard; for in this case, even though the measure would thus appear to have been infallible, the measurer who made use of it was not infallible, nor was the scrivener without liability to err who inserted a copy of the survey in the instrument. The erection of a standard of measure by the government can have no effect upon the legal rules having for their end the ascertainment of the true boundaries of land described in conveyances."

VI. To What Extent Calls for Adjoiners Control.

"The object in all boundary questions is to find some certain evidence of what particular land was surveyed, or was intended to be conveyed. Course and distance approaches very nearly to permanent certainty if any one of the termini be identified; and that is the usual description. But there may be a defect in the instrument, so as to run the line inaccurately; or there may be a mistake in setting down the course and distance. If, therefore, other things be called for, as to which there is less probability of error, they shall control the other calls. Such is the case where the call is for a natural boundary, with respect to which there is but little fear of mistake at the time of the survey, and but little difficulty in identifying it at a subsequent period. But even in that case, evidence may show which is, for instance, the stream called for, or which the parties took to be that to which they have given the name; though the necessity for such evidence seldom arises, because parties cannot readily fall into such mistakes. When the call is for the line of another, it has also been held that course and distance may yield to it. But it is, obviously, not so decisive as the call for a natural boundary; and the mind may be under a perfect conviction, from other circumstances, that the mistake is not in the course and distance, but in supposing that the other had a line at the end of the course and distance. If that conviction exists, there ought to be no deviation from course and distance": Carson v. Burnett, 18 N. C. 546, 30 Am. Dec. 143.

Where the line of an adjacent tract of land is used as a boundary, it may be designated by any form of expression definitely indicating its identity, such as the name by which it is commonly known, the name of its owner or former owner, or the place upon the public records where a deed conveying such adjacent tract may be found: Hill v. McConnell, 106 Md. 574, 68 Atl. 199; Quinn v. Heart, 43 Pa. 337; Bartlett Land etc. Co. v. Saunders, 103 U. S. 316, 26 L. ed. 546. A call for a railroad right of way may be treated as a call for an adjoining tract of land and as such control a call for course and distance: Couch v. Texas etc. Ry. Co. (Tex.), 90 S. W. 860.

"A monument governs measurements, and the land of an adjoining proprietor is a monument within that rule": Percival v. Chase, 182 Mass. 371, 65 N. E. 800.

Hence the general rule is that where a call is made for the line of an adjoining tract of land and that line is ascertainable, a call for course or distance will yield to it: *Bird v. Noon*, 9 Ariz. 37, 76 Pac. 592; *Roberti v. Atwater*, 43 Conn. 540; *Elliott v. Weed*, 44 Conn. 19; *Hogans v. Carruth*, 19 Fla. 84; *Simmons v. Spratt*, 20 Fla. 495; *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Miller v. Beeler*, 25 Ill. 163; *Sayers v. Lyons*, 10 Iowa, 249; *Brashears v. Joseph*, 32 Ky. Law Rep. 1139, 108 S. W. 307; *Brand v. Daunoy*, 8 Mart., N. S., 159, 19 Am. Dec. 176; *Bryant v. Maine Central R. Co.*, 79 Me. 312, 9 Atl. 736; *Gibson's Lessee v. Smith*, 1 Har. & J. 253; *Curtis v. Francis*, 9 Cush. 438; *George v. Wood*, 7 Allen, 14; *Howell v. Merrill*, 30 Mich. 282; *Smith v. Catlin Land etc. Co.*, 117 Mo. 438, 22 S. W. 1083; *Cunningham v. Curtis*, 57 N. H. 157; *Passage v. McVeigh*, 23 N. J. L. 729; *Cudney v. Earley*, 4 Paige, 209; *Bates v. Tymason*, 13 Wend. 300; *Corn v. McCrary*, 84 N. C. 496; *Causler v. Fite*, 50 N. C. 424; *Whitaker v. Cover*, 140 N. C. 280, 52 S. E. 581; *Ake v. Mason*, 101 Pa. 17; *Stroup v. McCloskey (Pa.)*, 10 Atl. 421; *Atkinson v. Anderson*, 3 McCord, 223; *Phillips v. Crabtree (Tenn. Ch.)*, 52 S. W. 787; *Duff v. Moore*, 68 Tex. 270, 4 S. W. 530; *Maddox v. Fenner*, 79 Tex. 279, 15 S. W. 237; *Ridgell v. Atherton (Tex. Civ. App.)*, 107 S. W. 129; *Graves v. Mattison*, 67 Vt. 630, 32 Atl. 498; *Fullam v. Foster*, 68 Vt. 590, 35 Atl. 484; *Miller v. Holt*, 47 W. Va. 7, 34 S. E. 956; *Morrow v. Whitney*, 95 U. S. 551, 24 L. ed. 456. But in case of a conflict between calls for natural objects, or lines or corners actually marked on the ground, on the one hand, and calls for adjoiners, the calls for the latter will yield: *Dana v. Middlesex Bank*, 10 Met. 250; *Marsh v. Marshall*, 19 N. H. 301, 49 Am. Dec. 156; *Blackman v. Doughty*, 40 N. J. L. 319; *Dula v. McGhee*, 34 N. C. 332; *Fincannon v. Sudderth*, 140 N. C. 246, 52 S. E. 579; *Mitchell v. Welborn*, 149 N. C. 347, 63 S. E. 113; *Thomas v. Mowrer*, 15 Pa. 139; *Grier v. Pennsylvania Coal Co.*, 128 Pa. 79, 18 Atl. 480; *Shute v. Buchanan*, 3 Hayw. (4 Tenn.) 206; *Hitchcock v. Southern Iron etc. Co. (Tenn. Ch.)*, 38 S. W. 588; *Mitchell v. Burdett*, 22 Tex. 633; *Jones v. Leath*, 32 Tex. 329; *Cartleman v. Pouton*, 51 Tex. 84; *Matheny v. Allen*, 63 W. Va. 443, ante, p. 984, 60 S. E. 407.

Where, however, it is evident that the call for an adjoiner was made through a mistake, and the following of it would be inconsistent with all other calls and against the manifest intention of the parties to the grant or deed, it may be disregarded in favor of calls for course and distance: *Hare v. Harris' Lessee*, 14 Ohio, 529; *Malone v. Sallada*, 48 Pa. 419; *Boon v. Hunter*, 62 Tex. 582; *Gregg v. Hill*, 82 Tex. 405, 17 S. W. 838. Where the distance to the adjoiners called for is so great as to render it morally certain that the boundaries called for were merely conjectural or where the courses must be entirely changed to reach them, the call for adjoiners will be disregarded: *Starke v. Johnson*, 2 Mill's Const. 9; *Texas Townsite Co. v. Hunnicutt (Tex. Civ. App.)*, 31 S. W. 520.

VII. To What Extent Calls for Course and Distance Control.

a. The General Rule.—In the absence of any calls for natural or artificial monuments, marked lines or adjacent lands, the courses and distances called for in the grant or deed determine the location of the land: *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Lewis' Trustee v. Louisville etc. R. Co.*, 30 Ky. Law Rep. 684, 99 S. W. 658; *Hammond v. Ridgely's Lessee*, 5 Har. & J. 245, 9 Am. Dec. 522; *Bradford v. Hill*, 2 N. C. 22, 1 Am. Dec. 546; *Deming v. Gainey*, 95 N. C. 528; *Tate v. Johnson*, 148 N. C. 267, 61 S. E. 741; *Coats v. Mathews*, 2 Nott. & McC. 99; *Frazier's Lessee v. Barset*, 1 Overt. 297; *Hickman v. Tait*, Cooke, 460; *Ratliff v. Burleson*, 7 Tex. Civ. 621, 25 S. W. 983, 26 S. W. 1003; *Bagley v. Morrill*, 46 Vt. 91; *McIver v. Walker*, 4 Wheat. 444, 4 L. ed. 611; *Chinoweth v. Haskell*, 3 Pet. 92, 7 L. ed. 614. But the rule that where the deed calls for no monuments, the calls for courses and distances will govern, does not apply where the land cannot be platted from the deed: *Ratliffe v. Gray*, 3 Keyes, 510.

Where a grant describes the land by course and distance only, or by natural objects which are not distinguishable from others of the same kind, course and distance, though unsafe guides, must be used in determining the land granted: *Chinoweth v. Haskell*, 3 Pet. 92, 7 L. ed. 614. Where a course cannot be run so as to touch all the natural objects called for, that course should be taken which will satisfy the greater number of the calls for natural objects: *Kentucky Land etc. Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31. Where a call for a stake is indefinite and uncertain, a call for course and distance will be given preference: *Brown v. House*, 118 N. C. 870, 24 S. E. 786. And where lines called for are of doubtful identity, course and distance should be resorted to as being the best evidence of the location of the boundary: *Browning's Admx. v. Atkinson*, 37 Tex. 633. Course and distance will be given preference over the call for a line or corner which has not been run and established at the time of the grant: *May's Lessee v. Sanders*, 6 J. J. Marsh. 349; *Galloway v. Brown*, 16 Ohio, 428; *McCown v. Hill*, 26 Tex. 359. Courses and distances will prevail over calls which are rendered uncertain by such expressions as "supposed" or "to or near": *Mizell v. Simmons*, 79 N. C. 182. Whenever the evidence is sufficient to induce the belief that the mistake in a survey is in the call for a natural or artificial object, and not in the call for course and distance, the latter will prevail: *Johnson v. Archibald*, 78 Tex. 96, 22 Am. St. Rep. 27, 14 S. W. 266.

But even where the description is by course and distance alone, extrinsic evidence may be admitted to aid in applying the calls to the land. The question whether the courses and distances carry the lines to certain points is not one of construction, but of boundary or location, to be determined as a question of fact upon the evidence in the case. Thus, in *Opdyke v. Stevens*, 28 N. J. L. 83, in discussing this subject, it was said: "Actual occupation, ancient reputation, the admissions of the party in possession against his inter-

est, ancient maps and draft, marked trees, the lines of adjoining surveys, monuments erected at or soon after the date of the grant of adjoining surveys, are all admissible for this purpose, and are constantly resorted to to fix the boundaries, though it conflicts with the courses and distances called for in the deed. The well-settled principle is, that practical location is evidence of a mistake in the description.

"The practice, as well as the reason upon which it rests, is stated with admirable clearness and felicity by Mr. Justice Washington, in *Conn. v. Penn*, 1 Pet. C. C. 511: 'No gentleman of the profession, who is at all conversant with land trials, can be ignorant that the courses and distances laid down in a survey, especially if it be ancient, are never in practice considered as conclusive, but that, on the contrary, they are liable to be materially changed by oral proof or other evidence tending to prove that the documentary lines are those not actually run. How often have we known reputed boundaries proved by the testimony of aged witnesses, and even by hearsay evidence of such witnesses, established in opposition to the most precise calls of an ancient patent. Such evidence has been constantly received, and distances have been lengthened or shortened without the slightest regard to the calls of the patent. The reason is obvious. It is not the lines reported, but the lines actually run by the surveyor, which vest in the patentee a title to the area included within these lines. The survey returned on the patent is the evidence of the former; natural marks or reputation is in almost all cases the evidence of the latter. The mistakes committed by surveyors and chain-bearers, more particularly in an unsettled country and wilderness, have been so common, and are so generally acknowledged, as to have given rise to a principle of law as well settled as any which enters into the land titles of this country, which is, that when the mistake is shown by satisfactory proof, courts of law, as well as of equity, have looked beyond the patent to correct it.' The principle was in this instance applied to an original patent, but it is evident that it applies with equal force to all grants and conveyances in an unsettled country: *Makepeace v. Bancroft*, 12 Mass. 469; *Owen v. Bartholomew*, 9 Pick. 525; *Boardman v. Lessee of Reed*, 6 Pet. 341, 8 L. ed. 115; *Rockwell v. Adams*, 6 Wend. 467."

In order for monuments to control courses and distances, the former should be identified with reasonable certainty. Where certain lines and corners of a survey are reasonably well identified or admitted and others are not, courses and distances will have a controlling force where the description by quantity is also in substantial accord with the area of the tract located by course and distance: *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073.

Where no monuments are called for and none intended to be thereafter established to designate the extent of the grant, the distances must govern: *Machias v. Whitney*, 16 Me. 343; *Negbauer v. Smith*, 44 N. J. L. 672.

Where monuments cannot be found, or their former location ascertained, resort will be had to course and distance as the most available and certain means of locating the boundary: *Whitcomb v. Dutton*, 89 Me. 212, 36 Atl. 67; *Drew v. Swift*, 46 N. Y. 204; *Deaver v. Jones*, 119 N. C. 598, 26 S. E. 156; *Clements v. Kyles*, 13 Gratt. 468; *Resurrection etc. Min. Co. v. Fortune etc. Min. Co.*, 129 Fed. 668, 64 C. C. A. 180.

b. Effect Where the Calls are Merely Incidental and not Locative.—Where the calls are merely incidental ones, made in passing from one point to another, they are not regarded as locative, and will not ordinarily be given precedence over calls for course and distance: *Hanson v. Red Rock*, 4 S. D. 358, 57 N. W. 11. In the case just cited it was said: "The doctrine that monuments, as locative calls, will generally control course and distance, grew up where such monuments were permanent objects, such as growing trees, well-defined highways, rivers, etc., and must necessarily be applied with some caution to mounds of earth easily made by anyone in a prairie country. So, incidental calls to dry runs, sloughs, etc., in a prairie country, are too vague and uncertain to control course and distance in resurveying the exterior lines of a township, when the township corners are undisputed. Such calls may serve as aids in determining whether or not the section and quarter section corner mounds found within the township, claimed to have been made in subdividing the township, are the mounds established by the government surveyor."

c. When variation of the Compass must be Allowed.—In running courses to locate original monuments, the variation of the compass between the time when the original survey was made and the time of locating the boundary should be taken in consideration: *Taylor v. Tomby*, 116 Ala. 621, 67 Am. St. Rep. 149, 22 South. 910; *Whitcomb v. Dutton*, 89 Me. 212, 36 Atl. 67; *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321.

d. Effect Where Courses and Distances are Used with Apparent Controlling Intent.—Where it appears by the conveyance that courses and distances were intended by the parties to control, they will be given such effect: *Nevin v. Disharoon* (Del. Super.) 66 Atl. 362; *Buffalo etc. R. Co. v. Stigeler*, 61 N. Y. 348; *Johnson v. McMillan*, 1 Strob. 143; *Mullaly v. Noyes* (Tex. Civ. App.), 26 S. W. 145. Where the calls for monuments and calls for course and distance do not coincide, and it is shown that the greater part of the boundary of the tract, which calls for five hundred thousand acres, was not run on the ground but was platted in, and the surveyor was ignorant or mistaken as to the true location of the monuments called for, which inclosed but a little over one hundred thousand acres, while according to the courses and distances the quantity called for in the grant will be inclosed, the latter will prevail as being in accordance with the intent of the parties: *King v. Watkins*, 98 Fed. 913. Where there is such a wide departure between courses and distances and

monuments that it appears that some of the monuments are erroneous, the latter may be disregarded in order to effectuate the intent of the parties: *Hamilton v. Foster*, 45 Me. 32.

e. Effect Where Variance Exists Between Course and Distance.—Where the courses and distances called for when run do not close the survey, the courses must be preserved and the distances sacrificed in order to make the survey close, if that can be done: *Brashears v. Joseph*, 32 Ky. Law Rep. 1139, 108 S. W. 307. Though it has also been held that the survey should be closed by following the course the proper distance, but if the distance falls short of closing it, and the course will do so, the reason for observing distance fails: *Martin v. King's Heirs*, 3 How. (4 Miss.) 125. The general rule is said to be that when a departure from either course or distance becomes necessary, distance must yield to the call for course: *Bryan v. Beckley*, Litt. Sel. Cas. 91, 12 Am. Dec. 276; *Kerr v. De Lancy*, 28 Ky. Law Rep. 1140, 91 S. W. 286; *Wilson v. Inloes*, 6 Gill, 121; *Henshaw v. Mullins*, 121 Mass. 143; *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886; *Rand v. Cartwright*, 82 Tex. 399, 18 S. W. 794; *United States v. Murray*, 41 Fed. 862. But the rule is not inflexible. "Cases may exist in which one or the other may be preferred upon a minute examination of all the circumstances": *Preston v. Bowman*, 6 Wheat. 580, 5 L. ed. 336. If it is evident from the calls of a deed that distance is the controlling call, course must yield to it. One or the other may be preferred according to the manifest intention of the parties and the circumstances of the case: *Kruse v. Wilson*, 79 Ill. 233; *Blight v. Atwell*, 44 J. J. Marsh. 279; *Johnson v. McMillan*, 1 Strob. 143; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877; *Western Min. etc. Co. v. Peytona C. Coal Co.*, 84 W. Va. 406.

Where the lines of the survey fail to close, it is sometimes proper, in order to determine whether course or distance should yield, to run the calls in reverse order, starting from undisputed corners or points, and in that way fix the open line: *Moore v. Loggins* (Tex. Civ. App.), 114 S. W. 183; *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073; *Ellinwood v. Stancliff*, 42 Fed. 316; *Davis v. Commonwealth Land etc. Co.*, 141 Fed. 740.

VIII. To What Extent the Designation of Quantity of Land Conveyed Controls in Locating the Boundary.

The designation in a conveyance of the quantity of land to be conveyed, although the least reliable and the last to be resorted to of all the descriptions in a deed, in determining the boundaries of the premises conveyed may sometimes be considered in corroboration of other descriptive calls therein: *McClintock v. Rogers*, 11 Ill. 279; *Baxter v. Wilson*, 95 N. C. 137; *Fullam v. Foster*, 68 Vt. 590, 35 Atl. 484; *Western Min. etc. Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406; *Field v. Columbet*, 4 Saw. 523, Fed. Cas. No. 4764; *Davis v. Commonwealth Land etc. Co.*, 141 Fed. 711. Where the land is

not described by known and established boundaries, or where the boundaries are doubtful, the designation of the quantity of land conveyed may become a very material, if not a controlling, element, in locating the boundaries: *Montgomery v. Johnson*, 31 Ark. 74; *Winans v. Cheney*, 55 Cal. 567; *Silver Creek C. Corp. v. Union Line & C. Co.*, 138 Ind. 297, 35 N. E. 125, 37 N. E. 721; *O'Brien v. Clark*, 104 Md. 30, 64 Atl. 53; *Moran v. Lezotte*, 54 Mich. 83, 19 N. W. 757; *Hoffman v. Port Huron*, 102 Mich. 417, 60 N. W. 831; *Duncan v. Madara*, 106 Pa. 562; *Kirkland v. Way*, 3 Rich. 4, 45 Am. Dec. 752; *Amick v. Holman*, 3 Strob. 122; *Hickman v. Tait*, Cooke, 460.

Where the intention is clearly expressed that a specified quantity of land is to be conveyed, the designation of quantity has undoubtedly a controlling effect in determining the boundaries of the land: *Sanders v. Godding*, 45 Iowa, 463; *Steele v. Williams*, 12 Ky. Law Rep. 770, 15 S. W. 49; *Surgi v. Shooter*, 17 La. Ann. 68; *People v. Jones*, 49 Hun, 365, 2 N. Y. Supp. 148; *Harper v. Lindsey*, Meigs, 310; *Rioux v. Cormier*, 75 Wis. 566, 44 N. W. 654.

The general rule is that where a tract of land is described by metes and bounds, and as containing a certain number of acres or area of land, the designation of quantity will yield to the description by metes and bounds. And this is particularly true where the quantity is stated as more or less: *Dozier v. Duffee*, 1 Ala. 320; *Thompson v. Sheppard*, 85 Ala. 611, 5 South. 334; *Winans v. Cheney*, 55 Cal. 567; *Belden v. Seymour*, 8 Conn. 19; *Jackson v. Magbee*, 21 Fla. 622; *Ray v. Pease*, 95 Ga. 153, 22 S. E. 190; *Seeders v. Shaw*, 200 Ill. 93, 65 N. E. 643; *Maguire v. Bissell*, 119 Ind. 345, 21 N. E. 326; *Richwine v. Jones*, 140 Ind. 289, 39 N. E. 460; *Davis v. Millandon*, 17 La. Ann. 97, 87 Am. Dec. 517; *Chandler v. McCard*, 38 Me. 564; *Mundell v. Perry*, 2 Gill & J. 193; *Howe v. Bass*, 2 Mass. 380, 3 Am. Dec. 59; *Gelman v. Riapelle*, 18 Mich. 145; *Mires v. Summerville*, 85 Mo. App. 183; *Perkins v. Webster*, 2 N. H. 287; *Andrews v. Rue*, 34 N. J. L. 402; *Wendell v. Jackson*, 8 Wend. 183, 22 Am. Dec. 635; *Thayer v. Finton*, 108 N. Y. 394, 15 N. E. 615; *Reddick v. Leggat*, 7 N. C. 539; *Smith v. Evans*, 6 Binn. 102, 6 Am. Dec. 436; *Bratton v. Clawson*, 3 Strob. 127; *Dalton v. Rust*, 22 Tex. 133; *Fletcher v. Clark*, 48 Vt. 211; *Sowles v. Butler*, 71 Vt. 271, 44 Atl. 355; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880.

Hence it follows that where the land is described by monuments, natural or artificial, and the quantity of land is also mentioned, the latter must yield to the description by measurements in case of a conflict: *De Arguello v. Greer*, 26 Cal. 615; *Mahon v. Richardson*, 50 Cal. 333; *Beall v. Berkhalter*, 26 Ga. 564; *Cottingham v. Parr*, 93 Ill. 233; *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85; *Emery v. Fowler*, 38 Me. 99; *Powell v. Clark*, 5 Mass. 355, 4 Am. Dec. 67; *Keyser v. Sutherland*, 59 Mich. 455, 26 N. W. 865; *Brudin v. Inglis*, 121 Mich. 410, 80 N. W. 115; *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. 147; *Sherwin v. Bitzer*, 97 Minn. 252, 106 N. W. 1046; *Bricken v. Cross*, 163 Mo. 449, 64 S. W. 99; *Roat v. Puff*, 3 Barb. 353; *Jackson v. McConnell*, 19 Wend. 175, 32 Am. Dec. 439; *Allerton v.*

Johnson, 3 Sand. Ch. 72; Large v. Penn. 6 Serg. & R. 488; Ardery v. Rowles, 71 Pa. 359; Altman v. McBride, 4 Strob. 208; Webb v. Haley, 7 Baxt. 600; Ayers v. Harris, 64 Tex. 296; Gwynn v. Schwartz, 32 W. Va. 487, 9 S. E. 880; McEvoy v. Loyd, 31 Wis. 142.

So, also, a designation of the quantity of land to be conveyed will yield to calls for lines marked on the ground: Blanc v. Duplessis, 13 La. 334; Clark v. Scammon, 62 Me. 47; Hunt v. Devling, 8 Watts, 403; Burnett v. Burriess, 39 Tex. 501. And a call for adjoiners will also control a call for quantity: Doe v. Porter, 3 Ark. 18, 36 Am. Dec. 448; Dutra v. Pereira, 135 Cal. 320, 67 Pac. 281; Gughlielmi v. Geismar, 46 La. Ann. 280, 14 South. 501; Kellogg v. McFatter, 111 La. 1037, 36 South. 112; Doe v. Thompson, 5 Cow. 371; Bear v. Bear, 13 Pa. 529; Koch v. Dunkel, 90 Pa. 264; Ragsdale v. Robinson, 48 Tex. 379; Woods v. Robinson, 58 Tex. 655; Tompkins v. Vintroux, 3 W. Va. 148, 100 Am. Dec. 735.

The designation of quantity in a deed ordinarily yields to a call for course and distance: Quillen v. Betts, 1 Penne. (Del.) 53, 39 Atl. 595; Kruse v. Scripps, 11 Ill. 98; Carroll v. Norwood, 1 Har. & J. 167; Melvin v. Proprietors of Locks etc. on Merrimack River, 5 Met. (46 Mass.) 15, 38 Am. Dec. 384; Pohlman v. Evangelical L. T. Church, 60 Neb. 364, 83 N. W. 201; Whitaker v. Cover, 140 N. C. 280, 52 S. E. 581; Boar v. McCormick, 1 Serg. & R. 166; Marey v. Broek, 207 Pa. 95, 56 Atl. 335; Johnson v. Garrett, 25 Tex. Supp. 13; Rand v. Cartwright, 82 Tex. 399, 18 S. W. 794; Grand Trunk Ry. Co. v. Dyer, 49 Vt. 74; McIrwin v. Charlebois, 38 Wash. 151, 80 Pac. 285. But the designated quantity may be considered in solving a doubt as to the true variation to be adopted in running a line called for: McDonald v. McCrabb (Tex. Civ. App.), 105 S. W. 238.

Where a specified tract of land is sold, the entire tract passes, although it exceeds the quantity mentioned in the deed: Innis v. McCrummin, 12 Mart., O. S., 425, 13 Am. Dec. 379. And where a deed describes land by its lot number according to a certain survey, or according to its sectional subdivisions under the United States survey, an actual survey of the ground is presumed, and the calls of the survey will prevail over a designation of the amount of land to be conveyed: Yolo County v. Nolan, 144 Cal. 445, 77 Pac. 1006; Stonewall Phosphate Co. v. Peyton, 39 Fla. 726, 33 South. 440; Wadhams v. Swan, 109 Ill. 46; Ufford v. Wilkins, 33 Iowa, 110; Williams v. Spaulding, 29 Me. 112; Rutherford v. Tracy, 48 Mo. 325, 8 Am. Rep. 104; Hathaway v. Power, 6 Hill, 453.

The rule that the designation of the amount of land to be conveyed will not control a call for established natural monuments is not affected by the question whether the increase or decrease of land will amount to a few hundred or many thousand acres: McCullough v. Absecom Beach Land etc. Co., 48 N. J. Eq. 170, 21 Atl. 481; Sturgeon v. Floyd, 3 Rich. 80; Bunton v. Cardwell, 53 Tex. 408; Robertson v. Moorser, 26 Tex. 428; Watkins v. King, 118 Fed. 524, 55 C. C. A. 290.

IX. To What Extent Maps, Plats, Field-notes and the Like are Considered.

One of the objects of filing maps, plats, plans and field-notes is to avoid the necessity of encumbering grants and deeds with lengthy descriptions of the land to be granted or conveyed. And when a patent or deed refers to such a map or plat for a more particular description of the premises, or describes the land as a certain lot or parcel as shown thereon, the map or plat becomes a part of the instrument and will aid the description therein: *Mayo v. Mazeaux*, 38 Cal. 442; *Hostetter v. Los Angeles Terminal Ry. Co.*, 108 Cal. 38, 41 Pac. 330; *McClintock v. Rogers*, 11 Ill. 279; *Beaty v. Robertson*, 130 Ind. 589, 30 N. E. 706; *Millikin v. Minnis*, 12 La. 539; *Erschine v. Moulton*, 66 Me. 276; *Davis v. Rainsford*, 17 Mass. 207; *Magoun v. Lapham*, 21 Pick. 135; *Bower v. Earl*, 18 Mich. 367; *Colter v. Mann*, 18 Minn. (Gil. 79) 96; *Bell v. Hickman*, 6 Humph. 398; *Lampe v. Kennedy*, 45 Wis. 23; *Cleveland v. Bigelow*, 98 Fed. 242, 39 C. C. A. 47; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. Rep. 203, 32 L. ed. 566. A map or plat is only a pictorial delineation of the actual survey, and a reference to it in the conveyance is merely a reference to the survey which it purports to represent: *Vance v. Fore*, 24 Cal. 435; *Beaty v. Robertson*, 130 Ind. 589, 30 N. E. 706; *Yoder's Lessee v. Fleming*, 2 Yeates, 311.

Where a grant or deed refers to a map, plat, or the field-notes of a survey, as a part thereof, in locating the land upon the ground from the calls and descriptions therein, the same primary rules apply as exist with reference to locating calls in a deed without such a reference; that is, the various calls are given the same order of preference: *Penry v. Richards*, 52 Cal. 496; *Burke v. McCowen*, 115 Cal. 481, 47 Pac. 367; *Alden v. Pinney*, 12 Fla. 348; *De Witt v. Hawkins*, 107 Ill. 109; *Decatur v. Niedermeyer*, 168 Ill. 68, 48 N. E. 72; *Thrush v. Graybill*, 110 Iowa, 585, 81 N. W. 798; *Rowell v. Weinemann*, 119 Iowa, 256, 97 Am. St. Rep. 310, 93 N. W. 279; *Appeal of Richardson*, 74 Kan. 844, 87 Pac. 678; *Bussey v. Grant*, 20 Me. 281; *Coleman v. Lord*, 96 Me. 192, 52 Atl. 645; *Neenan v. Smith*, 50 Mo. 525; *Brown v. Carthage*, 128 Mo. 10, 30 S. W. 312; *Holst v. Streitz*, 16 Neb. 249, 20 N. W. 307; *Allaire v. Ketcham*, 55 N. J. Eq. 168, 35 Atl. 900; *Hall v. Davis*, 36 N. H. 569; *Hastings v. McDonough*, 13 App. Div. 625, 43 N. Y. Supp. 628; *Jackson v. Freer*, 17 Johns. 24; *Robinson v. Laurer*, 27 Or. 315, 40 Pac. 1012; *Schmidtke v. Keller*, 44 Or. 23, 74 Pac. 222; *Riddlesburg Coal Co. v. Rodgers*, 65 Pa. 416; *Connor v. Johnson*, 59 S. C. 115, 37 S. E. 240; *Mayse v. Lafferty*, 38 Tenn. (1 Head) 60; *Boon v. Hunter*, 62 Tex. 582; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201; *Miner v. Brader*, 65 Wis. 537, 27 N. W. 313; *Brew v. Ungent*, 136 Wis. 336, 117 N. W. 813; *McIver v. Walker*, 9 Cranch, 173, 3 L. ed. 694; *United States v. Sutter*, 21 How. 170, 16 L. ed. 119.

BURDETT v. GREER.

[63 W. Va. 515, 60 S. E. 497.]

PARTNERSHIP—Liability of Partner After Dissolution.—All the partners are still bound, after dissolution, by a contract made during the partnership. (p. 1015.)

PARTNERSHIP—Admission of Partner After Dissolution.—An admission by one partner, made after dissolution, of the existence of a debt against a firm, or a settlement made with him finding a debt against it, the other partner not being present when such admission or settlement is made, does not bind the other partner, and is not admissible evidence against him. (p. 1018.)

PARTNERSHIP.—A Promissory Note Made by One Partner alone for the debt of the firm does not operate as payment, and does not release another partner from the debt, unless the creditor agrees to accept it as payment and release the other partner. (p. 1019.)

(Syllabi by the court.)

H. R. Howard, W. R. Gunn, J. S. Spencer and Charles E. Hogg, for the plaintiffs in error.

Rankin Wiley, for the defendants in error.

516 BRANNON, J. The declaration in this case in assumpsit is one of J. F. Burdett and George L. Burdett, partners as Burdett Bros., against Ed. R. Greer and W. E. Hayman, late partners as Greer & Hayman, in the circuit court of Mason county, in which action Burdett Bros. recovered verdict and judgment against Hayman alone, the action having been abated as to Greer on account of his discharge as a bankrupt. The action is for pay for cutting and sawing timber by Burdett Bros. for Greer and Hayman under a written contract made December 21, 1903.

It is assigned as error that the court rejected a special plea tendered by Hayman alone. It distinctly admitted that at the date of the contract on which the action rested Greer and Hayman were partners; but it alleged that on August 1, 1904, Greer & Hayman dissolved their partnership and that the plaintiffs knew it. The plea goes on further to say that upon the dissolution Greer became owner of the timber to which the contract related by purchase from Hayman of his interest, and that he purchased Hayman's interest at the instance and suggestion and advice of the plaintiffs, and that thereafter Hayman had no further connection with the performance of said contract, as he was released therefrom, "as he is advised by the acts and doings of the plaintiffs"; and that all partnership transactions under the contract upon the dissolution of the part-

nership. And after so stating the plea goes on to say that at the time of the accrual of the account sued on in this action and the incurrence of the indebtedness for which the action is brought, said partnership had been dissolved and Hayman released from all liability. It is argued here that the office of this plea was to deny the partnership and put the plaintiffs upon proof of it. We do not think that it could accomplish that purpose. It distinctly admits that at the date of the contract Greer and Hayman were partners. As they were such when the contract was made they were as partners bound for its complete execution, and the dissolution afterward could not absolve either partner from its ⁵¹⁷ obligation: *Barnes v. Boyers*, 34 W. Va. 303, 12 S. E. 708; *McCoy v. Jack*, 47 W. Va. 201; *Tomlinson v. Polsley*, 31 W. Va. 108, 5 S. E. 457. Admitting the partnership as the plea did at the date of the contract, and the liability then accruing, the plaintiffs could sue defendants as late partners on such continuing liability, and therefore were not called on to prove the facts so admitted by the plea.

Though the plea did not call for proof by plaintiffs of the partnership, could it bar the plaintiffs' recovery? That is, on the merits? Certainly not. When a partnership is dissolved its prior contracts still bind its members. The creditor is not required to look to the remaining active partner. Neither partner can be absolved from liability, unless the creditor agrees to accept him and discharge the other partners: *Dages v. Lee*, 20 W. Va. 584; *Bowyer v. Knapp*, 15 W. Va. 277; *Niday v. Harvey*, 9 Gratt. 454. This plea does not come up to that measure. It does not allege that the plaintiffs agreed to discharge Hayman and look to Greer. Suppose that Burdett Bros. did suggest and advise Greer to purchase of Hayman. That is no evidence of an agreement to look only to Greer and release Hayman, no release of Hayman. There is no consideration in such a matter—no agreement. It might be mere friendly advice as to the advisability as to Greer's purchase of Hayman's interest in the timber. And of course the facts stated would not bear out the allegation at the close of the plea that there was no partnership, whereas the opening of the plea distinctly admits it. The plea is inconsistent in this respect, in view of the admission of partnership, and besides the allegation—not allegation, but mere statement of opinion—that "therefore this defendant denies" that the defendants were partners is a non sequitur. In no view is that plea of any force.

The next point made is that a written contract was improperly admitted in evidence. That written contract reads thus: "This agreement made by and between Ed. R. Greer and W. R. Hayman, parties of the first part, and J. F. and G. L. Burdett, doing business under the firm name of Burdett Bros., parties of the second part. Witnesseth, that said Burdett Bros. agree to cut, log, saw, stack, on yard at mill and deliver at the bank of the Great Kanawha river, at a place designated by said Greer and Hayman at the Sterrett Landing. ⁵¹⁸ All the timber lying and being on the waters of Three Mile creek." It is signed by "Greer & Hayman," and by "Burdett Bros." The theory is that it was a variance from the declaration, because the declaration charged a contract made by Greer and Hayman as partners, when the written contract itself speaks a mere joint contract by them as individuals, not a partnership contract. Now, that contract shows a joint interest or ownership by Greer and Hayman of the timber to be cut under it. And whilst it names them as individuals in the opening of the contract, when they come to the last act in its formation—namely, the signature—they adopt what is *prima facie* a social or partnership name, "Greer & Hayman": *State v. Dry Fork R. Co.*, 50 W. Va. 235, 40 S. E. 447; *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 102 Am. St. Rep. 941, 46 S. E. 366, 63 L. R. A. 896; *Lindley on Partnership*, sec. 1147. Why say it is a joint individual contract rather than a partnership one, especially as the partnership is not denied in the record? Why not rather say that it is a partnership contract? *Bates on Partnership*, section 197, says: "As to the form of the signature of the firm's name, a note 'I promise,' signed A, for A, B, C & Co., will bind the firm. So of a contract by W., Superintendent of Keetes Mining Co., parties of the first part, signed W., Superintendent of Keetes Min. Co. So 'I promise,' signed by the firm's name, A, B & Co. So a promise by the company, signed A B, treasurer, is the company's note." "If in the body of a note made by one partner the language is 'I promise,' but signed with the partnership name, such note is binding on the firm": *Doty v. Bates*, 11 Johns. 544, cited *Parson on Partnership*, sec. 97. But, in fact, is there anything material in the question? Say that the instrument imports a joint liability. Does not a partnership promise import joint and several liability? In *Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249, it is held that in *assumpsit*, where the plaintiffs are described

as partners, but have a joint right of action, the description of them as partners is immaterial. It might be of import in a contest between social and individual creditors, but not in this case, both partners being liable, whether in one aspect or the other.

The court admitted evidence that Greer and the Burdetts met nearly a year after the dissolution, after the completion of the work under the contract, and made a settlement finding ⁵¹⁹ a certain sum due to Burdett Bros. The evidence showed that that part of the work under the contract which had been done prior to the dissolution had been paid for, and that this amount found on such settlement must have been for work done under the contract after dissolution. Was this settlement, treating it as an admission by Greer, made after the dissolution, in the absence of Hayman, admissible to bind Hayman? I have already stated that notwithstanding the dissolution Hayman still continued liable under the contract. That is not the present question. The question is whether the admission is admissible against Hayman. Upon this question there has been great conflict of authority: 17 Am. & Eng. Ency. of Law, 1st ed., 1148. We find it stated very often, as in *Ruffner v. Hewit*, 7 W. Va. 585, that "until the affairs of the partnership are settled, and outstanding engagements made good, the partnership must in contemplation of the law have a continuance, so far as respects the winding up of its affairs": *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653. But as stated in 1 *Lindley on Partnership*, 412: "This doctrine requires consideration." Its generality may mislead us. It refers to the authority of a partner after dissolution to pay and receive debts, and even to make settlements. We might think that this would admit his admission to prove the very existence of a debt against the firm. But the statement does not mean that. Each partner is the agent of the other, owing to their relation; but that agency ceases when the relation ceases. One partner, then, cannot make any new obligations binding the firm. "The general rule established by the weight of authority is that the power of a partner to make admissions binding upon the firm ceases upon dissolution": 1 *Ency. of Ev.* 580. "As a general rule, after dissolution, a partner cannot bind his copartner by an admission of liability": 22 Am. & Eng. Ency. of Law, 2d ed., 217. So holds *Thompson v. Bowman*, 6 Wall. 316, 18 L. ed. 736. The question is not one of the right to prove the liability of both partners by independent evidence, but the

right of one partner after dissolution, in the absence of the other, by admission, to make evidence, to create evidence, binding his late partner. The agency for that purpose has ceased, and an agent cannot bind his principal after the agency has ceased. The Virginia ⁵²⁰ authorities conflict on this question. *Garland v. Agee's Admr.*, 7 Leigh, 362, admits that an account rendered by the acting partner or his clerk, after dissolution, showing a balance due from the partnership is binding on the retiring partner. But the court gave no opinion or reasoning. I take it that that admission related to things that had been done before the dissolution, acts of the partnership creating liability prior thereto. So with *Wilson v. McCormick*, 86 Va. 995, 11 S. E. 976. I would doubt it even then under the preponderance of authority. In *Shelton v. Cocke*, 3 Munf. 191, the court itself said that an acknowledgment of a partner after dissolution is not proper evidence of the existence of the debt to charge the other party. So *Munsford v. Overseer*, 2 Rand. 319, and *Rootes v. Wellford*, 4 Munf. 215, 6 Am. Dec. 510. See note to *Shelton's Case*, in 3 Munf. (Annotated) 191 (670). I understand it to be well settled that after a partnership has been dissolved one partner cannot give a note for a firm debt, even though that debt existed during the partnership. The agency has ended and cannot create evidence against the other partner, in the absence of that other: *Roots v. Mason City Salt & M. Co.*, 27 W. Va. 483. He cannot renew paper of the firm: 22 Am. & Eng. Ency. of Law, 2d ed., 214. If, as is well settled, the one partner cannot make a note after dissolution, it is difficult to realize how he can make an oral admission of a debt, as it is evidence, if used, as well as a note.

Under principles above stated, there was no error in the instructions for plaintiffs. It is useless to detail them, as the legal principles they put are stated above.

The defendants were refused an instruction that if Hayman and Greer dissolved, and thereafter the plaintiffs looked to Greer alone for cutting the timber, and accepted him as owner of the timber, no recovery could be had for cutting after dissolution. What if he did accept him as mere owner? There was no evidence to support the claim that plaintiffs looked alone to Greer and accepted him as owner of the timber, so as to render the instruction even colorably relevant. After dissolution, Hayman wrote Burdett Bros. that he was no longer interested in the timber, and wished a release. This was September 5, 1904. Bur-

dett Bros. replied declining to release Hayman, and insisting that he was still bound ⁵²¹ to them under the contract. Hayman admitted this letter. Burdett Bros. wrote a letter, not denied, stating definitely the written contract, informing Hayman that he and Greer were largely indebted to Burdett Bros., and demanding payment of Hayman, and stating that they had been, and still were, complying with the contract, and notifying Hayman that they would hold both Greer and Hayman responsible. This letter was September 26, 1905. Hayman made no response to it. He said or did nothing, but he and Greer let the work go on to completion, not calling on Burdett Bros. to cease work. These letters negative all idea that Burdett Bros. looked only to Greer and discharged Hayman from liability. It is true that there was evidence that after the dissolution bills for cutting timber as it progressed were rendered to Greer, and a few notes for installments of money payable for cutting timber as the work went on were given by Greer. Though these facts be ever so true, they do not, as a matter of law, release Hayman. There is no color of evidence that Burdett Bros. agreed to release Hayman. There have been holdings that where a bond is given by one partner it merges the simple contract debt of the partners at law, not in equity: *Niday v. Harvey*, 9 Gratt. 454. But nowhere is it held that a promissory note, as in this case, by one releases the other partner, unless the creditor agrees to receive it as payment and release the other partner. In *Dages v. Lee*, 20 W. Va. 584, we find the law stated thus: "Where there is an express agreement between the creditor and a member of a partnership, whereby the creditor agrees to take and does take the joint and several note of such partner and his wife in discharge of the partnership debt, such note is founded upon a valid consideration, and is binding upon the wife's separate estate. The acceptance by the creditor of such note of the partner and his wife with an express agreement to surrender the evidence of the partnership debt operated a discharge of the partnership debt": See *Bowyer v. Knapp*, 15 W. Va. 277; *Karn v. Blackford*, 1 Va. Dec. 841. The general law is such: 22 Am. & Eng. Ency. of Law, 2d ed., 184, 550. Very often have this court and the Virginia court held a promissory note will not pay a debt, unless it be so expressly agreed. as will be seen from the multitude of cases cited in 11 Encyclopedic Digest, 63. This ⁵²² instruction would have misled the jury by presenting to it a matter not raised by the

evidence, upon which a verdict agreeing with the instruction could not stand.

Judgment reversed, verdict set aside and new trial granted.

The Rights, Liabilities and Remedies of Partners after the dissolution of the firm are discussed in the note to *Gilmore v. Ham*, 40 Am. St. Rep. 561. Where one partner transfers his interest in the firm property to the other, and the latter agrees to pay the firm debts, their obligation as joint debtors to a creditor who has not assented to the transaction continues, although the creditor has notice: *Dean & Co. v. Collins & Mahood*, 15 N. D. 535, 125 Am. St. Rep. 610, and see cases cited in the cross-reference note thereto.

PERRY v. OERMAN & BLAEBBAUM.

[63 W. Va. 566, 60 S. E. 604.]

AGENCY—Bona Fide Purchaser from Agent.—The doctrine that an agent disposing of the property of his principal without authority transfers no title as against the principal does not apply to currency or negotiable instruments without restrictive indorsement, where they have come into the hands of a bona fide purchaser for value without notice. (p. 1023.)

AGENCY—Misuse of Principal's Fund.—To make one liable by reason of participation in misuse of money of the principal by an agent, upon the ground that it was used to pay the private debt of the agent, it is necessary to show not only that the party sought to be charged was aware that the money belonged to the principal, but also that he was aware that the debt paid by it was in fact a private debt of the agent, or such a debt that payment thereof could not lawfully be made out of such money. (p. 1023.)

TRUSTS—Misappropriation by Third Person.—It must be shown that he knowingly partakes in the breach of trust, to charge a third person as a party to misappropriation of a trust fund. (p. 1023.)

(Syllabi by the court.)

Henry Gilmer, for the appellants.

McWhorter & McWhorter, for the appellee.

566 ROBINSON, J. Eliminating all matters not relating to the single point at issue upon this appeal, the case is this: Solomon F. Perry had a logging contract with Oerman & Blaebaum, of York, Pennsylvania, relating to their timber which was being cut on Robins Run, in Greenbrier county. Barnes was their agent, or manager on the ground. Ten miles away, at Wade's Draft, Barnes was operating a mill in other timber, as Perry at the time believed for this same

York firm, but it turns out ⁵⁶⁷ in evidence, for himself, under name of Barnes Lumber Company. Perry had contract for logging there also. The firm sent check for \$300 to Barnes, dated July 13, 1905, payable to Barnes Lumber Company. Of the amount so received, Barnes paid Perry \$150 by check of Greenbrier Pole Company. This payment was applied by Perry on the Wade's Draft contract, by express understanding with Barnes, as he insists. Barnes says there was no direction concerning its application. After Barnes had become financially involved and left, owing his principals on account of his agency at Robins Run, and Perry on account of the Wade's Draft contract, and Perry had gone on and satisfactorily completed the contract at Robins Run, the parties were unable to agree upon settlement as to the latter contract, because Oerman & Blaebaum insisted that the \$150 be thereon applied. Thereupon this suit, attachment in equity, was instituted against them by Perry, and, upon answer, general replication, and proof taken, there was hearing, which resulted in decree allowing such payment to be credited to Oerman & Blaebaum on the Robins Run contract. Complaining of this allowance of credit and the change of its original application by the parties, the plaintiff has appealed. Other matters are involved in the suit, but only as to the aforesaid item is our consideration demanded. The decree is for \$147.22, with interest from December 15, 1905, in favor of plaintiff against said defendant firm; but plaintiff insists that it is erroneous in not being in a sum larger by said \$150.

This case turns upon the question of fact whether Barnes committed a breach of trust in applying the money to his own debt, and, if he did, whether Perry was a party to that breach of trust. On behalf of Oerman & Blaebaum, it is contended that their agent misappropriated the \$150 so received, applied it to his private debt to Perry; and that, therefore, Perry is chargeable with the sum on what is due him from them on the Robins Run contract. This view was accepted by the court below, but careful consideration of the evidence leads us to conclude that the credit was improperly applied in the decree. While argument is made upon the fact that Barnes was the son in law of Perry, yet we observe nothing in proof that causes this relationship to be of weight. It does not appear as intimate as the relationship between Barnes and ⁵⁶⁸ Oerman & Blaebaum, still existing when Barnes' deposition was taken in their city of York on their behalf. The fact stands out

clearly that Perry cannot be charged with knowledge that Barnes, at the time of the payment aforesaid, was misappropriating money of his principals by such payment. Nor is it shown that there was such misappropriation. In fact, the opposite is to be inferred. Perry says that Barnes told him that he had received the check from the firm to pay up expenses on the Wade's Draft job; that he claimed it to be his money; that he did not have the check in his hand; and that he could not tell whether he was getting all the money from them. This is the substance of Perry's knowledge that he was being paid with the money from this firm. Significant, indeed, is it that the check for \$300 from which this payment was taken was made payable to Barnes Lumber Company, the very concern that, as it later appeared, was operating at Wade's Draft. Does it not look like an advancement for such purpose, rather than a check for money to be disbursed by him as their agent at Robins Run? A statement made by Barnes to the millman, King, who appears a wholly disinterested witness, supports this. Barnes said that his \$300 had come, but that which King and his father were expecting from Oerman & Blaebaum on their sawing at Robins Run had not. And it appears that, at this time, there was much less than \$150 due Perry on the Robins Run contract from Oerman & Blaebaum. Nowhere in the testimony of the defendants do they deny that this check was sent to be used as Barnes said it was to be used, and did use it. Then, it is also significant that Perry had been made to believe that Oerman & Blaebaum were operating at both places. Consistent with such belief on his part is the proof that the sawmill at Wade's Draft had been furnished by this firm, and Oerman and his brother, as witnesses, both express familiarity with Wade's Draft. True, the evidence shows that, in fact, the firm was not interested there, except that they owned the mill, which Barnes had contracted to buy; but the incidents were such as would lead Perry to believe them to be interested, as he said he did. Really, the contrary does not appear but that Perry was justified in believing that Oerman & Blaebaum were his paymasters at Wade's Draft, as well as at the other place. These and other things disclosed ⁵⁶⁹ in the proof convince us that Perry accepted the money so paid him in good faith on the Wade's Draft job and so applied it. And, in absence of evidence otherwise, it cannot even be said that it was not intended by Oerman & Blaebaum to be so applied, especially since the check was payable to Barnes' concern. Most cer-

tain it is that no knowledge can be imputed to Perry from the evidence herein which would charge him with collusion or improper conduct in this transaction with Barnes. To affect Perry in the premises, it would have to appear that he had knowledge of, or participated in, the unauthorized act of Barnes. This is consistent with *Rohrbough v. United Express Co.*, 50 W. Va. 148, 88 Am. St. Rep. 849, 40 S. E. 398, wherein it is held: "The powers of an agent are to be exercised for the benefit of his principal only, and when he acts otherwise, with the knowledge and participation of the person relying upon his unauthorized act, his principal is not bound by such act." Nor does the doctrine that, where an agent disposes of his principal's property without authority, he transfers no title as against the principal, apply to currency or negotiable instruments without restrictive indorsement, where they have come into the hands of a bona fide purchaser: *Clark & Skyles on Agency*, secs. 546, 547. In *Fifth Nat. Bank v. Village of Hyde Park*, 101 Ill. 595, 40 Am. Rep. 218, there is deduced from much eminent authority the law which fittingly applies to the case before us: "To charge a stranger to a trust fund as a trustee, by reason of participation in a misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was at the time aware that the debt paid by it was in fact a private debt, or such a debt that payment thereof could not lawfully be made out of such fund." Perry not only was without notice of, and participation in, the misuse of the money of Oerman & Blaebaum, if there had been proved a misappropriation, but it appears that he was not even aware that they were not his proper debtors on the Wade's Draft contract when the payment was made him, and that he was being paid the private debt of Barnes.

But more controlling than all else, Oerman & Blaebaum have not established that the \$300 check was actually sent ⁵⁷⁰ for account of Robins Run work, and that Barnes actually committed breach of trust relative to it. They insist herein that it should be applied on Robins Run contract; but mark you, they do not show that it was originally intended to be so applied. Its being payable to Barnes Lumber Company would permit that payee to make such use of the proceeds as it desired, unless specifically directed as to its application by the drawers. No specific direction

for the application of this check is shown to have been made at the time it was sent Barnes by Oerman & Blaebaum. It bore no restrictive indorsement, and did not show that it was intended for a special purpose. By the check, as far as shown, Oerman & Blaebaum simply made Barnes Lumber Company their debtor. In short, Oerman & Blaebaum failing to show that Barnes did, in fact, misappropriate this \$150, and that Perry had knowledge thereof, the application of the payment as made by Perry at the time on the Wade's Draft contract should not be disturbed. The testimony conclusively points to the fact that, as between Perry and Barnes, at the time, such application was intended and made. They had the right to agree on its application to a specific debt. If, as Barnes says, nothing was said as to its application, Perry had a right to apply the payment as he desired: *Buster v. Holland*, 27 W. Va. 510; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

So much, therefore, of the decree as credits Oerman & Blaebaum with said sum of \$150 on the debt due from them to Perry is erroneous, and to such extent will be modified. Then the decree is that Oerman & Blaebaum do pay Solomon F. Perry the sum of \$297.22, with interest from December 15, 1905, and the costs; and, as so modified, it will be affirmed, with costs to appellant.

If an Agent Applies Money of His Principal to the payment of the agent's debt, it has been affirmed that the creditor receiving such money acquires no title thereto, though when receiving it he does not know that it is not the money of his debtor: Porter v. Roseman, 165 Ind. 255, 112 Am. St. Rep. 222. If an agent, by mistake, pays to a third person money in his possession belonging to his principal, he may maintain an action in his own name to recover it back: Parks v. Fogelman, 97 Minn. 157, 114 Am. St. Rep. 703.

RUSSELL v. TENNANT.

[63 W. Va. 623, 60 S. E. 609.]

ADVERSE POSSESSION—Color of Title.—A Deed, Void for Defect Apparent upon its face, constitutes color of title, open, notorious, exclusive and hostile possession under which for a period of ten years gives title under the statute of limitations. (p. 1028.)

COTENANCY—Disseizin.—Color of Title and Mere Possession thereunder by one or more of a number of tenants in common, however long continued, does not amount to a disseizin of the cotenants

out of possession, and is, therefore, not adverse. The possession of one tenant in common is the possession of all. (p. 1029.)

COTENANCY—Disseizin.—If One Tenant in Common be in Possession and a stranger enter into possession with him, the cotenants out of possession are not thereby disseized, and such joint occupancy of the tenant in possession and the stranger is not adverse to the tenant out of possession. (p. 1032.)

COTENANCY—Adverse Possession Against Co-owners.—A tenant in common in sole possession of the land may make his possession adverse to his fellow-tenant, by repudiating or disavowing the relation of tenancy in common between them, and any act or conduct of his signifying intention to hold, occupy and enjoy the premises exclusively of which the tenant out of possession has knowledge, or of which he has sufficient information to put him upon inquiry, amounts to an ouster of such tenant, and from the time when he has notice thereof the possession of the other party is adverse. (p. 1032.)

COTENANCY—Ouster and Adverse Possession.—Such ouster may be effected by mere acts or matter in pais, unwitnessed by any written memorial thereof, such as a verbal partition or exclusive occupation of the premises with notice of hostility of claim. (p. 1030.)

COTENANCY—Ouster of Co-owner.—A Void Deed, executed by one tenant in common to another, though inoperative to pass title, and whether regarded as constituting color of title or not, is sufficient to prove a disseizin of the party who executed it; it being a written memorial of a hostile claim asserted by the grantee and notice thereof on the part of the grantor. (p. 1029.)

COTENANCY.—When Title by Adverse Possession is Established in one tenant in common against his cotenants, the deed, will, patent or other instrument under which both had claimed originally operates in favor of the claimant by adverse possession as color of title, so as to extend his possession to uninclosed lands. (p. 1031.)

COTENANCY—Ouster and Adverse Possession.—A Tenant in Common in possession of the land may not, by means of his possession alone, disseize any of his cotenants, nor can a stranger, by possession alone, disseize one tenant without disseizing all, but either may disseize one or more of the tenants out of actual personal possession by adding an act of ouster to his sole occupancy of the land. (p. 1031.)

DOWER—Rights of Widow—Adverse Possession.—The dower of a widow confers no right of possession upon her, except as to the mansion house and curtilage, until after assignment, and, before assignment, it is no obstacle to the right of entry on the part of an heir and does not prevent the running of the statute of limitations against him in favor of an adverse claimant in possession who has procured a relinquishment of the dower in his favor by purchase thereof. (p. 1035.)

(Syllabi by the court.)

K. C. Moore, Pugh & Pugh and O. W. O. Hardman, for the appellant.

A. B. Fleming, Thos. P. Jacobs, Charles Powell, Kemble White, C. B. Riggle, B. Engle and I. M. Underwood, for the appellees.

625 **POFFENBARGER, P.** Samantha Russell has appealed from a decree of the circuit court of Tyler county

dismissing her bill and amended bill, filed against Cassie A. Tennant and others, for an accounting as to petroleum oil taken from a tract of land containing one hundred and seventy-six acres, under a lease claimed by the South Penn Oil Company, and to prevent further operation under said lease, or, if such relief cannot be had, to have the oil and proceeds thereof placed in the hands of a receiver for conservation of her alleged right in respect thereto.

She claims a one-twelfth undivided interest in the land, as one of the twelve children of James Stewart, who died intestate in February, 1889, seised and possessed of it in fee simple. Some time prior to July 1, 1890, Jacob S. Tennant and Cassie A. Tennant purchased the undivided interests of six of the children and obtained deeds therefor. In July, 1890, the Tennants instituted a partition suit against the widow and the six other children of James Stewart, deceased, one of whom was the appellant, Samantha Russell. On the thirteenth day of August, 1890, a decree was entered in said suit by which the respective interests in the property were determined and commissioners appointed to go upon the land and divide it. But before this decree was executed Jacob S. Tennant purchased the undivided interests of four of the other heirs, namely, Lucy Stewart, Elwood Stewart, Campsie Dell Lysle and Samantha Russell, and also the dower interest of Elva Stewart, widow of James Stewart. Having exhibited to the court in that suit the deeds for these interests, from which, together with the bill and decree, it appeared that he and Cassie A. Tennant were then the owners of ten-twelfths of the tract, and that only two interests were then outstanding in other persons, namely, Louis Stewart and Emma Copenhaver, infants, the decree appointing commissioners and directing partition to be made was set aside and the two outstanding interests were decreed to be sold, and on the sale ⁶²⁶ thereof Jacob S. Tennant became the purchaser, and the sale to him was confirmed by a decree entered on the ninth day of December, 1891, but the deed for these two interests was not executed and delivered until August 31, 1895. He took possession of the land in April, 1891, although he did not purchase the interests of the two infants until later, and the sale thereof to him was not confirmed until December 9, 1891. On the twenty-eighth day of June, 1894, he and Cassie A. Tennant executed an oil and gas lease to the South Penn Oil Company, and on May 1, 1897, they executed to the said company another such lease. Under these two leases said company drilled a number of

productive oil wells on the property. Louis Stewart, on the twenty-ninth day of June, 1900, brought a suit in equity, and obtained relief from the judicial sale of his interests, under the statute allowing him, as an infant, to show cause against the decree. That case came to this court and the disposition thereof is reported in 52 W. Va. 559, under the title "Stewart v. Tennant."

Notwithstanding the execution by Samantha Russell and her husband of a deed, bearing date September 1, 1890, purporting to convey to Jacob S. Tennant her one-twelfth interest in the land, and his long possession under his several claims of title until the time of his death, 1901, and the possession of his heirs thereafter until the commencement of this suit in June, 1903, her bill asserts title to said one-twelfth interest against Cassie A. Tennant and the heirs of Jacob S. Tennant, and demands an accounting as to the oil taken therefrom, on the ground of invalidity of the deed, the acknowledgment thereto being fatally defective for lack of conformity to the statute in existence at the time it was executed, in respect to the certificate of acknowledgment.

That there was once a tenancy in common between the Tenants and the appellant admits of no doubt. On the purchase of the six interests by Jacob S. and Cassie A. Tennant, this tenancy in common began, and it continued, without interruption, until the delivery of the deed from Samantha Russell and her husband to Jacob S. Tennant, presumptively January 10, 1891, the date thereof. As to all the heirs of James Stewart, except Samantha Russell, Louis Stewart and Emma Copenhaver, it ceased, by the execution and delivery ⁶²⁷ of deeds conveying the interests of the other three heirs, Lucy Stewart, Elwood Stewart and Campsie Dell Lysle.

Unless there has been an act of ouster as to Samantha Russell, starting the running of the statute of limitations against her, that relation of tenancy in common still exists. It undoubtedly existed as between Jacob S. Tennant and Louis Stewart and Emma Copenhaver until after the purchase of their interests at the judicial sale and confirmation thereof December 9, 1891, although Tennant had been in possession of the land prior to that time. And it is insisted that his possession, as against them, could not become adverse until after the execution of the deed for their interests, made by the special commissioner in 1895, less than ten years prior to the institution of this suit. The delay in the execution of the deed was no doubt on account of time allowed for the payment of the purchase money. It is the usual practice,

when land is judicially sold and payment of the purchase money deferred, to retain the title as security for the payment of the money.

The contention of counsel for the appellee is, first, that the deed of Samantha Russell, being void on its face, is not color of title; second, that if color of title, the possession of the Tennants was not adverse to Louis Stewart and Emma Copenhaver, until after the execution of the deed for their interests in 1895, and, not being adverse as to them, it could not be adverse as to any of the other cotenants, of whom Samantha Russell was one; and third, that there was not, and could not have been, any ouster as to Samantha Russell, because there was not possession of the entire premises by Tennant under color of title for the requisite period of time.

That a deed absolutely void on its face is nevertheless good as color of title, notorious, hostile and exclusive possession under which, for the period of ten years, gives a good title, cannot be doubted. Decisions of this court assert the proposition in express terms: *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423. But an attempt is made to found a distinction upon the difference between deeds void for matter not apparent upon the faces thereof, and deeds the invalidity whereof is apparent on their faces; it being claimed that a judicial declaration of invalidity is sometimes necessary to work its destruction when the defect ⁶²⁸ is apparent, and that it is necessary in such cases as this. We are unable to concur in this view. The maxim, importing that all men are deemed to know the law, applies. If the invalidity of the deed is apparent upon its face, it is a void deed, no matter that its invalidity has not been declared, and a layman, or even a lawyer, might regard it as valid. His ignorance of the potentiality of the apparent defect avails him nothing if he relies upon the deed alone. The virtue or efficacy which the law accords to such a deed, when possession has been held under it for a period of ten years, seems to stand upon mere tenderness of the law in favor of one who, although bound to know it was void, has relied upon it and held possession under it, mistakenly believing it to be good, or relying upon the acquiescence in his claim of title by all those whose interest it was to deny it. Title in such cases is not imparted by the deed. The deed is only an incident or circumstance bearing upon the conduct of the parties, disclosing intent, which the statute of limitations converts into good title. Without possession under it the deed is absolutely worthless. Both courts and juries must disregard it. Pos-

session without the deed would be worthless except to the extent of the actual inclosure. But both the deed and the possession produce a situation or relationship between the parties which the statute of limitations converts into good title, by denying a right of entry. As to whether a deed void on its face is color of title, the authorities are by no means uniform. "The decisions on this question seem to be fairly well balanced": 1 Cyc. 1087. However, we regard it as settled by our decisions, and rightly settled.

But independently of this question, there is a doctrine or principle of ouster operating between tenants in common, whether coparceners or not, not founded exclusively upon the doctrine of color of title. One may oust another or all the others, without any deed or other writing from him to them, by any act of hostility while in possession sufficient to show that he repudiates and disavows the relationship previously existing between them, which is brought to the knowledge of the other party. In *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121, it was held that a parol or verbal partition between tenants in common and possession according thereto started the statute of limitations in favor of each against the other. There was ⁶²⁹ no color of title, no deed, no memorandum, no paper of any kind, signifying to each of the parties that the other claimed the land in severalty and held it in hostility to, and exclusion of, the other. In that case it is said: "Partition, though it be void, and holding land in severalty by cotenants, is a mutual ouster of each other as to the portion in actual occupancy, and is therefore adverse." In *Cochran v. Cochran*, 55 W. Va. 178, 46 S. E. 924, this court held as follows: "When one tenant in common occupies the common property openly, notoriously and exclusively as the sole owner, keeping up the improvements, paying the taxes thereon, and receiving to himself the rents and profits, and exercising over the property such acts of ownership as evidence an intention to ignore the rights of his cotenants, such acts amount to a disseizin, and his possession will be regarded as adverse to his cotenants from the time they are shown to have knowledge of such acts and claims." In *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102, it was held that a partition not evidenced by writing would be sufficient, if followed by actual possession in severalty, to make the possession adverse. Of course, it is necessary that knowledge of the intention to hold exclusively be brought to the attention of the tenant whom it is proposed to oust. Accordingly, the court said in that case: "It is the intention

of the tenant or parcener in possession to hold in common property in severalty and exclusively as his own, with notice or knowledge to his cotenants of such intention, that constitutes the disseizin." In *Cooley v. Porter*, 22 W. Va. 120, the real basis of the decision was the exclusive possession with hostile intent, brought to the notice of the opposite party, that effected the disseizin rather than the void deed. That instrument was a memorial of a transaction between the parties which evinced notice to the ousted tenant of the hostile intent of the one in possession. And so it was in the case of *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231.

In such cases the void deed, contract of partition, or conduct of the parties in establishing the division line, or express notice of adverse holding, whatever may be its form, is not in reality color of title. It does not always mark the limits of the claim nor operate to pass title. It creates an equitable right or title, and the location and area of the land in which that title is acquired are generally marked and designated ⁶³⁰ by the deed or will under which both parties claim. If there is any color of title involved, and there must be as to uninclosed lands, that instrument is the paper by which the boundaries are described and limits fixed. In *Adkins v. Spurlock* it does not appear that the land was inclosed, and there was no partition deed. The void deed in *Cooley v. Porter* was not regarded by the court as having any particular value or efficacy as color of title. It is nowhere called color of title in the opinion. Judge Snyder, delivering the opinion of this court, said: "The nature or character of the title or claim under which the occupying tenant asserts his ownership is entirely immaterial. It is the fact that he claims the property as his own and not the goodness of his title which makes his possession adverse. His claim may be founded on a defective or even a void deed or paper as well as upon a valid instrument, or it may be simply in pais, without any paper or color of title, and resting wholly upon a naked assertion of title or claim in himself accompanied by exclusive possession." That the deed in that case was treated as efficacious only to the extent of proving notice to the assertion by the defendant of his hostility of claim to all the land described in the deed under which both had previously held, and whether it was strictly color of title, was not actually decided. Judge Snyder said: "The paper and its contents exist as physical facts, and it must be conclusively presumed that Mr. Cooley and John Porter, the parties thereto, were fully cognizant of its contents. They must have had some object in

the execution of it. That object is apparent. . . . Unless we presume that they deliberately undertook to perform a solemn farce, it must be conceded that Mary Cooey intended by said paper to confer upon John Porter all her interest in said land, and that after its execution both she and said John believed that the said John had obtained from her all of said interest. And he having intended to acquire, and believing he had acquired, said interest, it must be presumed that his possession from that time was with an intention to claim and hold the same under and by virtue of said paper, and she being a party thereto and entertaining the same belief as to its effect and purpose, necessarily had notice of his intention so as to hold the said interest. This, under the rule of law before stated, would operate as an ouster, and ⁶³¹ from that time make the possession of said John adverse to that of the said Mary Cooey. . . . The intention to hold the property as his own exclusively, with notice of that intention to his copartner, is the criterion by which the law determines the character of his subsequent possession." He claimed title under the deed to the common ancestor of the parties which fixed the location and the boundaries of the tract of land. Up to the time of the ouster, the extent of his interest was not defined upon the ground. He was seised of an interest in every acre, foot, particle and molecule of land within the limits of the ancestral deed. His right was coextensive with the boundaries thereof, but not exclusive. His possession until that time extended to the whole of the land, but, like his right, it was not exclusive. When he had effected the ouster his possession was still coextensive with the boundaries of the deed, but exclusive, and, after the expiration of twenty years following the ouster, his title became perfect, not only in respect to area but also as to the quantum of interest. By the act of ouster and subsequent possession, he changed not the limits of the territory in dispute, but the character of his possession and title. The ancestral deed conferred upon each heir the right of possession of all the land. Possession is evidence of title. Possession under such a deed is obviously possession under color of title, although the occupant is not the sole owner and his possession is that of his cotenants; and if, being in possession, he exclude his cotenant and make his possession hostile to him, his possession thereafter would logically and necessarily be adverse under color as well as claim of title. No reason is perceived either why the void deed from the parcener may not be considered color of title, though it purports to convey only an

undivided interest. It purports to vest a right of possession coextensive with the boundaries of the tract and so lends color of right to the possession. In my opinion, both deeds could be regarded as color of title in such a case. No person is restricted to one claim of title. A man may have several titles to the same land and rely upon any or all of them.

In view of the alleged tenancy in common between the Tennants and Louis Stewart and Emma Copenhaver, because of the want of a deed for those two interests at the time at 632 which it is claimed the adverse holding began, reliance is placed upon the legal proposition laid down in 1 Lomax's Digest, 623, "that a man cannot disseize another of an undivided moiety as he might of a part of the land." The illustration given by Lomax states a case in which an owner of the true title was in possession, and a stranger entered into the possession with him, and they together occupied the land and received the rents and profits therefrom for twenty years. Afterward, the heir of the owner of the true title, who has never been ousted of his possession, brought an ejectment against the stranger and was allowed to recover. The same proposition is stated in Angell on Limitations, section 434, and the principle was applied in *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22. This proposition rests upon the hypothesis of mere possession and reception of the profits. It leaves out the important element of ouster—notice of hostile intention. The sole possession of one tenant in common, however long continued, will not amount to a disseizin: *Reed v. Bachman*, 61 W. Va. 452, 123 Am. St. Rep. 996, 57 S. E. 769. But if, in addition to his sole occupancy of the land, he does some act of a hostile character, importing intent to hold exclusively, and knowledge of this act on the part of the tenant out of possession is established, the possession is thereafter adverse. If, one tenant being in possession, a stranger enter into possession with him, and nothing more occurs, no disseizin of the tenants out of possession would be effected, for the obvious reason that the possession of the one who is occupying the land is the possession of all, and he has not been disseized, and there is no notice of an adverse holding or claim. If, on the contrary, the stranger and the tenant in possession, upon the entry of the former or afterward, should repudiate or disavow cotenancy with the party out of possession, a new element is introduced, an additional and highly important fact. The case does not stand alone upon possession under color or claim of title. To the occupancy of the stranger and one cotenant, the fact of ouster of the other cotenant has been

added. By way of illustration, let it be supposed that one of two tenants in common, being in possession, should convey an undivided half to a stranger, and thereafter he and his grantee should remain in possession and repudiate or disavow the relationship of cotenancy with the one out of possession, ⁶³³ why should not that be as effective as if the stranger had entered and the notice had been given only by the cotenant in possession? Though, in 1891, Jacob S. Tennant and Cassie A. Tennant were the owners of only nine-twelfths of the land, and their possession was not adverse to that of Louis Stewart and Emma Copenhaver, they had previously given notice to Samantha Russell of their intention to claim and hold her undivided interest in the land. It was not the mere entry of a stranger under a hostile title. Such an entry alone would not have disseized Samantha Russell, because it did not disseize her cotenants, Louis Stewart and Emma Copenhaver, and because the relation of cotenancy had previously existed between her and Jacob S. Tennant himself, which his mere possession could not destroy. His possession was not only for himself, but for her also. But the Tennants did more than merely enter under the strange title. They disavowed and repudiated the claim of title of Samantha Russell and gave her notice of such repudiation and disavowal. The argument is that no such ouster can be effected unless the land is held in sole and exclusive possession. The authorities relied upon do not sustain that position. All they say is that mere possession will not do it. They do not go to the extent of asserting that the entry and ouster combined will not make the possession adverse. If such an ouster as we have described is effected between two tenants in common, making the possession of one adverse against the other, why should it not be equally effective in the case of three, two being in possession and disavowing the title of the third? We are unable to perceive any reason why it should not be as effective in one case as in the other. And this view seems to accord with a principle of the law of adverse possession declared in analogous cases. In *Wade v. Johnson*, 5 Humph. (Tenn.) 117, 42 Am. Dec. 422, it was held that if one or more of many tenants in common be barred by the statute of limitations, and others be within the saving of the statute, it shall not operate against those who are within the saving of the statute to bar them; nor shall the partition given by those within the saving of the statute prevent the operation of the bar as to those without the saving of the statute; each one shall recover or be barred, as to his aliquot share or por-

tion of the land, as he may be within or without the saving of the statute. In ⁶³⁴ *McFarland v. Stone*, 17 Vt. 165, 44 Am. Dec. 325, it was held that the statute of limitations may run against the estate of one tenant in common, without affecting the rights of the cotenants who are under disability. In *Doolittle v. Blakesley*, 4 Day (Conn.), 265, 4 Am. Dec. 218, the court said: "One tenant in common, as it respects his fellow-tenant, is always safe in the possession of his fellow-tenant unless ousted. But when disseized, either by a fellow-tenant or a stranger, he has his remedy in his own right, upon his own independent title; and if he will not exercise his right within fifteen years, he must suffer the consequences of an adverse possession and lose his estate." The same principle is declared in *Moore's Lessee v. Armstrong*, 10 Ohio, 11, 36 Am. Dec. 63; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630; *Marstellar v. McClean*, 7 Cranch, 156, 3 L. ed. 300. Mr. Freeman, in his work on Cotenancy and Partition, at section 377, says: "Where one of the two coparceners was under a disability and entered within twenty years after the removal of such disability, it was held that her entry could not operate in favor of the other coparceners who had not been under any disability. . . . The new title thus acquired by the disseizor must of necessity correspond with that on which the disseizin operated, as he could not acquire by disseizin a greater estate than that held by the disseizee. If the latter held only an undivided interest as tenant in common with another, the disseizor would acquire by disseizin a similar undivided interest; for it was only that on which the disseizin operated and took effect. The disseizor of one of several tenants in common acquiring a title by disseizin, therefore, becomes himself a tenant in common with the other cotenants." The observations of Judge Brannon in *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562, relating to this question, were based upon the mere fact of possession under color of title. The element of ouster of a particular fellow-tenant, amounting to a disseizin of that tenant alone, was not present in that case.

As Jacob S. Tennant at the time of his entry upon the land had bought the dower interest of the widow of James Stewart, it is contended that there was no right of entry on the part of the appellant as against him, and that the statute did not commence to run for that reason. There had been no assignment of the dower, and neither in the hands of the widow nor her assignee did it prevent an entry on the part ⁶³⁵ of the heirs. It gave no right of possession as against

them. If the widow had any right of possession at all, it was limited to the mansion house. As against the heirs, she could only demand a share of the rents, issues and profits. The observations made in *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223, respecting the dower have no relation whatever to the right of possession. That question was not at all involved in the case. The discussion was induced by the denial of Tennant's right, as owner of the dower interest, to participate in the profits of the oil wells opened after the death of the husband. It was a claim based upon an obligation resting upon the heir to yield part of the rents to the dowress, because of his failure to assign the dower. That organization presupposes possession and right of possession in the heir, not the dowress.

We perceive no error in the decree and it will be affirmed.

A Void Deed may Constitute Color of Title within the law of adverse possession: *Carpenter v. Booker*, 131 Ga. 546, 127 Am. St. Rep. 241; *Hamilton v. Witner*, 50 Wash. 689, 126 Am. St. Rep. 921; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959. The fact that a deed is void on its face does not prevent it from constituting color of title: See the note to *Power v. Kitching*, 88 Am. St. Rep. 705.

The Ouster by One Tenant in Common of his cotenants and his acquisition of title by prescription are discussed in the note to *Joyce v. Dyer*, 109 Am. St. Rep. 609. To constitute an ouster by a cotenant there must be some open, notorious assertion of an exclusive claim, and a direct interference with or denial of the right of the other owner: *Moragne v. Doe*, 143 Ala. 459, 111 Am. St. Rep. 52. See, too, *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 963; *Reed v. Bachman*, 61 W. Va. 452, 123 Am. St. Rep. 996.

LOGAN PLANING MILL COMPANY v. ALDREDGE.

[63 W. Va. 660, 60 S. E. 783.]

GUARDIAN—Sale of Land.—A court of chancery has no inherent power to authorize a guardian to sell or mortgage his ward's land. (By the editor.) (p. 1036.)

MECHANIC'S LIEN—Whether Attaches to Ward's Land.—Out of proceeds of a sale of an infant's land in a suit brought by his guardian to sell his land, under Code, chapter 83, the court authorizes the guardian to build a house on other land of the infant. This will not authorize a mechanic's lien for lumber used in construction against the land on which the house stands. (p. 1037.)

MECHANIC'S LIEN.—To Enable a Court of Equity to Enforce a mechanic's lien, the lien must have legal validity. (p. 1038.)

MECHANIC'S LIEN—Whether Attaches to Infant's Land.—The mere fact that lumber is used in the construction of a house on an infant's land gives no lien on the land enforceable in equity. (p. 1039.)

(Syllabi by the court except where otherwise stated.)

Ellison & England, for the appellant.

Chafin & Bland, for the appellees.

661 BRANNON, J. Cecil Aldredge, an infant, was the owner of some land in Arracoma, in Logan county. His guardian, James R. Henderson, instituted in the circuit court a proceeding for the sale of some of the infant's land, and a decree was rendered authorizing the sale, and sale was made and confirmed. The court authorized the guardian to use some of the money coming from the sale in building a house on the real estate not sold as a residence and for the benefit of the infant. He did build the house under a contract with W. F. Castle. In the construction of the house the Logan Planing Mill Company furnished Castle lumber and other materials which entered into the construction of the house and it recorded a mechanic's lien against the house and lot, and brought this chancery suit to enforce the lien against the same, and upon the hearing of the suit the court refused to enforce the mechanic's lien and dismissed the bill without prejudice to any right of the Planing Mill Company against Henderson as guardian or as individual. The Planing Mill Company has brought the case to this court by appeal.

It is very clear that by our law a guardian has not power to sell or mortgage the land of his ward unless authorized by statute: *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014; *Rhea v. Shields*, 103 Va. 305, 49 S. E. 700. A court of chancery has no inherent power to do so. I do not understand that a guardian may build houses on his ward's land, merely under his power as such, with the money of the ward. He may reasonably repair existing houses to prevent destruction until the infant shall come to full age; but this does not say that he can build new houses, to go to decay or to be destroyed by fire: *Woerner on Guardianship*, sec. 175; 21 Cyc. 98. The common law gives guardians very limited power. Our Code, chapter 82, section 7, gives him the custody of his ward and **662** the possession, care and management of his estate, and authorizes him out of it to provide for the maintenance and education of the ward; but he cannot invade the principal even for bread and raiment, unless a court allow him to do so under section 8 of that chapter. This chapter relative to guardians gives a guardian no power to build new houses with his ward's money. Chapter 83, section 7, provides that the proceeds of sale of land sold under court authority under that chapter "shall be invested under the direction of the court, for the use and benefit of" the infant. Whether such

an order as the court made in this case would be justified by that provision we need not say, because we cannot concede that, without authority of the court expressly given to mortgage or create any lien, the guardian may mortgage or create a lien which may sweep away the infant's land. The order of the court in this case conferred no such authority. It simply gave authority to apply the money to build. It cannot be that this material company can create a lien affecting the very body of the infant's estate, taking his land and imposing chancery costs in the enforcement of a mechanic's lien. The infant could not make a mortgage or mechanic's lien, though the expenditure went into permanent improvements: Hogg's Equity Principles, 692. The guardian could not make a mortgage. An infant cannot appoint an agent. A guardian may be called agent for some purposes, but not for such a purpose as this case presents. But it is argued that as the court gave authority to build the house, the power to bind the land even by a mechanic's lien vested in the guardian as an incident to the power to build. We cannot yield to this position. The order of the court did not authorize, even imply it, as we think, and did not contemplate such mechanic's lien. We should require express words in the order, plain intent, to give such authority. In *Payne v. Stone*, 7 Smedes & M. 367, is what I think good law fitting this point. "If a person deal with a party, having by law but a limited authority, he can have no right beyond what the authority rightfully exercised would confer. The probate court of Adams county granted to S., guardian, etc., permission 'to erect out of the funds of his wards a building upon their lot in Natches, of such dimensions and quality as may suit their interest.' Held, that the court did not ⁶⁶³ thereby intend to authorize the guardian to erect a building upon credit and thereby destroy the interest of his wards. The probate court has no power to authorize the erection of buildings upon the real estate of minors, which may involve the necessity of selling that estate to pay for them." We find it laid down that the guardian cannot make contracts binding the infant without authority: 16 Am. & Eng. Ency. of Law, 70. He has no power to convert personalty into realty. He cannot buy a farm or build a house: *Boisseau v. Boisseau*, 79 Va. 73, 52 Am. Rep. 616. The powers of a guardian being limited, as above shown, it follows that the authority merely to build could not draw with it the consequence that under such a contract for building between the guardian and contractor a mechanic's lien could be put on the land for the

contractor or those supplying material to the destruction of the infant's estate in the land.

We think the circuit court was right in dismissing the bill, if for no other reason than the want of a valid lien. Of course, there must be a valid lien for equity to enforce. "No equitable lien exists either on behalf of the guardian or party who has contracted with him for the improvements of the ward's lands. Neither party has a right, under the circumstances, to the mechanic's lien, unless specifically authorized by statute. As, where a probate court had no power to authorize the erection of buildings upon real estate of minors upon credit, nor did it undertake to exercise such power, and the guardian nevertheless erected a building for which there were no sufficient funds to pay, the mechanic has no lien on it, for if a person deal with a party having by law but a limited authority, he can have no right beyond what the authority rightfully exercised would confer. So if a probate court grant to guardian permission 'to erect, out of the funds of his wards, a building upon their lot, of such dimensions and quality as may suit their interest,' the authority does not authorize the guardian to erect a building upon credit, and thereby destroy the interest of his wards. Again, where a law gave 'a lien against the owner to the extent of his interest upon a house, and upon the land on which it stands, for labor done, etc., no lien could be acquired by the builder of a house upon a lot of land owned by the minor daughter of the defendant, although the defendant, in his contract for such ⁶⁶⁴ building, claimed to own the lot; nor could he, as such guardian, without authority from a competent court, build a house upon the land of his ward and charge the expense upon the ward, or create a lien upon the property for the labor and materials in favor of mechanics." Phillips on Mechanics' Liens, sec. 111. 27 Cyc. 65, says: "The contract of an infant not being binding upon him, a mechanic's lien cannot be predicated thereon, nor will a retention of the property as improved amount to such ratification as to sustain a lien." *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572, says: "Contract made with minor to furnish labor and material for the improvement of his property is not binding upon him, and the contractor can claim no lien therefor against the property. Where minor contracts for materials and labor for the improvements of his property, his receipt of the rents from the property so improved, after he becomes of age, will not amount to a ratification of the contract, so as to give to the

contractor a lien upon the property": 20 Am. & Eng. Ency. of Law, 2d ed., 329.

We hardly deem it necessary, in response to the claim that though the mechanic's lien is not good, yet as the lumber went into the house the infant must pay for it. This would be doing indirectly what he could not do directly and enable an infant to destroy his estate. But if even this were so, it would be a personal demand, and where any lien for jurisdiction in equity? *McCarty v. Carter*, just cited, will sustain this proposition. The use of a building built under an unauthorized contract on an infant's land "will not ratify the contract so as to subject the land to liens": 20 Am. & Eng. Ency. of Law, 2d ed., 329.

Decree affirmed.

A Mechanic's Lien cannot be Acquired against the property of a minor under a contract entered into by himself, for he is incompetent to make a valid contract: *Alvey v. Reed*, 115 Ind. 148, 7 Am. St. Rep. 418; *Bloomer v. Nolan*, 36 Neb. 51, 38 Am. St. Rep. 690. And a mechanic's lien cannot be enforced against the property of minors, where the contract under which the work was done or materials furnished was entered into on their behalf by their guardian without first obtaining an order of court authorizing him so to do: *Fish v. McCarthy*, 96 Cal. 484, 31 Am. St. Rep. 237.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

LYNCH v. RYAN.

[137 Wis. 13, 118 N. W. 174.]

MORTGAGEE IN POSSESSION—Reimbursement for Expenditures and Improvements.—The general rule is that a mortgagee in possession is entitled to reimbursement by the owner of the right of redemption for his reasonable expenditures to preserve the property, such as taxes, repairs, and the like, but not outlays for permanent improvements. (pp. 1043, 1044.)

MORTGAGEE IN POSSESSION—Reimbursement for Permanent Improvements.—If a mortgagee in possession makes permanent improvements of the property with the approval of the mortgagor, or which are necessary to the proper and profitable use of the property and without objection by the mortgagor, he is entitled to be equitably reimbursed therefor by the latter as a condition of his exercising the right of redemption. (p. 1044.)

MORTGAGEE IN POSSESSION—Compensation for Permanent Improvements.—Where a mortgagee should be reimbursed as aforesaid, the proper basis of compensation is the reasonable cost. (p. 1044.)

MORTGAGEE IN POSSESSION—Compensation for Repairs or Improvements.—Evidence showing that repairs or improvements of mortgaged property were made as a judicious owner would make the same in caring for his own property is sufficient, *prima facie*, to show that the charges therefor are reasonable. (p. 1045.)

MORTGAGEE IN POSSESSION—Computation of Interest.—In an accounting between a mortgagee in possession and the mortgagor there should be no rest resulting in compounding interest. It is proper to close the account at the end of each year, striking a balance between debit and credit items, excluding the original debt and interest thereon, any balance in favor of the mortgagee after discharging the interest to be added to the principal, and any balance in favor of the mortgagor going in reduction thereof. (p. 1046.)

MORTGAGEE IN POSSESSION—Interest on Improvements.—If a mortgagee in possession is not allowed expenditures in making permanent improvements of the property which increase its value and is charged with the rental value of the property as improved, he should be given credit with interest on the reasonable cost of the improvements, unless such cost exceeds the enhanced value of the property, in which case he should be credited with interest on such enhanced value. (pp. 1043, 1046, 1047.)

MORTGAGEE IN POSSESSION—Insurance.—If a mortgagee in possession incurs expenses for insuring buildings thereon against loss by fire, he should be allowed credit therefor. (p. 1048.)

MORTGAGEE IN POSSESSION—Credit for Expense of Supervision.—A mortgagee in possession is not entitled to credit for services in supervising the property. (p. 1048.)

MORTGAGEE IN POSSESSION—Computation of Interest.—In an accounting between mortgagor and mortgagee where there is an annual closing, interest on the items down to the time thereof should not be charged or credited. (p. 1048.)

MORTGAGEE IN POSSESSION—Action for Redemption—Costs.—As a general rule, in an action by a mortgagor against the mortgagee in possession to establish his right of redemption and for an accounting, the defendant should recover costs notwithstanding plaintiff prevails. (p. 1049.)

MORTGAGEE IN POSSESSION—Action for Redemption—Costs.—In such an action as above mentioned, if the defendant is at fault, rendering expensive litigation necessary to establish plaintiff's right to redeem, the plaintiff may, in the discretion of the court, be allowed costs. (p. 1049.)

MORTGAGEE IN POSSESSION—Action for Redemption—Costs.—Generally, in a suit for redemption of mortgaged property and for an accounting, if the circumstances are exceptional, warranting the imposition of costs upon the defendant, recovery should be contingent upon plaintiff exercising his right of redemption, but under exceptional circumstances whereby the plaintiff by defendant's wrong is put to very burdensome expenses to establish his right, the recovery of costs may properly be made absolute. (pp. 1049, 1050.)

(Syllabi by Marshall, J.)

Ruger & Ruger, for the plaintiff.

M. G. Jeffris, Edward H. Ryan and M. O. Mouat, for the defendant.

15 MARSHALL, J. Equitable action to have a deed, under which defendant Ryan had claimed and been possessed of a farm property for several years, declared to have conveyed to him only a mortgage interest and plaintiff adjudged to be entitled to redeem from the encumbrance as owner of the legal title, and to compel said defendant to account as mortgagee in possession under the rules applicable to the situation, to the end that the amount might be ascertained which he was equitably entitled to receive from plaintiff to extinguish the mortgage lien and said defendant's other legitimate claims against the property.

Such proceedings were duly had in the action that defendant Ryan obtained judgment dismissing the complaint with costs, which was reversed on appeal to this court, plaintiff being sustained as to the relations of the parties to the property, and the cause being remanded for the accounting and other necessary proceedings to settle the rights of the

parties. The case on the first appeal is reported in 132 Wis. 271, 111 N. W. 707, 112 N. W. 427. An accounting was had pursuant to the decision aforesaid. The general result was as follows: During the time defendant Ryan occupied the property he knew his only interest therein was that of a mortgagee. His possession commenced about March 1, 1899, and continued down to the accounting, during which time he enjoyed the rents and profits of the property, and expended ¹⁶ money for taxes levied thereon, interest upon prior encumbrances, repairs and improvements of the property, and performed labor in that regard as indicated in the account. All repairs and improvements, except enlarging the barn, were made with the knowledge and approval of plaintiff and were necessary to the profitable management of the property. Two hundred and ninety-seven dollars was expended in enlarging and improving the barn, \$175 of which was for the enlargement. The annual rental value of the land was \$400 per year. Defendant Ryan is entitled to credit for expenditures for improvements made with plaintiff's consent, for all necessary repairs, including his own labor in that regard, for interest on the original debt to him and for interest and taxes paid, and he is chargeable with the rental value of the farm. He is not entitled to credit for personal care and supervision of the property. The account should be stated by striking a balance March 1, 1900, between the credits Ryan was entitled to, interest upon the original debt and the rental value of the property, and in like manner a balance for each year thereafter down to the time of closing the account March 1, 1908, and then crediting him with his principal claim, and with the balance found in his favor and interest on each from the date thereof to that of closing the account, and charging him with the balance in plaintiff's favor with interest from the date thereof to that of closing the account. The result of such accounting is that Ryan March 1, 1908, was in credit \$1,612.94 as shown in the itemized statement.

The court, not being able to determine definitely from the evidence what items were for repairs and what were for improvements, deducted from his credits for the first period, which included the expenditures for enlarging the barn, the \$175 found to be the extra expenditure for the enlargement.

Plaintiff was held entitled to costs up to the time of the accounting, the amount thereof to be deducted from that found due defendant, in case of the right of redemption being exercised within the time allowed, otherwise that pay-

ment ¹⁷ be enforced by execution. Neither party held entitled to costs of the trial as to the accounting.

In accordance with the foregoing judgment was ordered and rendered in plaintiff's favor, he being allowed one year from and after March 1, 1908, to redeem the property by paying the amount due Ryan in accordance with the findings, with interest, and in case of an appeal two months after filing of the remittitur, and in case of the right of redemption not being exercised within such time plaintiff was foreclosed of all interest in the property.

Numerous exceptions to the findings were filed by both parties and each appeals from the judgment.

The greater part of the briefs of counsel on both appeals is taken up in discussing the findings that all the repairs and improvements of the mortgaged property charged for by defendant in his account, except the enlargement of the barn, were made by him with the knowledge and approval of the plaintiff, and were necessary to the profitable management of the farm; that such enlargement required an expenditure of \$175 out of a total of \$297 paid for repairing and rebuilding the barn; that defendant knew from the beginning of his possession his sole interest in the property was by virtue of a second mortgage he owned thereon; and that the rental value of the property during such possession was \$400 per year. Notwithstanding very positive claims made upon the one side or the other that some or all of these findings are unsupported by evidence, as we read the record, there is credible evidence as to each matter and no clear preponderance of evidence against the conclusion arrived at by the trial court in regard to either of them. It is ¹⁸ considered better to rest this branch of the case with this statement of the court's opinion than to go at length into a discussion of the evidence.

In view of the fact as indicated, supported, as we think it is, by the decision upon the former appeal and the undisputed oral and written evidence, that defendant incurred the expenses charged in his account with knowledge of his interest in the property and with the approval and consent of plaintiff, with the exception mentioned, we may pass as immaterial the complaint that evidence was permitted on the part of the defendant that he believed, prior to the judicial determination to the contrary, that he was the true owner of the property and the argument made on the subject of whether he acted in good faith as such owner in making the expenditure, and that a mortgagee in possession is not en-

titled to reimbursement for permanent improvements of the property as a condition of the mortgagor being permitted to redeem.

While it is true, generally speaking, that a mortgagee in possession is only entitled to be reimbursed by the holder of the right of redemption for his reasonable expenditures for preserving the property, such as taxes, repairs, and the like, not including permanent improvements, he is entitled in addition to be compensated for his reasonable outlays in making such improvements as such holder approves and consents to. That exception to the general rule is as well established in the law as the rule itself, and is just as well grounded in principles of equity, upon which such rule depends: 2 Jones on Mortgages, 6th ed., secs. 1127, 1128; 2 Pingrey on Real Property, sec. 970; 27 Cyc. 1266, and cases cited. *Gleiser v. McGregor*, 85 Iowa, 489, 52 N. W. 366, is a good type of the adjudications on this subject. The instrument creating the mortgage interest was in the form of an absolute deed and the circumstances were quite similar to those in hand. In disposing of the matter as to the improvements the court said: "Having virtually consented to the improvements, there is no reason why plaintiff should not be held to account ¹⁹ for what they cost, in the absence of evidence showing that the cost was so great as to indicate that the defendant intended thereby to prevent any redemption."

To the same effect are *Harrill v. Stapleton*, 55 Ark. 1, 16 S. W. 474, and many other cases that might be referred to. *Merriam v. Goss*, 139 Mass. 77, 28 N. E. 449, is to the effect that a mortgagor is liable to reimburse his mortgagee in possession for the latter's expenditures for reasonable improvements when, having knowledge of their being made and intending to redeem, he makes no objection. This is particularly in point in a case like the one before us, characterized as it is by circumstances well calculated to produce serious doubt, at least, in the mind of the mortgagee as to whether the right of redemption will ever be exercised.

There is another exception to the general rule as to allowing the mortgagee in possession compensation for improvements, which is applicable here by reason of the finding that the improvements in question were reasonably necessary for the profitable management of the farm. That exception is this: Where possession by the mortgagee is under agreement and the improvements are necessary to the "judicious and proper management of the property" (*Rowell v. Jewett*, 73

Me. 365), or as stated in *Wells v. Van Dyke*, 109 Pa. 330, where they "were necessary and beneficial for the proper use of the property." That exception, manifestly, does not apply where there is not at least consent by not objecting; not under any circumstances where there is a protest against the expenditure.

There is no difficulty with the trial court's disposition of the case because of there not being any finding as regards the extent to which the improvements were beneficial to plaintiff. That, ordinarily, is the equitable limit of recovery, but not so where the making of the improvements was authorized or consented to. In that case the legitimate basis is the reasonable cost, the same as in case of repairs: *Merriam v. Goss*, 139 Mass. 77, 28 N. E. 449.

²⁰ Neither is there any serious difficulty because of absence of any finding that the expenditures for that which was done were reasonable. The parties proceeded from first to last in the accounting upon the theory that if it were proper to make the repairs and improvements at the expense of the mortgagor, the expenditures to that end were reasonable. Moreover, the evidence pretty clearly shows, without controversy, that defendant proceeded in the matter as a judicious owner would in caring for his own property, which is sufficient of itself to show that the charges for repairs and betterments were reasonable, in the absence of any evidence to the contrary.

What has been said brings us to the accounting. The court was not able from the evidence to distinguish definitely between defendant's expenditures for repairs and those for improvements, but that is not very serious, since, in view of the consent and approval found, all are on the same basis, except the outlay for enlarging the barn. True, since the court found the enlargement was not consented to and, as we understand it, was not really necessary for the beneficial use of the farm, it was necessary to eliminate from the account all matters in that regard. That was not done by specification of particular items, but was as to the aggregate with substantial justice between the parties in our judgment.

The account was stated by crediting defendant with interest on his mortgage indebtedness and his disbursements down to March 1, 1900, the most convenient time in the judgment of the trial court for a first settlement after the possession commenced, and crediting him expenditures for interest paid on the first mortgage, taxes levied upon the

property, and repairs and improvements, and charging him for the rental value of the farm to that date, and the \$175 included in the items of credit covering the cost of enlarging the barn, and striking a balance, and proceeding in like manner for each year down to the final settlement March 1, 1908, making ²¹ eight yearly statements in all. Then accumulating the several balances and interest on each from the date thereof down to such final date and the original indebtedness into a final statement of debits and credits and striking a balance. In this way the amount found due the defendant at such final date was \$1,612.94. With the exceptions hereafter noted the manner of the accounting is fully sanctioned by *Martin v. Morris*, 62 Wis. 418, 22 N. W. 525, though the better way would have been to have taken an account of the debit and credit items, exclusive of the interest on the original indebtedness, for the first period, and in case of the balance being in favor of the mortgagee, deducted therefrom the interest on the original indebtedness down to such date and added the residue, if any, to the principal, and then computed interest thereon down to the end of the second period and treated the same as before, in case of there being again a balance between the debit and credit items in favor of the mortgagee sufficient to cover the interest, and, if not, carried the deficiency forward to be added to the interest for the third period, and thus proceeded to the end, avoiding compounding interest and reducing the principal indebtedness at the end of any period, in case of there being a balance between the debit and credit items in favor of the mortgagee after deducting interest, and increasing such principal in case of the residue being the other way.

These fundamental rules are to be observed in an accounting of this sort: There should be no rest resulting in a compounding of interest nor any other than such as equity requires. Any balance in favor of the mortgagor between debit and credit items after discharging the interest should be added to the principal, and any balance between such items after discharging the interest in favor of the mortgagee should go in reduction of the indebtedness. In this case the balance was in defendant's favor for each of the first four years, and for all except the second thereof such balance was ²² for a sum in excess of interest on the indebtedness. The result of crediting defendant, as was done with interest on those balances which included interest, was to give him the benefit of full compound interest for each

of the three years, and likewise for the other year as to the difference between the accrued amount and the balance between the credit and debit items as the court made up the account, which balance only should have been applied upon the interest and the residue of interest carried forward as above indicated. The amount of these errors has been carefully determined, and make a substantial sum to be charged to defendant in correcting the final balance.

Again, for each of the last four years there was a small balance in favor of the plaintiff. Charging such balance to defendant with interest from the date of each down to the time of closing instead of applying the same in reduction of the indebtedness, resulted in a small error in plaintiff's favor. Again, the court credited the defendant each year with interest upon the interest paid on the outstanding mortgage from the date of the payment down to the closing of the account for that year; to that extent swelling the balance in favor of the defendant at the end of the year upon which interest was computed down to the closing of the account, thus compounding the interest, resulting in a further error to a small amount in defendant's favor for such compounding, and a further error in allowing interest upon the interest item before the close of the current year.

On the other hand, since defendant was charged with the full rental value of the farm as improved by the reconstruction and extension of the barn, he is obviously entitled to interest on the cost for the enlargement from the end of the year in which the same occurred down to the closing of the account. True, it has been held that a mortgagee in possession who is allowed to recover for improvements should not be permitted to have credit for interest thereon, since he has ²³ the use thereof (*Hadley v. Stewart*, 65 Wis. 481, 27 N. W. 340), but by the same principles of equity where he is charged the full rental value of the property as improved, but not allowed for the improvements, he should be given credit, at least, for interest upon the reasonable cost thereof. So the court here, equitably, should have credited defendant with seven years' interest upon the cost of the barn, exclusive of the repairs.

We note that notwithstanding the learned court decided that all of the improvements made by the defendant were consented to by plaintiff and that they were necessary to the profitable management of the farm, except as to the \$175, it disallowed items for fruit trees and setting the same out and for reseedling the orchard, aggregating \$17.50. It is the

opinion of the court that credit for that amount should have been allowed for the year in which the expenditure was made. We must assume that it was an oversight in not doing so.

There was a charge for \$2.50 for insurance on the property, paid in 1902, which was disallowed. It is believed that in the light of modern ideas in respect to the reasonable care of property by one in possession thereof in the nature of trustee for another, having a duty or authority to preserve the same, reasonable expenditures for insurance are as legitimate as such expenditures for repairs and to prevent loss by decay or destruction otherwise.

The aggregate of the corrections in plaintiff's favor and those in defendant's favor in accordance with the foregoing shows that the one substantially balances the other. There is not enough difference, in view of the nature of the account, to take the matter out of the field of *de minimis non curat lex*.

Some other objections to the account made upon defendant's appeal may well be briefly disposed of. There is one that the defendant should have been allowed credit for the ²⁴ reasonable value of his services in making several trips to the farm to look after the same and a sum per year for five years for supervision. That is ruled in favor of plaintiff by the familiar principle that in such an accounting charges for supervision are not allowable: 2 Jones on Mortgages, 6th ed., sec. 1132. That there are exceptions to that general rule may be true, but there are no special circumstances here sufficient to require any variation of the ordinary method.

There is a further claim to interest on items of expenditure during each of several years down to the following March 1st, upon the assumption, we take it, that there was no income from the property to provide therefor till that time. Obviously, there was no fixed date when the rent became chargeable. It was accruing day by day as the items of expense became chargeable, and equitably the one so far offset the other that for convenience, and as the most practicable method and the usual one for an equitable adjustment, all items of debit and credit for each particular year were brought down to the end thereof without interest, for a determination of the condition of things between the parties at that time.

It is urged upon defendant's appeal that the general rule in an action of this sort is that defendant is entitled to costs

notwithstanding plaintiff recovers. Such we recognize as being the general chancery practice (17 Ency. of Pl. & Pr. 975, and cases cited), but, as is usual, there are important exceptions. One of them exactly fits this case, viz.: When defendant is clearly at fault in the litigation to the plaintiff's prejudice by denying his right of redemption and compelling him to establish it by protracted and expensive litigation, he has no equitable right to costs or to be relieved from paying costs: *Wells v. Van Dyke*, 109 Pa. 330; *Still v. Buzzell*, 60 Vt. 478, 12 Atl. 209; *Hills v. Loomis*, 42 Vt. 562; *Ryer v. Morrison*, 21 R. I. 127, 42 Atl. 509; *Barton v. May*, 3 Sand. Ch. 450; *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62, 7 S. W. 570; ²⁵ 2 *Jones on Mortgages*, 6th ed., sec. 1111, and cases cited. The rule deducible from these authorities and many others that might be referred to is this: While, generally speaking, in case of a suit for a redemption of mortgaged premises, even though plaintiff recovers, the defendant should be allowed costs, in case of an unwarranted defense, especially of a denial of the right of redemption in toto, causing delay and expense in establishing such right, the defendant may not only be denied costs but be adjudged to pay costs to his adversary. That principle, which was well grounded in chancery, is fully preserved in our statutory system, since it provides that the costs in equity cases may be allowed or disallowed in the discretion of the court. The court's discretion was wisely exercised as to the main issue, and was at least permissibly exercised in not allowing costs to either party on the trial as to the accounting, since there were many claims on each side as to matters of fact as well as of law which could not receive approval: 2 *Jones on Mortgages*, 6th ed., sec. 1112.

Serious complaint is made because the award of costs to the plaintiff was absolute. It may well be that, ordinarily, where in a case of this sort costs are adjudged to the plaintiff, they should be contingent upon the right of redemption being actually exercised, but it is considered that such rule is not without its exceptions, though it may be said there should be some rather extraordinary circumstances to justify making the mortgagee pay costs regardless of the right of redemption being exercised. However, where, as in the instance before us, the right of redemption is denied and the burden of establishing it is very great, the contest in regard to the matter and the final accounting required several trials in several courts, covering a period of several

years, attended with expenses so great that the magnitude of the burden may well render the right of redemption when fully established and made exercisable of little value, or, at least, its value under the circumstances very much impaired, it is not an abuse ²⁶ of judicial discretion to, so far as practicable, remedy the wrong done to the plaintiff by enforcing payment to him at all events, in the ordinary way, of costs of the trial on the main issue.

There are some other trifling matters which, as we view them, cannot in any event affect the result, and do not involve any important principle of law, and, therefore, we will pass them with this brief notice. The general result of the foregoing is that the judgment as rendered does substantial justice between the parties.

By the COURT. The judgment is affirmed upon both appeals. Neither party will be taxed with costs in this court in favor of the other, and each will pay one-half of the clerk's costs.

A Mortgagee in Possession is ordinarily not entitled to compensation for improvements further than such as are necessary to keep the premises in repair: *Robertson v. Read*, 52 Ark. 381, 20 Am. St. Rep. 188; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231; notes to *Cleland v. Clark*, 81 Am. St. Rep. 184; *Caldwell v. Hall*, 4 Am. St. Rep. 69. If, not intending to keep possession, but entering solely for the purpose of more effectually foreclosing his mortgage under a power contained therein, a mortgagee makes repairs which are not needed to preserve the estate from loss or injury while he is in possession, and are not made for that purpose, but solely that a higher price may be obtained at the sale, he goes beyond his duty, and is not entitled to be allowed the sum expended for such purpose: *Fletcher v. Bass River Savings Bank*, 182 Mass. 5, 94 Am. St. Rep. 632.

The Right of a Mortgagee in Possession to an allowance for payments made in insuring the property is considered in *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281.

STEELE v. KORN.

[137 Wis. 51, 118 N. W. 207, 120 N. W. 261.]

PARTIES—Defects in, When Cured.—An exception to the ruling of the trial court on the defendant's demurrer upon the ground of a defect of parties defendant need not be considered on appeal if he consented to an order correcting the alleged defect. (p. 1053.)

PLEADING—Imposing Costs as Condition of Answering.—The imposition of ten dollars costs as a condition of answering on the overruling of defendant's demurrer furnishes no basis for complaint, when it appears that he participated in the trial to the extent of offering his evidence and presenting his claims by counsel. (p. 1053.)

WILL—Personal Liability of Devisee for Charge Imposed by Will.—By accepting and taking possession of a devise the devisee becomes personally liable to pay a legacy charged thereon when it becomes payable by law. His situation is, that he owns real property subject to a lien which he has agreed to pay, and which may be foreclosed and enforced at any time after it falls due. (p. 1054.)

WILL—Creation of Life Estate.—Where a Will Devises Real Estate to a person for life, with remainder over to his issue, and provides that if he should leave no issue, the remainder over shall go to the testator's grandchildren living at the time of the devisee's death, this limits his interest to his life. (p. 1054.)

WILL—Enforcing Liability for Legacy Against Life Estate.—Where a legacy is a lien upon lands devised for life, and it is apparent that a separate sale of the life estate or of the remainder will fail to bring a reasonable price, while a sale of the whole property in fee will operate to the advantage of all owners, it should be so sold. The value of the life estate in the proceeds may be ascertained under the rules for such computations, and if a balance remains over the amount required to pay the judgment, the life tenant becomes the absolute owner thereof; and if the funds are insufficient to satisfy the judgment, the deficit may be taken out of the estate in remainder. Whatever of the latter estate is not required must be placed in charge of a trustee to hold for accumulation for the persons entitled thereto on the death of the life tenant. (pp. 1054, 1055.)

APPEAL—Law of the Case.—A Decision on a Former Appeal that a devisee takes a "base fee," whether right or wrong, becomes the law of the case and binds the parties. (p. 1056.)

Tular & Lockney, for the appellant.

Frame & Blackstone, for the plaintiff and respondent.

Ryan, Merton & Newbury, for the minor respondents.

53 SIEBECKER, J. This is an action for the collection of a legacy and the enforcement of the lien created thereby upon the real estate specified in the will of plaintiff's father, Henry Korn, deceased. William Korn has a life interest in the real estate charged with the lien. After his death the property is devised to his issue then living, and if he dies without issue then living, then it is devised to the living grandchild or children of the testator. The original parties defendant in this

action were William Korn, Alice Korn, his daughter, Henry Nelson Friz, Marion Friz, Charles F. Steele, Mary E. Steele, and William H. Steele, grandchildren of Henry Korn, and Etta R. Steele, wife of William H. Steele, all of whom are alleged to claim an interest in this real estate. The complaint sets forth the claim of plaintiff, the death of Henry Korn, the fact that he left a will and devised the real estate in question to his son William, upon the condition therein stated, and bequeathed to plaintiff, his daughter, five thousand dollars, to be paid to her by William, and which is made a charge upon the real estate devised to William. The remainder over was devised to William's children, and, if he should leave no issue living at the time of his death, then to testator's grandchildren, as above stated. For a detailed statement of the facts concerning the estate, the death of Henry Korn, the nature of the provisions of his will, and the devisees and legatees under it, and the proceedings for a construction ⁵⁴ of it, see the report of the case of *Korn v. Friz*, 128 Wis. 428, 107 N. W. 659.

William Korn demurred to the complaint on the ground that there was a defect of parties in that it omitted to make Florence Korn, his wife, a party, she having dower and homestead rights in the land and being therefore a necessary party. The trial court overruled the demurrer and allowed William Korn thirty days to answer upon payment of ten dollars. William Korn did not answer. The court thereafter entered consent orders, agreed to by William Korn, dismissing the case as to Alice Korn and making Florence Korn a party defendant, and she was served with summons and complaint. All the defendants except the two Friz minors defaulted. They answered, admitting plaintiff's claim, but demanded that personal judgment be enforced against William Korn, and if such judgment could not be satisfied out of his property, aside from his interest in the real estate devised by the will, that his interest so acquired by him under the will might first be sold for satisfaction of plaintiff's claim, and, if his property and interest in such real estate so devised to him did not satisfy plaintiff's claim, that the whole interest in such real estate might be sold, and so much of the proceeds applied to the payment of plaintiff's claim as might be necessary when added to the sums realized out of William's property and the value of his interest in such real estate. The court heard the application and took proof of the material allegations. William Korn took part as a party to the action, and insisted that the whole of the

real estate be sold to satisfy plaintiff's claim. The guardian ad litem appeared and demanded that judgment be awarded holding William primarily liable for plaintiff's claim, and that his property and interest in the real estate devised to him by the will be first applied in satisfaction of plaintiff's judgment.

The court made findings covering the material allegations, which are not in dispute, and awarded judgment in plaintiff's favor against William Korn for five thousand dollars, with interest from ⁵⁵ January 11, 1906, the date it became due, and costs of this action. Such judgment was decreed to be a lien on the interest of William Korn in the real estate devised by his father, and the interest of William was decreed to be primarily liable for the payment of plaintiff's judgment. The judgment was furthermore decreed to be a lien on the remaining interests in this real estate, in which the other defendants have a contingent interest, and plaintiff was adjudged to have the right to sell these interests in such real estate to satisfy the judgment. The judgment further directed that the sheriff of Waukesha county, at the expiration of four months from the date, offer for sale to satisfy the judgment, first, the interest of William Korn in this real estate; if a sufficient sum should not be offered to satisfy the judgment, then the sheriff was directed not to make sale thereof, but thereupon to offer and sell the fee simple absolute of all the real estate, unless the judgment should first be paid within the four months. The sheriff was directed to pay the judgment and the costs of sale out of the proceeds of the sale, to make report, and deposit the surplus with the clerk of the court. Upon confirmation of the sale, deeds were to be issued and the possession of the premises to be delivered to the purchaser, and the defendants thereafter were to be forever barred and foreclosed of all right, title, interest, and equity of redemption in the real estate unless it should be redeemed as provided. The defendant William Korn appeals from this judgment.

The exception to the court's ruling on defendant's demurrer to the complaint upon the ground that it ⁵⁶ appeared that there was a defect of parties defendant to the action need not be considered, since he consented to the dismissal of the action as to Alice Korn and to making Florence Korn a party defendant. The imposition of ten dollars costs as a condition of answering furnished no basis for complaint. The imposition of terms was proper under the circumstances. Furthermore, it appears that the appellant participated in

the proceedings and the trial to the extent of offering his evidence and of presenting his claims to the court by counsel. This practically afforded him the same privileges as if he had served an answer denying the right to judgment of foreclosure as rendered by the court.

Appellant contends that the court erred in awarding judgment against him personally for the amount of plaintiff's legacy and in making the interest he acquired in the real estate under his father's will primarily liable for payment of this legacy. In the action of *Korn v. Friz*, 128 Wis. 428, 107 N. W. 659, it was determined that the appellant in the instant action took the real estate devised to him upon the condition that he pay to testator's daughter, the plaintiff in this action, the sum of five thousand dollars, and that she had the right to a lien or charge for that amount upon the land devised to appellant, which could be enforced against the land. It appears that appellant has taken possession of this property under the will devising it to him. The result is as stated in *Merton v. O'Brien*, 117 Wis. 437, 94 N. W. 340: "By accepting the devise, and taking possession thereof under the devise, he doubtless became personally liable to pay the charge thereon when it became payable by law. [Citing cases.] His situation, then, was that he owned real property subject to a lien thereon, which he had agreed to pay, and which might be foreclosed and enforced at any time after it fell due."

The holding of the trial court is to this effect, and it rendered judgment against appellant for the amount of the legacy he thus agreed to pay, and, in default of such payment, ⁵⁷ awarded judgment of foreclosure and sale of his interest in the premises, and, if appellant's interest in the lands should fail to sell for a sum sufficient to discharge the plaintiff's demand, then the judgment of foreclosure and sale was against the interests of all those owning the land. There is no question but that the plaintiff is entitled to have the lands sold under foreclosure judgment: *Korn v. Friz*, 128 Wis. 428, 107 N. W. 659. The will devised the real estate to appellant for life, with remainder over to his issue, and, if he should leave no issue, then the remainder over was devised to the testator's grandchildren who might be living at the time of William's death. This limited appellant's interest to his life.

It is apparent that appellant's estate in this land will, in all probability, sell for a meager sum on account of its uncertain duration, and for the same reason a separate sale of

the estate in remainder will probably fail to bring a reasonably fair price. The selling of these interests separately will operate to the injury of all parties interested in the land. The trial court found that the sale of the premises as a whole would be to the advantage and best interest of all parties. Under the circumstances presented the court must adopt the course which, in freeing the property from the lien of the plaintiff, will least threaten loss to the estates and which will promote the interests of all the owners. "To accomplish this result the interests in remainder are to be preserved, as nearly as the circumstances will permit, as the creator of them has provided," and, if this cannot be effected by selling a part of the real estate, then the whole may be converted into its equivalent in money and dealt with in this form as realty: In re Kingston's Estate, 130 Wis. 560, 110 N. W. 417; Ruggles v. Tyson, 104 Wis. 500, 79 N. W. 766, 81 N. W. 367, 48 L. R. A. 809. Under these circumstances it is manifest that a sale of the whole property in fee simple will operate to the advantage of all the owners. The value of appellant's ⁵⁸ life estate in the whole proceeds may readily be ascertained under the rules for computing the value of such estates, and it may be taken out of the selling price of the whole estate and applied in payment of plaintiff's judgment. If there be a balance over and above the amount required to satisfy the judgment, such balance should be paid to him as absolute owner thereof.

In the event that the amount found to be the value of appellant's life estate is insufficient to satisfy plaintiff's judgment, then a sum which, when added to the life estate, will be sufficient to satisfy the judgment must be taken out of the estate in remainder. Whatever estate in remainder is not required to satisfy the judgment must be placed in charge of a trustee to administer and hold for accumulation for the persons entitled thereto at the time of the death of appellant, the life tenant.

In view of these considerations the judgment entered by the trial court is erroneous and must be reversed and the cause remanded to the trial court, with directions to enter judgment upon the record in accord with this opinion.

By the COURT. It is so ordered.

The following opinion was filed March 9, 1909:

SIEBECKER, J. The appellant moves for a correction of the record, which in effect states that the will of Henry Korn, deceased, devised the property in question to William

Korn for life, with remainder over to his issue; that William Korn's interest is limited to a life estate, and that after his death the property is devised to his issue then living. The case of *Korn v. Friz*, 128 Wis. 428, 107 N. W. 659, discloses that in deciding the question then presented the court regarded the interest of William Korn in the real estate devised to him by his father, Henry Korn, deceased, as a fee, determinable at his death if he should die without issue, and ⁵⁹ considered that a determination of the nature and quality of his estate was necessarily involved in the question then presented. It was declared to be a "base fee." As between the parties, the decision then made must be regarded as the law of the case, and it cannot be changed on this appeal.

In a statement of the opinion in the instant case the estate devised by the will of Henry Korn, deceased, to his son William is referred to as a life estate with remainder over to his children. In view of the former decision in *Korn v. Friz*, 128 Wis. 428, 107 N. W. 659, this is erroneous, and must be so regarded. When the question of William's interest in this real estate under his father's will has been passed upon by this court, that decision, whether right or wrong, becomes the law of the case and binds the parties: *Cole v. Clarke*, 3 Wis. 323.

This condition of the record in no way affects the correctness of the decision of this appeal, and does not call for a modification of the mandate. It is to be understood that whenever William Korn's interest is referred to in the record, such an interest is meant as the case of *Korn v. Friz*, 128 Wis. 428, 107 N. W. 659, holds that he acquired.

By the COURT. The motion is denied. No motion costs are to be taxed against either party.

PERSONAL LIABILITY OF DEVISEES FOR CHARGES IMPOSED BY THE WILL.

- I. General Rules of Liability.
 - a. For Payment of Legacies, 1057.
 - b. For Support of Relative, 1059.
 - c. For Payment of Debts, 1059.
- II. General Rules of Nonliability, 1060.
- III. Circumstances Affecting Liability.
 - a. Acceptance of Devise, 1061.
 - b. Value of Devise, 1061.
 - c. Death of Devisee, 1062.
 - d. Conveyance of Devised Land, 1062.
- IV. Manner of Enforcing Liability.
 - a. In Equity—Sale of Land, 1063.
 - b. At Law—Action of Debt or Assumpsit, 1063.
 - c. Limitation of Actions, 1064.

I. General Rules of Liability.

a. For Payment of Legacies.—It is a well-recognized rule that when real estate is devised with directions to the devisee to pay a legacy, an acceptance of the devise carries with it the personal obligation on the part of the devisee to pay the legacy as directed. This personal liability may be created by the testator directly, without charging the property: *Mason v. Smith*, 49 Ala. 71; *Olmstead v. Brush*, 27 Conn. 530; *Mahar v. O'Hara*, 9 Ill. 424; *Spearman v. Foote*, 126 Ill. App. 370; *Appeal of Haworth*, 105 Pa. 362; *Anderson v. Hammond*, 2 Lea (Tenn.), 281, 31 Am. Rep. 612. But most frequently, perhaps, the charge is imposed upon the estate devised. In the latter case the devisee, upon acceptance, may none the less be personally liable, although the property is also bound; for the rule is that when realty is devised, charged with the payment of legacies, the devisee is personally liable to pay the legatees if he accepts the devise: *Dunne v. Dunne*, 66 Cal. 157, 4 Pac. 441, 1152; *Olmstead v. Brush*, 27 Conn. 530; *Burch v. Burch*, 52 Ind. 136; *Duke of Richmond v. Milne's Exrs.*, 17 La. 312, 36 Am. Dec. 613; *Eskridge v. Farrar*, 30 La. Ann. 718; *Chew v. Farmers' Bank of Maryland*, 2 Md. Ch. 231; *Gridley v. Gridley*, 24 N. Y. 130; *Redfield v. Redfield*, 126 N. Y. 466, 27 N. E. 1032, affirming 59 Hun, 620, 12 N. Y. Supp. 831; *Larkin v. Mann*, 53 Barb. 267; *Birdsall v. Hewlett*, 1 Paige, 32, 19 Am. Dec. 392; *Dodge v. Manning*, 11 Paige, 334; *Fox v. Phelps*, 17 Wend. 393, 20 Wend. 437; *Dill v. Wisner*, 23 Hun, 123, affirmed 88 N. Y. 153; *Decker's Exrs. v. Decker's Exrs.*, 3 Ohio, 157; *In re Lobach*, 6 Watts, 167; *Shobe's Exrs. v. Carr*, 3 Munf. 10; *Kenny's Admrs. v. Kenny*, 25 Gratt. 293; *Merton v. O'Brien*, 117 Wis. 437, 94 N. W. 340. But his personal liability does not discharge the real estate from the lien of the legacies charged thereon by the will: *Lofton v. Moore*, 83 Ind. 112; *Mitchell v. Mitchell*, 3 Md. Ch. 71; *Hoover v. Hoover*, 5 Pa. 351. Said Justice Story: "I understand it to be a general rule in the construction of clauses of this sort that where the testator devises an estate to a person, and in respect thereof charges him with the payment of debts and legacies, the charges are always treated as charges in rem, as well as in personam, unless the testator uses some other language, which limits, restrains, or repels that construction. Upon no other principle can many cases in the books admit of any rational explanation": *Sands v. Champlin*, Fed. Cas. No. 12,303, 1 Story, 376.

To quote from the New York court of appeals: "It is well settled that when a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy. And the rule is the same when the legacy is directed to be paid by the executor who is the devisee of real estate. If the devisee, in such case, accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound, even if the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape responsibility, he must

refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy, which he is directed to pay": *Brown v. Knapp*, 79 N. Y. 136; approved in *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Hunkypillar v. Harrison*, 59 Ark. 453, 27 S. W. 1004.

And to quote from the supreme court of Vermont: "It is settled law that a devisee who accepts a devise charged with the payment of a legacy thereby becomes personally liable to pay the legacy, although the land is worth less than the amount of the legacy. This liability is put upon the ground of an implied promise arising from the fact of acceptance; for the doctrine is that he who accepts a benefit under a will must conform to all its provisions, and renounce every right inconsistent with them": *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625. And to quote from the supreme court of Ohio: "Thus, in *Glen v. Fisher*, 6 Johns. Ch. 33, 10 Am. Dec. 310, it is held that where land is devised charged with the payment of a legacy, and the devisee accepts the devise, he is personally and absolutely liable for the legacy; and he has no right to require of the legatee, before payment, a security to refund, in case of a deficiency of assets to pay debts. And in *Fuller v. McEwen*, 17 Ohio St. 288, this court stated the rule in substantially the same language, and held that, in an action to enforce such personal obligation, the fact that the devisee or legatee is or is not also the executor of the will makes no difference in the case. The rule is also recognized and stated in *Yearly v. Long*, 40 Ohio St. 27. The rule is thus stated in *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704: 'Where lands are devised to one who, by the will, is directed to pay a legacy, the legacy is charged upon the land devised; and, when payment of the legacy is made a condition of the devise, its acceptance creates also a personal liability to the legatee, which may be enforced without resorting to the land, the lien still remaining as a security.' Many other cases might be cited to the same effect, and are sustained by text-writers of standard authority: *Woerner on Administration*, 1099; *Williams on Executors*, 1704, 1272. The rule rests upon the reasonable principle that he who takes a benefit under a will must take it subject to its provisions. Any other construction would necessarily defeat the intention of the testator. So that, where a devisee is required to pay legacies to others, an acceptance of the devise imports a promise to pay the legacies; and the legatees have the right to maintain an action thereon for its nonperformance as though the promise had been made to themselves": *Case v. Hall*, 52 Ohio St. 24, 38 N. E. 618, 25 L. R. A. 766.

The reason, then, for the personal liability of a devisee for legacies, the payment of which is charged upon him or the devise, is apparent. If he were permitted to evade this liability he would thereby defeat the intention of the testator, and moreover would enjoy benefits under the will without conforming to its provisions. He must take the devise cum onere; he will not be allowed to dis-

appoint the will under which he accepts a benefit: *Glen v. Fisher*, 6 Johns. 33, 10 Am. Dec. 310. His liability, as stated in the preceding paragraphs, has been put upon the ground of an implied promise arising from the fact of acceptance: *Case v. Hall*, 52 Ohio St. 24, 38 N. E. 618, 25 L. R. A. 766; *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625. The legacy stands upon the footing of an ordinary debt which he has promised to pay: *Wiggin v. Wiggin*, 43 N. H. 561, 80 Am. Dec. 192.

b. For Support of Relative.—Where a testator devises land, directing the devisee to support a relative or other specified person for life or for some other period of time, making such support a condition of the devise, the devisee, upon accepting the devise, is personally liable for such support: *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Pickering v. Pickering*, 15 N. H. 281; *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490, affirming 48 N. Y. Supp. 792; *Sommers v. Sommers*, 59 App. Div. 340, 69 N. Y. Supp. 866; *Snyder's Appeal*, 75 Pa. 191. The liability accrues and may be enforced without demand: *Watt v. Pittman*, 125 Ind. 168, 25 N. E. 191; *Wiggin v. Wiggin*, 43 N. H. 561, 80 Am. Dec. 192; *Johnson v. Cornwall*, 26 Hun, 499; *Dickson v. Field*, 77 Wis. 439, 46 N. W. 668, 9 L. R. A. 537. While it may be enforced without resort to the land, still such resort is permissible if necessary when the will imposes a charge thereon: *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; although it has been held that a personal charge upon a devisee to furnish support to a designated person cannot be enforced against the land devised, unless there are words in the will warranting such a construction: *Appeal of Haworth*, 105 Pa. 362. The devisees may be bound for the support, even beyond the value of the land devised: *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704. Devisees who accept land given them by will which lays on them the duty of supporting their sisters and mother, become jointly and severally liable for the support, and one of them who bears the whole burden is entitled to contribution from the others: *Shillito v. Shillito*, 160 Pa. 167, 28 Atl. 637.

c. For Payment of Debts.—Where a will directs devisees to pay the debts of the testator as a condition of the testamentary gifts, the devisees become personally bound for the debts by accepting the devise: *Harland v. Person*, 93 Ala. 273, 9 South. 379. And by accepting a devise charged with the payment of a debt the devisee becomes personally liable for the debt: *Gridley v. Gridley*, 24 N. Y. 130, reversing 33 Barb. 250; *Dill v. Wisner*, 23 Hun, 123, affirmed in 88 N. Y. 153; *Baylor's Lessee v. Dejarnette*, 13 Gratt. 152. But in *Hayes v. Sykes*, 120 Ind. 180, 21 N. E. 1080, it is declared that a will, charging the debts of the testator, on a deficiency of personal assets, upon land therein devised, does not impose a personal liability on the devisees upon their acceptance. "By the terms of the will," said the court, "they took title to the real estate subject to the encumbrances and charge that was placed upon it. . . . In cases

referred to by counsel for the appellant, a personal liability was imposed upon the devisee. The provisions of the will were such in each of these cases that by an acceptance of its terms a personal liability was assumed." The theory of this decision seems to be that the testator did not intend to impose a personal liability for the charge, and that in the absence of such an intention there could be no personal obligation. Clearly, a testator cannot, by any direction to devisees to pay his debts, prevent his creditors from reaching his estate if they desire: *Carpenter v. Carpenter*, 14 N. Y. St. 284.

II. General Rules of Nonliability.

The fact that a devise is merely subject to the payment of a legacy does not render the devisee personally liable on accepting the devise. Said Justice Mitchell, in *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020: "It is undoubtedly true that where real estate is devised with a naked direction to the devisee to pay a legacy, or upon condition that he pays it, the legacy is a charge on the person of the devisee, and if he accepts the devise he is personally liable for its payment. But it is equally well settled that where the devise is merely subject to the payment of the legacy, the latter is not a charge on the person of the devisee, and the acceptance of the devise does not render him personally liable."

The general rule that where a devisee accepts a devise charged with the payment of debts or a legacy, he becomes personally liable, is modified by the paramount rule that the intention of a testator as disclosed by the will must govern its interpretation and effect: *Hunkypillar v. Harrison*, 59 Ark. 453, 27 S. W. 1004. Other authorities supporting this proposition are *Haskett v. Alexander*, 134 Ind. 543, 34 N. E. 325; *Eskridge v. Farrar*, 34 La. Ann. 709; *Nudd v. Powers*, 136 Mass. 273; *Cronkhite v. Cronkhite*, 1 Thomp. & C. 266; *In re Taber*, 116 N. Y. Supp. 960; *Worth v. Worth*, 95 N. C. 239; *Estate of Semple*, 189 Pa. 385, 42 Atl. 28. The Arkansas court, in the above case, decided that under a will requiring the sole legatee to "pay out of the proceeds of the property, real and personal," specified annuities, the legatee is not personally bound therefor on accepting the gift. The court, in the course of its opinion, said: "There are innumerable instances in which the testators, in making devises with charges thereon, have in terms given direction as what manner and out of what funds the general devisee is to pay off the special legacies made a charge upon the property devised. In all these cases the personal liability of the devisee is more or less affected, even to the extent in many cases of being entirely wanting. And this is so simply from the fact that the obvious meaning of the testator, as gathered from the language of the will, is to the effect that he does not wish the devisee to pay the special legacy at all events, but only as far as the property devised to him will enable him to do. This principle is illustrated in numberless cases. Thus, in *Hayes v. Sykes*, 120 Ind. 180, 21 N. E. 1080, the following

provision of a will was under consideration in the supreme court of Indiana: 'I will that, in case there is not enough money in the hands of the executor of my father's will to pay all my just debts, I then devise that the property herein devised to my wife, Anna, and to my mother, Mary Ann Sykes, shall be held liable, in equal proportion, to pay the same; and to this end I make a charge upon my estate so devised, to perform the same.' Here is a charge upon two legacies to pay debts, and under the general rule . . . the legatees would be personally bound to pay these debts, whether the property devised to them is sufficient or not. But the court, from a consideration of the language of the will, held the real and true meaning of the testator to be otherwise."

In *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136, a bequest subject to legacies with a direction that the legacies should be paid "out of" the bequest is held not to make the payment of the legacies a personal charge on the devisee.

III. Circumstances Affecting Liability.

a. **Acceptance of Devise.**—A charge imposed by a testator to pay debts or legacies does not become the personal obligation of the devisee unless he chooses to accept the devise: *Wilson v. Moore*, 86 Ind. 244; *Miltenberger v. Schlegel*, 7 Pa. 241. The authorities all recognize that the acceptance of the devise is a condition precedent to any personal liability on the part of the devisee for legacies or debts. And if the land is sold under order of court to pay debts, the devisee has no personal liability, although he had taken pro forma possession: *Carpenter v. Carpenter*, 14 N. Y. St. 284. Said the court in this case: "All the cases reported, holding the devisee liable for the payment of the debts and legacies upon accepting the devise cum onere, are where the proof showed that the devisee had taken and appropriated the subject of the devise, had the full benefit of it, and had not been interfered with in the enjoyment of it. There is no case holding that when the devisee had taken pro forma possession of the thing devised, but was in turn evicted and the property taken away to meet the lawful demands of the estate, by lawful proceedings in settlement of the estate, that nevertheless the devisee, although foiled in his attempt to get the benefit of the devise, was held liable to pay the debts and legacies."

b. **Value of Devise.**—The general rule is that the personal liability of a devisee for the payment of legacies charged by the testator is absolute, upon acceptance of the devise, whether or not the land devised is adequate for their payment. By accepting the devise the legacies become the personal debt of the devisee, which he must pay, although the property devised to him is of less value than the legacies: *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Spencer v. Spencer*, 4 Md. Ch. 456; *Brown v. Knapp*, 79 N. Y. 136; *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625. In *Glen v. Fisher*, 6 Johns. Ch. 33, 10 Am. Dec. 310, it was held that a

devisee had no right to require of the legatee, before payment, security to refund in case of a deficiency of assets to pay debts. In *Dunham v. Deraismes*, 166 N. Y. 607, 59 N. E. 903, it is held that when a legacy is charged on all the land devised, a devisee of part of the land becomes personally liable, upon accepting the devise, for only his proportionate share of the legacy.

c. Death of Devisee.—In the event of the death of a devisee on whose devise the payment of a legacy was a charge, it would seem that the devised estate would still remain subject to the liability for the payment of the legacy: *Mitchell v. Mitchell*, 3 Md. Ch. 71. In *Case v. Hall*, 52 Ohio St. 24, 38 N. E. 618, 25 L. R. A. 766, it is held that where land is devised in fee, with directions to the devisee to pay certain legacies as each legatee attains the age of twenty-one years, the devisee, on accepting the devise, becomes personally liable to pay the same as directed by the testator; and where the devisee dies before all the legatees attain the requisite age, his estate, as an entirety, remains liable to such as thereafter become of age, and it is the duty of his administrator to pay the same. And in *Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979, where a man devised a farm on condition that the devisee should pay an annuity to the widow for life and furnish certain products from the farm, secured by a lien thereon, it is held that the devisee takes the property charged with the conditions imposed, and is personally liable to perform them as upon a contract, express or implied, that the land is charged with the performance thereof during the life of the annuitant, and that the estate of the devisee after his death is liable for past due payments which are not barred. If accepting the devise is regarded as an implied promise to pay the legacy, then an action lies against the executor or administrator of the devisee for any breach of the contract in his lifetime: *Pickering v. Pickering*, 15 N. H. 281; *Shannon v. Howell*, 36 Hun, 47.

d. Conveyance of Devised Land.—When the devisee conveys the land subject to the charge, the vendee, it is said, stands, in respect of personal liability for the legacy, much like one who purchases mortgaged premises subject to the mortgage, who does not become personally liable for the mortgage debt without a contract of assumption evidenced in some way, though no particular form of words is necessary to create such liability: *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625. In this case it was decided that persons acquiring title by quitclaim to devised land took with notice of provisions in the will charging the land with a legacy, and were personally liable for the full amount of the legacy without regard to the value of the land; they were held liable also because by the terms of the deed, they assumed the payment of the legacy and promised to pay it according to the provisions of the will. The personal liability of a grantee of the property to the legatee seems to be recognized in *Andrews v. Sparhawk*, 30 Mass. (13 Pick.) 393; *Phillips v. Humphrey*, 42 N. C. 206. In *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852, it is held

that where a will charges with a legacy land devised to a person who conveys it to a third person, and the latter retains in his hands out of the purchase money a sum to pay the legacy, promising his grantor to pay it, the grantor may maintain a bill in equity against the grantee, making the legatees parties, to compel the payment of such fund on the legacy and to enforce the charge on the land. It is clear that when land is charged with payment of a legacy, it remains subject to the charge when conveyed to a purchaser with notice, actual or constructive, until the legacy is paid: *Wilson v. Piper*, 77 Ind. 437; *Gardenville Permanent Loan Assn. v. Walker*, 52 Md. 452; *Pickering v. Pickering*, 15 N. H. 281; *Copp v. Hersey*, 31 N. H. 317; *Hoyt v. Hoyt*, 17 Hun, 192, affirmed in 85 N. Y. 142; *Nellons v. Truax*, 6 Ohio St. 97; *Appeal of Steele*, 47 Pa. 437; *Scott v. Patchin*, 54 Vt. 253.

IV. Manner of Enforcing Liability.

a. In Equity—Sale of Land.—Equity will entertain a suit to compel a devisee to pay a legacy for which he is personally liable, and will enforce its decree by a sale of the land devised: *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Mahar v. O'Hara*, 9 Ill. 424; *Cornish v. Willson*, 6 Gill, 299; *Sherman v. Sherman*, 86 Mass. (4 Allen) 392; *Horning v. Wiederspallen*, 28 N. J. E. 387; *Degraw v. Clason*, 11 Paige, 136; *Collister v. Fassitt*, 163 N. Y. 281, 78 Am. St. Rep. 586, 57 N. E. 490; *Dunning v. Dunning*, 82 Hun, 462, 31 N. Y. Supp. 719, affirmed in 147 N. Y. 686, 42 N. E. 722; *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852. And it is said that the fact that an action at law will also lie to enforce the liability does not preclude a court of chancery from assuming jurisdiction: *Cady v. Cady*, 67 Miss. 425, 7 South. 216. Speaking of an annuity made a charge upon real property devised, the New York court said: "It being an express charge thereon, the devisees, upon accepting the devise, became personally bound to pay such annuity, and its payment could be enforced by a suit in equity against the real estate, or by an action against the devisees upon the promise to pay implied by the acceptance of the devise": *Redfield v. Redfield*, 59 Hun, 620, 12 N. Y. Supp. 831, affirmed in 126 N. Y. 466, 27 N. E. 1032. The Wisconsin court, in the principal case, recognizes the power of a court to proceed to a foreclosure sale of the property, in that case a life estate with remainder over, to satisfy the legacy charged thereon.

b. At Law—Action of Debt or Assumpsit.—In the early cases there seemed some doubt as to whether assumpsit would lie against a devisee to enforce his personal liability for the payment of legacies. But the theory has prevailed that the acceptance of the devise implies a promise on the part of the devisee to pay the legacy, and that the legatee has the right to maintain an action thereon for its nonperformance and recover a personal judgment: *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979; *Case v. Hall*, 52 Ohio St. 24, 38 N. E. 618, 26 L. R. A. 766. That assumpsit will lie to enforce the personal liability of a

devisee to pay legacies charged by the will is recognized in *Willis v. Roberts*, 48 Me. 257; *Doolittle v. Hilton*, 63 Me. 537; *Wiggin v. Wiggin*, 43 N. H. 561, 80 Am. Dec. 192; *Tole v. Hardy*, 6 Cow. 333; *Gridley v. Gridley*, 24 N. Y. 130; and that an action of debt will lie to enforce such liability is recognized in *Etter v. Greenawalt*, 98 Pa. 422; *Renner v. Headley*, 129 Pa. 542, 18 Atl. 549. In case the devisee is also executor, the remedy is nevertheless *assumpsit*, and not an action on his bond: *Olmstead v. Brush*, 27 Conn. 530. In *Red v. Power*, 69 Miss. 242, 13 South. 586, it is held that where property is devised with a direction to the devisee to give a certain person two hundred dollars a year as long as he lives, the devisee, upon accepting the provisions of the will and entering into the enjoyment of the property, becomes the debtor of the person to whom the money is to be paid, and that the indebtedness is subject to garnishment.

c. **Limitation of Actions.**—The relation between devisee and legatee, where the devisee is personally liable to the legatee for a legacy charged by the will, is not a trust relation which prevents the running of the statute of limitations against an action to enforce the liability. Thus in *Etter v. Greenawalt*, 98 Pa. 422, where it is held that an action of debt will lie against a devisee to compel him to pay a sum which the will directs him to pay to the plaintiff, it is decided that the statute of limitations precludes a recovery if more than six years have elapsed since the death of the testator. And in *Merton v. O'Brien*, 117 Wis. 437, 94 N. W. 340, it is held that the devisee of land, subject to the payment of a legacy charged as a lien thereon, is not "a trustee of an express trust," and hence that an action by the legatee to enforce the lien against the property may be barred by the statute of limitations.

THIEL v. JOHN WEEK LUMBER COMPANY.

[137 Wis. 272, 118 N. W. 802.]

LOGS—Contract to Cut and Bank.—Where One Agrees to cut and bank logs under a contract providing that the logs shall be scaled by a scaler to be mutually agreed upon, and that either party dissatisfied with the scale may demand a test scale by a disinterested scaler, and the party cutting the logs demands a test scale to be made after an unsatisfactory scale has been made and at a time when it is possible to scale the logs, which demand the other party refuses and thus breaches the contract, the first party may show by other testimony the actual number of feet of logs cut and banked. (p. 1066.)

PARTIAL ASSIGNMENT.—A Debt cannot be Split Up by the Creditor against the debtor's consent, even by formal assignment, because the debtor has the right to pay his debt in *solido* and to refuse to be subjected to claims or suits by various claimants. (p. 1067.)

PARTIAL ASSIGNMENT.—Where a Debtor Refuses to Consent to a partial assignment of the debt, the creditor can maintain his action to recover the entire debt, although there are outstanding orders drawn by him in favor of third persons. (p. 1067.)

Schweppe & Urquhart, for the appellant.

Herman Leicht, for the respondent.

273 WINSLOW, C. J. This is an action to recover a balance claimed to be due for cutting, skidding, and banking saw-logs and to enforce a log lien therefor. The action was tried before a jury. It appeared that the parties made a written contract December 5, 1904, by which plaintiff was to cut, mark, haul and bank on Rib river all the timber on a certain quarter section of land during the winter of 1904 and 1905 for five dollars per thousand, to be paid in installments as the work progressed, the final payment to be made May 1, 1905. One clause of the contract provided that the logs should be scaled by a scaler to be mutually agreed on, and that either party, if dissatisfied with such scale, might demand a test scale to be made by some competent, disinterested scaler to be agreed on by the parties. It further appeared that the plaintiff did not cut the entire amount of timber, but he claimed, and gave evidence tending to prove, that he was released from entire performance by subsequent parol agreement. One Nelson was sent by defendant to do the scaling, and according to his scale the amount cut and banked was 420,830 feet. Soon after Nelson commenced scaling the plaintiff became dissatisfied with his scaling and employed another man to make an independent scale. Plaintiff claimed, also, that he communicated his **274** dissatisfaction to the defendant, and that defendant's agent told him that if there was anything wrong with the scale it would be fixed up in the spring, but this was denied by the defendant's testimony. According to the plaintiff's independent scale there were 500,000 feet of logs cut and banked. It appears without dispute that on April 1, 1905, the plaintiff made a written demand that a test scale be made, and that the defendant refused to consent that such a scale be made, on the ground that it was too late and that the logs had gone down the river. There was no evidence, however, tending to show that the logs had in fact gone down the river, and the plaintiff testified that the logs were then so that they could be scaled. The defendant counterclaimed for damages for failure to cut and bank all the timber and for failure to properly bank the logs cut. The defendant also claimed that the plaintiff

had sold and assigned his claim to third parties, and was not the real party in interest.

The jury returned a special verdict to the effect (1) that the original written contract was made by the parties; (2) that said contract was afterward modified as alleged by the plaintiff; (3) that during the progress of the work the defendant's agent induced the plaintiff to waive his right to demand a test scale; (4) that defendant waived the provision calling for the cutting and banking of the logs, which plaintiff failed to cut and bank; (5) that plaintiff complied substantially with the terms of the modified contract; (6) that plaintiff in fact banked 481,760 feet of logs; (7) that plaintiff's damages amounted to \$563.41; (8) that plaintiff did not bank the logs in convenient rollways in a workmanlike manner in full accordance with the contract; and (9) that by reason of such failure defendant suffered damages in the sum of \$110. Upon this verdict judgment was rendered for the plaintiff for the amount of his damages (less the defendant's damages on its counterclaim), with interest and costs, and the defendant appeals.

²⁷⁵ We do not find it necessary to consider the errors assigned in detail. The fundamental questions in the case were whether, under the facts in evidence, the plaintiff was bound by Nelson's scale, and whether he had lost his right to have a test scale made at the time he made his demand.

The testimony as to the accuracy of Nelson's scale is not very satisfactory. Under his own testimony it appears that he actually scaled only a portion of the logs and estimated the balance, and it may well be doubted whether he in fact made a scale such as the contract required. But be this as it may, it is certain that on the 1st of April the plaintiff exercised his contract right of demanding a test scale, and all the evidence on the subject shows that at this time the logs were still in such a situation that a test scale could be made. The defendant refused this demand and thus breached the contract, and it was then competent for the plaintiff to show by other testimony the actual number of feet of logs cut and banked. This he did, and we cannot say that upon the evidence before them the jury were not justified in finding, as they did, that the whole amount was 481,760 feet. Thus all questions concerning the alleged waiver of the right to demand a test scale become immaterial.

The court did not submit to the jury any question concerning the alleged assignment of the claim to third persons, and this omission is assigned as error. The evidence shows that

during the progress of the work the plaintiff drew orders on the defendant in favor of third persons amounting to more than \$800, which the defendant refused to pay. The form of the orders is not given, and hence we assume that they were merely general orders to pay money, and did not name **276** the fund from which they were to be paid. The debt could not be split up by the creditor against the debtor's consent, even by formal assignments, because the debtor had the right to pay its debt in solido and to refuse to be subjected to claims or suits by various claimants. In the present case the debtor did so refuse, and could at any time have discharged its debt to the plaintiff by paying him the whole sum due, without regard to the rejected orders or liability to their holders: *Skobis v. Forge*, 102 Wis. 122, 78 N. W. 426. Hence it seems clear that, the defendant having refused to consent to partial assignments of the debt, the creditor could unquestionably maintain his action to recover the entire debt. Otherwise a situation would be presented where nobody could recover it.

No other questions are presented of sufficient importance to require treatment.

By the COURT. Judgment affirmed.

Partial Assignments of a Fund or Demand are discussed in the notes to *Harris County v. Campbell*, 2 Am. St. Rep. 272; *McDaniel v. Maxwell*, 28 Am. St. Rep. 744. It is said by some authorities that a part of an entire demand cannot be assigned at law so as to enable the assignee to bring an action upon it without the consent of the debtor: *McDaniel v. Maxwell*, 21 Or. 202, 28 Am. St. Rep. 740. Compare, however, *Avery v. Popper*, 92 Tex. 337, 71 Am. St. Rep. 849; *Schilling v. Mullen*, 55 Minn. 122, 43 Am. St. Rep. 475; *Whittemore v. Judd Linseed etc. Oil Co.*, 124 N. Y. 565, 21 Am. St. Rep. 708; *Burditt v. Porter*, 63 Vt. 296, 25 Am. St. Rep. 763. As to the effect of an assignment of a portion of a fund in the hands of a depositary, see *Raesser v. National Exchange Bank*, 112 Wis. 591, 88 Am. St. Rep. 979.

CURTIS LAND AND LOAN COMPANY v. INTERIOR LAND COMPANY.

[137 Wis. 341, 118 N. W. 853.]

VENDOR AND VENDEE—Contract by Letters.—A valid contract for the sale of real estate may be made through the medium of letters. In case of a breach thereof by the vendor, the vendee may enforce specific performance; and in the event of a breach by the vendee, the vendor may maintain an action for the purchase price. The promise of the vendee to pay is a sufficient consideration for the agreement by the vendor to sell. (pp. 1070, 1071.)

VENDOR AND VENDEE—Contract by Letters.—Letters between a vendor and vendee must, in order to constitute a binding contract, contain a definite offer to sell and an unqualified acceptance thereof. (p. 1071.)

VENDOR AND VENDEE—Conditional Acceptance.—If a vendee's acceptance by letter of the offer of the vendor to sell is coupled with any condition that varies or adds to the offer to sell, it is not an acceptance, but a counter proposition. (p. 1071.)

VENDOR AND VENDEE—Conditional Acceptance.—Where a vendee's letter of acceptance to the offer of the vendor to sell contains a mere suggestion or request that payment be made at a particular place, but the request is not a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell, and will not defeat specific performance. (p. 1071.)

VENDOR AND VENDEE—Implied Agreement for Good Title. An agreement to convey land, in the absence of any reservation or exception, requires the vendor to convey a marketable title free of encumbrances. (p. 1072.)

VENDOR AND VENDEE.—Outstanding Tax Certificates constitute an encumbrance upon the land and a cloud upon the title. (p. 1073.)

VENDOR AND VENDEE—Conditional Acceptance.—A statement in a letter accepting an offer to sell land that the vendee expects the vendor to "take care of" delinquent taxes does not impose a condition upon the acceptance. (p. 1073.)

VENDOR AND VENDEE—Conditional Acceptance.—The statement in a vendee's letter replying to the vendor's offer to sell that "if it is just as satisfactory to you, will you please send your deed to National Bank of Merrill for collection," is not an attempt to impose a condition upon the acceptance. (p. 1073.)

VENDOR AND VENDEE.—Under a Promise to Convey the "SW SW 6-35-8" in a specified county of the state at a certain price per acre, the unit upon which the price is made is the acre, not the forty. (p. 1074.)

VENDOR AND VENDEE.—The Correct Acreage of Any Particular Forty is presumed to be shown by the government's survey. (p. 1074.)

CORPORATION—Functions and Authority of Officers.—The secretary of an ordinary business corporation is just as much its general managing agent as is the president, both performing interchangeably a wide range of duties and exercising much the same functions in the conduct of corporate business as are exercised by general partners in a partnership business. (p. 1076.)

CORPORATION—Estoppel to Deny Authority of Agent.—A corporation is estopped from denying that its agents possess all the authority which it gives them the appearance of having. (p. 1076.)

CORPORATION—Estoppel to Deny Authority of Officers.—A corporation is estopped from denying that a general officer had the power which it has customarily allowed him to exercise. (p. 1076.)

Jeffris, Mouat, Smith & Avery, for the appellant.

Smart & Curtis, for the respondent.

343 BARNES, J. This action is brought to compel the defendant to specifically perform a contract alleged to have been made for the sale of real estate. The contract is based entirely upon letters passing between the parties. On December 10, 1906, the plaintiff wrote the defendant as follows:

“Will you please let us know your cash price per acre for SW SW 6-35-8.”

Two days later the defendant answered, acknowledging receipt of this letter, and stating:

“Will say our cash price on SW SW 6-35-8 is \$6 per acre. Would be pleased to sell same to you.”

On December 17th plaintiff, replying to this letter, wrote as follows:

“Your favor of the 12th inst. received. We will take your SW SW 6-35-8, Lincoln county, Wisconsin, for your cash price of \$6 per acre. Your records probably show the acreage, which is 22.13 acres. If it is just as satisfactory to you, will you please send your deed to National Bank of Merrill for collection. Kindly have it made out to Curtis Land & Loan Co., a Wisconsin corporation. We note that this description was sold in 1903 and 1904 to F. J. Smith for delinquent taxes. Please take care of these taxes. We may later be able to do some business with you respecting your other descriptions in the section named, and are not ready to consider them just now.”

On December 19th the defendant acknowledged receipt of this letter as follows:

“Your letter of the 17th at hand and noted. Will say that our records do not show that this is a fractional forty, and we would have to investigate this further, but we could sell it to you, as we understand that this is a full forty. With reference to this description being sold for taxes to F. J. Smith, or in the name of F. J. Smith, are tax certificates we had him buy in for us. We will look this matter up **344** promptly and let you know just as soon as we can have it looked up. We do not anticipate selling this forty for less than \$240, which was at the rate of \$6 per acre for the full forty. We will investigate and let you hear from us promptly.”

The remaining portion of the correspondence consisted largely of claims made by the plaintiff that the foregoing letters constituted a complete contract, and of denials of such claims on the part of the defendant.

The trial judge decided that a valid contract was entered into between the parties and that the plaintiff was entitled to a decree for specific performance, and judgment was entered accordingly, from which judgment the defendant brings this appeal.

In addition to contending upon the trial that the letters did not constitute a valid contract, the defendant likewise asserted that such letters were written by a representative of the defendant who had no authority to quote prices on the parcel of land in question, and that the defendant corporation was not bound by the acts of its agent in so doing.

The appellant urges that the judgment appealed from is erroneous in the following particulars: (1) The court had no jurisdiction of the subject matter of the action. (2) The contract is executory and is without consideration, and equity will not enforce specific performance of such a contract. (3) The letters passing between the parties did not make a contract. (4) No competent evidence was offered to show the acreage of the parcel of land in controversy. (5) The agent and officer of the defendant corporation who carried on the correspondence in its behalf had ³⁴⁵ no authority to bind his principal. (6) The alleged contract was void under section 2304, Statutes of 1898.

The first, second, third and sixth errors assigned are so correlated that they may well be treated together. No claim is urged upon our consideration to the effect that the superior court of Lincoln county had not jurisdiction concurrent with that of the circuit court of such county to try actions brought to compel specific performance. The first error assigned is in fact predicated upon the proposition that no contract was entered into between the parties, and, in any event, if the writings are held to constitute a contract, the plaintiff's appropriate remedy is an action at law to recover damages for the breach of such contract. The second, third and sixth alleged errors relate solely to the legal effect that should be given the letters passing between the parties and constituting the alleged contract.

It is the settled law of this state that a valid and binding contract for the sale of real estate may be made through the medium of letters. It is just as well settled that, in case of a breach of such contract on the part of the vendor, the

vendee may enforce specific performance, and that, in the event of a breach on the part of the vendee, the vendor may maintain an action to recover the purchase price. The promise to pay on the part of the vendee is a sufficient consideration for the agreement to sell by the vendor: *Northwestern Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557; *Clark v. Burr*, 85 Wis. 649, 55 N. W. 401; *Baker v. Holt*, 56 Wis. 100, 14 N. W. 8; *Matteson v. Scofield*, 27 Wis. 671; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887; *W. G. Taylor Co. v. Bannerman*, 120 Wis. 189, 97 N. W. 918. The cases cited hold that such letters must contain all the elements necessary to constitute an unambiguous contract, and that there must be contained therein a definite offer to sell on the part of the owner of the land and an unqualified acceptance of such offer on the part of the purchaser. The vendee in his letter of acceptance may not attach ³⁴⁶ any condition to such acceptance, even to the extent of undertaking to dictate the place where payment shall be made. If his attempted acceptance is coupled with any condition that varies or adds to the offer to sell, it is not an acceptance, but is in reality a counter proposition: *Northwestern Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557; *Baker v. Holt*, 56 Wis. 400, 14 N. W. 8. Where the letter of acceptance contains a mere suggestion or request that payment be made at a particular place, but such request is not a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell, and will not defeat an action for specific performance: *Matteson v. Scofield*, 27 Wis. 671; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887. Applying these principles of law to the errors under consideration, the case does not present any unusual difficulties.

The letter of defendant written December 12, 1906, was ambiguous as to the parcel of land which was the subject thereof, although both parties undoubtedly understood it to refer to the southwest quarter of the southwest quarter of section 6, township 35 north, of range 8 east, in Lincoln county. The ambiguity consisted in the correspondence up to this point not showing the state in which the land was located, or whether the township was north or south or the range east or west. Plaintiff's letter of acceptance referred to the land as being located in Lincoln county, Wisconsin, and with this addition to the description referred to in the former correspondence there was no ambiguity about it whatever. This was the letter that resulted in the final consummation of the agreement. In addition to accepting defendant's

offer it cleared up something that the parties had in mind by making it a part of the writings. The defendant made no protest against the declaration that the land was located in Lincoln county, and does not now make any claim that both parties did not perfectly comprehend and understand that they were dealing with land correctly described in ³⁴⁷ the letter last referred to. The addition of the words "Lincoln county, Wisconsin," to the description in plaintiff's letter of acceptance attached no condition to the acceptance of the offer to sell, but elucidated something that was perfectly apparent to the contracting parties, and clarified the situation by obviating the objection that the writings were not sufficiently definite as to description.

Plaintiff's letter of acceptance also contained the following statement: "We note that this description was sold in 1903 and 1904 to F. J. Smith for delinquent taxes. Please take care of these taxes." This letter makes it clear that the plaintiff expected the defendant to take care of the outstanding tax certificates mentioned in the letter. If this portion of the letter contained any requirement that was not comprehended in the defendant's offer to sell, then it may well be asseverated that plaintiff did not make an unqualified acceptance, but a conditional one, and that therefore no contract was made. If the legal effect of defendant's offer to sell the land at a stated price was that it should furnish a marketable title free and clear of outstanding liens and encumbrances, then the paragraph quoted added nothing to the defendant's proposition to sell, and did not constitute a counter proposition. The defendant's offer to sell is silent as to the nature of its title and as to the character of the conveyance which it purposed giving. But the law seems to be well settled that an agreement in general terms to convey real estate, without specifying the nature of the title held by the vendor or the kind of a deed which is to be given, calls for a conveyance of the entire interest in the land sold, by a good and sufficient deed. In other words, an agreement to sell at a sound price, without reservation or exception, implies that a marketable title free of encumbrances will be passed to the vendee upon compliance with his obligations: *Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 303; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453; *Bateman v. Johnson*, 10 Wis. 1; *Arentsen v. Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 99 N. ³⁴⁸ W. 790, 65 L. R. A. 973. On an agreement by the vendor of lands to execute a good and sufficient conveyance, the purchaser may demand a clear title as well as that it be assured him by

proper covenants: *Davis v. Henderson*, 17 Wis. 105; *Taft v. Kessel*, 16 Wis. 273. The decisions outside of this court are generally to the effect that an agreement to convey, in the absence of any reservation or exception therein, requires the vendor to convey a marketable title free of encumbrances: *Drake v. Barton*, 18 Minn. 462 (Gil. 414); *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Sibley v. Spring*, 12 Me. 460, 28 Am. Dec. 191; *Hill v. Hobart*, 16 Me. 164; *Shreck v. Pierce*, 3 Iowa, 350; *Bartle v. Curtis*, 68 Iowa, 202, 26 N. W. 73; *McGuire v. Blanchard*, 107 Iowa, 490, 78 N. W. 231; *Swan v. Drury*, 22 Pick. 485; *Van Eps v. Schenectady*, 12 Johns. 436, 7 Am. Dec. 330; *Dearth v. Williamson*, 2 Serg. & R. 498, 7 Am. Dec. 652; *Swayne v. Lyon*, 67 Pa. 436.

The tax certificates referred to in the plaintiff's letter of December 17th were outstanding liens against the land. One of the certificates was subject to a tax deed and the other would be subject to deed within a few months. The holder of these certificates, if they were in fact held adversely to the defendant, had an equitable title to the land: *Eaton v. Manitowoc Co. Suprs.*, 44 Wis. 489. They imported, if outstanding, an absolute and paramount right, subject only to the right of redemption: *Coe v. Manseau*, 62 Wis. 81, 22 N. W. 155. They constituted an encumbrance upon the land (*Pillsbury v. Mitchell*, 5 Wis. 17) and a cloud upon the title (*Dean v. Madison*, 9 Wis. 402). It is apparent that the defendant would not be complying with the terms of its offer to sell in the event of its refusal to take care of these outstanding tax liens, and that therefore the plaintiff might insist in its letter of acceptance that the certificates in question, if outstanding, be redeemed, and that by so doing it added nothing to the obligations the defendant had assumed in the event of its offer being accepted.

349 Aside from the considerations referred to, defendant's offer to sell was without qualification and the plaintiff's acceptance was without condition. The statement in plaintiff's letter, "If it is just as satisfactory to you, will you please send your deed to National Bank of Merrill for collection," was a mere suggestion or request, and not an attempt to impose a condition upon the defendant not in consonance with its offer. It is apparent that there was no intention on the part of the plaintiff to make its acceptance conditional upon the deed being sent to Merrill for collection.

The plaintiff contended that the actual acreage of the description involved and the quantum of land for which it

should pay was 22.13 acres. The defendant asserted that it was entitled to pay for forty acres, and, inasmuch as it supposed it was selling forty acres, whereas the plaintiff supposed it was buying a lesser quantity, the minds of the parties never met on the consideration to be paid. There does not seem to be any ambiguity in the contract in this regard. Certainly an acre of land ordinarily means one hundred and sixty square rods. There is no claim made in this case that the government survey did not accurately show the actual acreage of the parcel of land in question. It is notorious that there are variances in the actual acreage of quarter-quarter sections in government surveys, not often as great as is found here, but still very considerable. A patent conveying the ordinary quarter-quarter section of land generally recites that it contains forty acres more or less according to the government survey. It seldom happens that a description having a range line for its western boundary, as in the case before us, or one having a township line for its northern boundary, contains just forty acres. The variances in such cases are often wide. Sometimes the acreage largely overruns, sometimes it falls short. If the description in question contained fifty or sixty acres, as many descriptions lying immediately east of range lines do, we entertain no doubt that plaintiff would, upon acceptance ³⁵⁰ of defendant's offer, be compelled to pay upon the actual acreage. The unit referred to in the correspondence of both parties, and upon which a price was made and accepted, was the acre, not the forty, and there does not appear to be any such ambiguity in the writings as would admit of any parol testimony to vary the terms of the written agreement. In defendant's letter written in reply to plaintiff's letter of acceptance it does not place any different construction upon the contract. It said that "our records do not show that this is a fractional forty, and we would have to investigate this further, but we could sell it to you, as we understand that this is a full forty." This is not an assertion on defendant's part that its offer, in reality, was one to sell the description for two hundred and forty dollars. Its statement amounted to little more than saying that, because its records did not show the forty to be fractional, it would have to satisfy itself as to what the acreage was before making a conveyance.

It is urged that the proof is insufficient to sustain the findings of the court that the acreage of the description of land in question was only 22.13. An examination of the testimony discloses that there was sufficient evidence to sustain a finding

to the effect that the government survey showed the acreage to be in accordance with the finding of the court. In the absence of proof to the contrary, the presumption would be that the correct acreage was shown by such survey.

The remaining error relates to the authority of F. J. Jeffris, who carried on the correspondence for the defendant, to bind it. There were three stockholders in the defendant corporation: D. K. Jeffris, D. H. Jeffris, his wife, and F. J. Jeffris, each of whom was a director. D. K. Jeffris was president, D. H. Jeffris vice-president, and F. J. Jeffris secretary and treasurer. F. J. Jeffris carried on the correspondence in behalf of the defendant with the plaintiff, and it is asserted that he did not have the authority to bind the defendant by his offer to sell, no such authority having been ³⁵¹ conferred, at least by any formal action taken by the board of directors of the corporation. In reference to the subject of authority, F. J. Jeffris testified that he and D. K. Jeffris handled the business of the corporation; that he generally did the work and his brother did the rest; that he kept the books, answered letters, signed the name of the company, and closed deals for the sale of lands, subject to the approval of his brother; that, if a proposition came to the office to buy a parcel of land for a stated price, he generally answered it, accepting or refusing the offer without consulting anyone; that his brother knew that he answered such letters without consultation, and knew that the witness was carrying on the business of the defendant in this way at the time the correspondence referred to took place; that he consulted his brother as occasion required; that the wife of D. K. Jeffris left the business to the witness and her husband; that the company did not call directors' meetings when it desired to sell lands; that his practice was not to consult his brother before making such an offer to sell as was contained in his letter to the plaintiff; and that his brother left to him the matter of making quotations, and in making quotations or offers he signed the name of the company and placed his initials thereunder. The court found on sufficient evidence that the managing agent of the plaintiff, who conducted the negotiations on its behalf, knew F. J. Jeffris and knew the position which he occupied in the Interior Land Company, and knew that he acted generally for the defendant in fixing prices and in dealing with its lands.

A very large part of the business of the country is carried on by corporations. It certainly is not the practice of persons dealing with officers or agents who assume to act for such

entities to insist on being shown the resolution of the board of directors authorizing the particular officer or agent to transact the particular business which he assumes to conduct. A person who knows that the officer or agent of the corporation ³⁵² habitually transacts certain kinds of business for such corporation under circumstances which necessarily show knowledge on the part of those charged with the conduct of the corporate business assumes, as he has the right to assume, that such agent or officer is acting within the scope of his authority. It has recently been said by this court that the secretary of the ordinary business corporation is just as much its general managing agent as is the president, both performing interchangeably a wide range of duties, and exercising much the same functions in the conduct of corporate business as are exercised by general partners in a copartnership business: *Swedish-American Nat. Bank v. Koebernick*, 136 Wis. 473, 128 Am. St. Rep. 1090, 117 N. W. 1020. A corporation is estopped from denying that its agents possess all the authority which it gives them the appearance of having. It is estopped from denying that a general officer had the power which it has customarily allowed him to exercise. This subject is so fully discussed in the case of *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234, and in the cases therein referred to, that no good purpose would be served in reiterating a doctrine which is well established and which we think is fairly applicable to the facts before the court in this case. The secretary and treasurer of the defendant was clothed with apparent authority to do the acts which he did do, and his acts are binding upon the corporation.

By the COURT. Judgment affirmed.

A Conditional Acceptance of an option to sell usually amounts to a rejection thereof: *Tilton v. Sterling etc. Coke Co.*, 28 Utah, 173, 107 Am. St. Rep. 689. But a request, suggestion, or proposal of alteration or modification, made after an unconditional acceptance of an offer, and not assented to by the opposite party, does not affect the contract put in force and effect by the acceptance, nor amount to a breach thereof, giving a right of rescission: *Turner v. McCormick*, 56 W. Va. 161, 107 Am. St. Rep. 904. It has been held that in case of an offer by a person in one state to sell land in another state at a certain price, an acceptance of the offer, directing the deed to be sent to a bank in the latter state, to be delivered on payment of the purchase money, does not create a binding contract, as such offer, not mentioning the place of payment, entitles the vendor to payment at the place of his residence: *Egger v. Nesbitt*, 122 Mo. 667, 43 Am. St. Rep. 596. And it has also been held that if proposal to buy real property for a price specified, and no more, is followed by an ac-

ceptance providing that the property is to be clear of expenses of taxes, and that the purchaser is to repay one year's insurance which has been paid on the property, this is not an unqualified acceptance of the offer, and there is no contract between the parties: *Kennedy v. Gramling*, 33 S. C. 367, 26 Am. St. Rep. 676.

There is an Implied Agreement on the Part of a Vendor, in every contract for the sale of land, to make good title to the vendee: *Meyer v. Madreperla*, 68 N. J. L. 258, 96 Am. St. Rep. 536.

MILLER v. NEALE.

[137 Wis. 426, 119 N. W. 94.]

FIRES.—A Man may Lawfully Burn Rubbish or Brush upon his own land if he exercises that prudence in starting and managing the fire which ordinary care demands. (p. 1078.)

FIRES—Duty Toward Adjoining Property.—When there is inflammable material on the ground and the wind is strong in the direction of neighbors' property, a land owner may be charged with negligence if he starts a fire, or if, having started it, he does not exercise that care to keep it under control which ordinary prudence dictates. (p. 1078.)

FIRES—Liability for Destruction of Timber.—Where a land owner is negligent in setting out or managing a fire on his premises, so that it spreads to the timber of adjoining owners, he is liable therefor in damages. (pp. 1078, 1081.)

FIRES—Evidence as to Negligence.—In an Action Against a Land Owner for negligence in starting a fire which spreads to adjoining property, evidence is admissible as part of the *res gestae* that just before starting the fire he asked a neighbor if it would harm his building, and the latter, after noting the direction of the wind, replied that it would do no harm. (p. 1079.)

FIRE—Damages for Destruction of Timber.—The true measure of damages where standing timber is injured by fire is the diminution in the value of the land caused by the injury. In an action therefor, it is not error to instruct the jury that the plaintiff is entitled to recover such sum as will compensate him for the injury by the defendant's negligence, nor is it error to admit proof of damage to the timber itself. Such proof does not determine the measure of damages, but it is proper to be considered by the jury in fixing the diminished value of the land. (p. 1081.)

Daniel H. Grady, for the appellants.

D. W. McNamara, for the respondent.

427 WINSLOW, C. J. This is an action to recover damages resulting to the plaintiff's standing timber by reason of a fire alleged to have been negligently set on the defendants' land by their servant and which escaped from control and spread onto the plaintiff's land. There was a general verdict

for the plaintiff, assessing ⁴²⁸ his damages at one hundred and twenty-five dollars, and from judgment thereon the defendants appeal.

The plaintiff and the defendant William Neale own adjoining farms separated by a north and south country highway. The defendant's farm is on the west side of the highway and the plaintiff's on the east, and the plaintiff's wood lot is on the south side of his land adjoining the highway. Page Neale is a son of William, and was living upon and working William's farm at the time of the fire, while William lived at some distance, but was at the farm occasionally, and, so far as the evidence shows, was managing the farm with his son. On the morning of the 22d of April, 1905, at about 8 o'clock, one Belcher, who was a hired man employed by the Neales, set a fire upon the defendants' land for the purpose of cleaning out some grass and brush preparatory to building a fence between a pasture lot and a wood lot, under general directions from the defendants which had previously been given. There was considerable dry grass and brush on the ground between the starting point of the fire and the plaintiff's land, and there was evidence that a strong northwest wind was blowing, although this latter fact was in dispute. The fire spread eastward and southward and got beyond control. Belcher finally started a back fire near the highway in order to arrest the progress of the original fire, but the attempt was unsuccessful, and the fire crossed the highway about noon and did some damage in the plaintiff's timber, the amount of which was in dispute.

A man may lawfully burn rubbish or brush upon his own land if he exercises that prudence in the starting of the fire and the management of it after it is started which the rules of ordinary care demand. He is using a dangerous agent, and when there is much inflammable material on the ground, and the wind is strong in the direction ⁴²⁹ of his neighbors' lands, he may well be charged with negligence if he sets a fire, or if, having set it, he does not exercise that care to keep it under control which ordinary prudence dictates. These principles are fundamental, and they form a sufficient answer to the defendants' contention that there was no evidence of negligence and hence that a nonsuit should have been granted. There was sufficient evidence in the present case to entitle the jury to find that there was negligence, both in starting the fire and in taking care of it after it was started.

Many minor errors are assigned, all of which have been examined and the more important of which will be noticed.

It is said that the plaintiff was guilty of contributory negligence, as matter of law, because he was working in his own field some eighty rods distant from the starting point of the fire and saw the smoke during the forenoon, but did not go to the place of the fire or offer assistance until about the time when it crossed the highway. This question was clearly one for the jury. The evidence on the subject was not so conclusive as to warrant the court in saying that the rules of ordinary care required him to do more than he did.

Upon the cross-examination of the plaintiff the court permitted the defendants to ask a number of questions concerning the custom of farmers in that locality with reference to burning off grass and brush at that time of year. At a later stage of the case the court struck out the evidence, and this ruling is assigned as error. On examination of the testimony so stricken out we find that, while plaintiff admitted that there was a custom in an early day to burn over both pasture and timber land, he directly denied that there was any such custom at the time of the fire and for some years prior thereto, where, as in this case, pasture and timber joined. Irrespective of the question, therefore, whether evidence of custom would be competent, there was no prejudice to the defendants in the striking out of the testimony.

One of plaintiff's witnesses, named Grosskratz, who was a ⁴³⁰ farmer living north and east of the starting point of the fire, testified that he was with Belcher when he started the fire, and that just before starting it Belcher asked him if it would harm his buildings, and he looked at the wind and saw it was coming from the northwest and told Belcher that it would do no harm. This testimony was objected to, and its admission is now assigned as error. Clearly, these remarks were declarations made in connection with and throwing light upon the main fact in controversy, namely, the setting of the fire, and were admissible as part of the *res gestae*.

Errors are assigned because the plaintiff was allowed to testify that the timber was good timber, also that he was keeping it for his own use, and because the defendants were not permitted to fully cross-examine the man Belcher when called as a witness for the plaintiff. The first two of these assignments of error are trivial in their nature, and the rulings could not be prejudicial, even if it be admitted that they were technically erroneous. As to the alleged improper limiting of the cross-examination of Belcher, it is sufficient to say that he was afterward called and fully examined as a witness for the defendants, and was not an adverse or unwill-

ing witness, and that the defendants then had full opportunity to examine him upon the subjects as to which they desired to cross-examine him.

A large number of instructions were requested by the defendants, all of which were refused, and these rulings are now assigned as error. We shall not consider the instructions requested in detail. The trial court gave the jury a comprehensive and substantially correct charge, placing before them the legal principles which should govern the deliberations, without repetition and with commendable clearness and brevity. So far as the requested instructions stated correct principles of law applicable to the case they were included in the charge given. A number of these requested instructions touched upon the question of a supposed change in the velocity or direction of the wind during the progress of ⁴³¹ the fire, and upon the legal effect of such change upon the question of defendants' negligence. None of these instructions were given or incorporated in the general charge, for the very sufficient reason that there was no substantial evidence on which to base them. The nearest approach to evidence showing a change, either in the velocity or direction of the wind, was some testimony that the fire worked eastward for a time and then southward; but this might easily result from the nature of the intervening ground and the presence or absence of combustible material in the course of the fire, and there is practically no evidence to show that it resulted from change of wind.

Various exceptions bring up the question whether there was error in the rulings or instructions to the jury on the question of the measure of damages. The plaintiff, after stating the kind of timber in his wood lot and that twelve acres of the timber was entirely killed by the fire and the other eighteen acres blackened, was allowed to answer, against objections, that in his opinion the damage to the timber was about three hundred dollars. On cross-examination he stated that he did not count the trees, and that his statement of damages was not based on measurement or accurate inspection, but was a guess. Thereupon the defendants moved to strike out plaintiff's answers as to the value of the timber burned, but the motion was overruled. On redirect examination he testified that the land with the timber on it prior to the fire was worth about thirty-five dollars per acre and after the fire about twenty dollars per acre. One Baker, who was a farmer and a witness called by the plaintiff, testified to an examination of the timber after the fire and that about one-third of

the trees were dead, and that in his opinion the land was worth twenty dollars to thirty-five dollars an acre before the fire, and after the fire ten dollars less an acre. Several witnesses for the defendants testified to an examination of the woods just prior to the trial and that in their opinion the damage to the timber by fire was about fifteen dollars in all.

The foregoing constituted all the evidence that was given ⁴³² on the subject, and the court charged the jury that in assessing damages they should be fair and just, and fix such sum as would compensate the plaintiff for the injury which the preponderance of the evidence established that he actually sustained, solely as a result of the defendants' negligence. No definite rule as to the mode of ascertaining the damage was given by the court or requested by either party. While the evidence was not very satisfactory on the subject, and the charge was merely general, we are unable to see that any positive error was committed either in the rulings or in the charge. Doubtless, the true measure of damages was the diminution in the value of the land caused by the injury to the timber (*Nelson v. Churchill*, 117 Wis. 10, 93 N. W. 799), and doubtless, also, the trial court would have given a definite instruction to this effect had it been requested; but it was not, and it certainly was not error to say that the plaintiff was entitled to recover such sum as would compensate him for the injury sustained which was caused by defendants' negligence. Nor was it error to admit proof of the damage to the timber itself. While such proof does not determine the measure of the damages, it was entirely legitimate proof and entitled to be considered by the jury in fixing the diminished value of the land: *Nelson v. Churchill*, 117 Wis. 10, 93 N. W. 799. The plaintiff's admission that his statement as to the damage to the trees was a mere guess evidently meant that was a rough estimate and not an accurate judgment based upon careful measurement and hence there was no error in refusing to strike out his evidence on the subject.

By the COURT. Judgment affirmed.

Negligence by a Land Owner in Starting or Managing Fires on his premises is discussed in the note to *Weitzmann v. Barber Asphalt Co.*, 123 Am. St. Rep. 576.

JONES v. MONSON.

[137 Wis. 478, 119 N. W. 179.]

CONSPIRACY—Liberal Rules of Pleading.—In deciding whether a pleading states facts reasonably indicating the execution of a conspiracy, it must be tested by the broad liberal rule of the statute that “in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties.” (p. 1085.)

PLEADING—Liberal Rules of Code.—More and more, as time continues, the beneficent purpose of the code rule is appreciated that in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties, and the disposition is evinced to give it the broadest scope which can reasonably be done. (p. 1085.)

PLEADING—Purpose of Reformed Procedure.—The builders of the code proposed to sweep away, as far as possible, the technicalities of the common-law procedure, superseding it by a new system as near the ideal as practicable of a plain, simple, easy method of presenting controversies for judicial treatment and solution—one that would always give dignity to the substance of things, overcoming mere solvable indefiniteness and nonprejudicial imperfections. (p. 1085.)

PLEADING—Liberal Rules of Code.—Criticism of a Pleading will not support a challenge for insufficiency if sufficient can be discovered reasonably by judicial construction to sustain it. The sole test is, “Will the language used permit of a reasonable construction which will sustain” the pleading? (p. 1085.)

CONSPIRACY—Gist of Civil Action.—In a civil action for damages for an executed conspiracy, the gist of the wrong is the damages. The combination may be of no consequence except as bearing upon the rules of evidence. (p. 1087.)

ALIENATION OF AFFECTIONS—Conspiracy by Parents.—Husband and wife, accomplishing by concert of action the deprivation of their son in law of his marital rights, are both liable for the resulting damage. (p. 1088.)

ALIENATION OF AFFECTIONS—Liability of Parents.—What a father and mother may do in relation to their daughter continuing to reside with her husband, without an inference of bad intent arising therefrom, is quite different from what a stranger may do in regard to such an interference. Parents may properly, to some extent, watch over the welfare of a daughter after marriage as well as before; they may advise her, under some circumstances, contrary to the inclination of her husband, and even to the extent of advising desertion of him, and may act upon her mind successfully to that end from proper motives. (pp. 1087, 1089.)

ALIENATION OF AFFECTIONS—Liability of Parents.—Acts done by a stranger in accomplishing the deprivation of another of his marital rights may well be regarded as malicious, while similar acts by parents of the husband or wife would not give rise to a well-grounded suspicion of bad intention. (pp. 1088, 1089.)

ALIENATION OF AFFECTIONS—Liability of Parents.—In determining whether parents are liable for influencing their daughter to leave her husband the test is, were they, in what they did, actuated with reasonable parental regard for their child, or were they actuated by unreasonable ill-will toward husband or wife, as the case may be. If the former, and they yet, from the standpoint of

better judgment, were wrong, excusably mistaking the true situation, the resulting injury is *damnum absque injuria*. (pp. 1088, 1089.)

INSTRUCTIONS.—A Charge to the Jury is not Required to Contain a Discussion of the Evidence in connection with legal propositions applicable thereto, nor to state any such proposition more than once, nor adopt any particular phrasing of a proposition by counsel, nor is it advisable to state any such proposition in an argumentative way, and it is not necessary to indulge in enlarging upon the importance of a particular proposition in its moral or other aspects. (p. 1089.)

ALIENATION OF AFFECTIONS—Liability of Parents.—The acts of parents in inducing their daughter to leave her husband are presumed to be in good faith, and for the purpose of promoting their child's welfare. (p. 1089.)

INSTRUCTIONS—Quantum or Preponderance of Evidence.—It is not error against the defendant to instruct the jury that the burden of proof is on the plaintiff to "establish the facts essential to his cause of action by a preponderance or greater weight of evidence," but it would be better to use the expression "satisfied by a preponderance of evidence," or "satisfied to a reasonable certainty by a preponderance of the evidence." (pp. 1090, 1091.)

INSTRUCTIONS.—The Word "Established," as Applied to the quantum of evidence necessary to warrant the existence of a fact in issue, is more appropriate to a criminal than to a civil case. (p. 1091.)

Daniel H. Grady, for the appellants.

Henry A. Gunderson, for the respondent.

480 MARSHALL, J. The appeal is from a judgment of sixteen hundred and eight dollars and twenty cents damages and costs to remedy injuries caused by alienating the affections of plaintiff's wife.

481 The defendants are husband and wife and parents of plaintiff's wife. Plaintiff's claim was that defendants conspired together with bad intent to deprive plaintiff of his wife's affections and cause her to desert him, and accomplished their purpose by compelling the wife, who with her husband was residing with the defendants and had so resided for a considerable length of time prior to their marriage, to seclude herself and baby girl, which had been born to them, from him, and induced her to refuse to speak to him or recognize him as her husband, or permit him to pay her or their child any attention, and drove him from the house by ill-treatment and forbade him to return or come upon the premises, notifying him that the daughter would not go therefrom to live with him.

Defendants answered putting in issue all the allegations of the complaint as to improper treatment of the plaintiff and with bad intent influencing his wife against him.

Upon evidence tending to support the allegations of the complaint, the cause was submitted to the jury on the subject

of punitive and that of actual damages as well, resulting in a verdict in defendants' favor as to the former but in the plaintiff's favor as to the latter, the damages being assessed at fifteen hundred dollars. Judgment was entered upon the verdict in plaintiff's favor.

The first three assignments of error will be considered together. They involve these subjects: (1) Did the complaint present a case of an executed conspiracy to injure by wrongfully depriving respondent of his wife's affections? (2) Can there be a conspiracy as between husband and wife? (3) Was there sufficient proof of such a conspiracy as to render evidence of what was said or done by one in the absence of the other admissible against ⁴⁸² both? (4) Was the evidence sufficient to carry the case to the jury on the issue of wrongful intent?

1. No question is raised but that a conspiracy to injure respondent by depriving him of his wife's affections and society was alleged. The infirmity claimed is that the complaint failed to state facts reasonably indicating an execution thereof. In deciding that, the pleading must be tested by the broad liberal rule of the statute that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties": Stats. 1898, sec. 2668. More and more, as the time continues, the beneficent purpose of that statute is appreciated and disposition to give it the broadest scope which can reasonably be done is evinced. It is one of the most significant of the indications found throughout the Code that its builders purposed to sweep away, so far as possible, the technicalities and hindrances of common-law procedure, superseding it by a new system as near the ideal as practicable of a plain, simple, easy method of presenting controversies for judicial treatment and the solution thereof—one that would always give dignity to the substance of things, overlooking mere solvable indefiniteness and non-prejudicial imperfections. In harmony therewith it has been iterated and reiterated that "criticisms of a pleading will not support a challenge for insufficiency . . . if sufficient can be discovered, reasonably, by judicial construction to sustain it." The sole test is, "Will the language used permit of a reasonable construction which will sustain" the pleading? *Emerson v. Nash*, 124 Wis. 369, 109 Am. St. Rep. 944, 102 N. W. 921, 70 L. R. A. 326. Failure to appreciate the force of this rule and the extent of the change wrought by the Code,

results in a waste of energy of counsel, useless expense to clients and to the public.

The complaint, after stating, in appropriate language, the formation of a conspiracy to injure by depriving respondent of the affections and society of his wife, charged that the persons so wrongfully conspiring "did finally acquire, from ⁴⁸³ bad and improper motives and malicious, false insinuations, such influence over plaintiff's said wife, and defendants used such influence to the extent that the love, affections, and respect of plaintiff's said wife for plaintiff had been wholly alienated and destroyed." That is followed by allegations of the perpetration of specific, malicious acts for the purpose, as stated, of "forcing and driving plaintiff away from his said wife and child," and so resulting, concluding with the charge "that by carrying out such malicious conspiracy . . . plaintiff had been wrongfully and maliciously deprived of his wife's affections, society, comfort and assistance." What more is required? We are unable to suggest anything, and counsel fails in that regard, except upon the hypothesis that the complaint does not charge that the alleged wrongful acts were done pursuant to a formed conspiracy to accomplish the result reached. True, the complaint might have been more logically framed. After charging the conspiracy to injure by accomplishing what in fact occurred, the pleader might well have then charged that pursuant to such wrongful conspiracy to injure, with specific malicious intent to effect the purpose thereof, certain acts, specifying them, were done with bad intent, closing with a charge as to the consummation of the conspiracy to the plaintiff's damage. But there is no mistaking the purpose of the pleader to state that the wrongful acts were perpetrated pursuant to the wrongful combination, and that the purpose was accomplished. Moreover, it can hardly be said that rules for judicial construction of a pleading need be resorted to for that purpose, as the quotations we have given clearly indicate. But if it were otherwise the rule for testing pleadings for insufficiency, to which we have referred, easily solves the uncertainty. "All facts," as stated in *White v. White*, 132 Wis. 121, 111 N. W. 1116, a case similar to this, "reasonably inferable from those expressly alleged are to be regarded as efficiently pleaded."

2. We are not familiar with the supposed rule counsel contends ⁴⁸⁴ for, that a wife is incapable of being guilty of a wrong jointly with her husband because of the ancient presumption that what a wife does in that regard in the husband's presence, or so near by as to be within his influence, is

presumed to be under coercion of his will. That doctrine, so far as it once existed and is not obsolete, relates to a mere rebuttable presumption, not disability: *Miller v. State*, 25 Wis. 384; 1 Bishop's New Criminal Law, secs. 356-366.

The common-law doctrine undisturbed by statute, that a husband and wife by themselves cannot be guilty of a criminal offense when the gist thereof is conspiracy, is familiar: 2 Bishop's Criminal Law, sec. 187; Wright's Criminal Conspiracies, 221. The basic feature thereof is that a husband and wife are but one, and that since it takes two or more persons to form a conspiracy, the husband and wife alone are incapable thereof, but are so when acting with one or more others. That principle by no means goes to the extent of exempting a wife from the consequences of criminal acts in execution of a conspiracy jointly with her husband which are of themselves subjects of criminal prosecution. The parties may be prosecuted jointly with or without any other person being charged, the conspiracy not being the gist of the offense, and both convicted: *State v. Clark*, 9 Houst. (Del.) 536, 33 Atl. 310.

The authorities relied upon by the learned counsel and which it seems moved the learned trial court to rule in counsel's favor to the extent of holding that an action for conspiracy will not lie against husband and wife on the supposition that the complaint in one aspect might be treated as a pleading in an action to remedy such a wrong, are all, so far as any bearing on the question is concerned, criminal cases. There is no such a thing as a civil action for conspiracy. There is an action for damages caused by acts pursuant to a formed conspiracy, but none for the conspiracy alone. When the unlawful combination is the offense, as in criminal prosecutions, then the principle invoked by counsel applies: 485 *Rex v. Locker*, 5 Esp. N. P. 107; *People v. Miller*, 82 Cal. 107, 22 Pac. 934; *State v. Clark*, 9 Houst. (Del.) 536, 33 Atl. 310; *Kirtley v. Deek*, 2 Munf. 10, 5 Am. Dec. 445. These and similar cases are pointless as regards the action here. The last citation was a civil case. The husband and wife were charged with others, and the law that they may be so charged notwithstanding the doctrine of unity was passingly referred to as sufficient for the case. Counsel there argued that the principle now insisted on had no application as the gist of the offense was the damage, not the conspiracy. The court passed that question, the suggestion before indicated being deemed sufficient.

In a civil action for damages for an executed conspiracy, as is very familiar, the gist of the wrong is the damages. The combination may be of no consequence except as bearing upon rules of evidence: *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; *Randall v. Lonstorf*, 126 Wis. 147, 105 N. W. 663, 3 L. R. A., N. S., 470. The circuit court seems to have thought it was necessary to reject from the complaint as surplusage the allegation to the effect that the defendants conspired together with bad intent to accomplish the wrong. Not so, since the action, as before indicated, was not for the conspiracy, but for damages on account of the consummation of the purpose of it, the two acting in concert. That would make a criminal offense before reaching the consummation as to persons not under disability, as stated in *Randall v. Lonstorf*, 126 Wis. 147, 105 N. W. 663, 3 L. R. A., N. S., 470. The disability would not militate against capability of the two in concert to wrongfully damage the intended victim and become responsible to him therefor. The rule of evidence, as in any ordinary case of a wrongful act committed pursuant to an agreement to do it, would apply. It is sufficient, if actual damage is the result, for a remediable wrong. In that case whether one or more are concerned may be immaterial to the cause of action, but whether there was a subsidiary agreement by two or more persons to do the act ⁴⁸⁶ consummated by concert of effort may affect the remediable procedure as regards methods of proof. That alienation of a wife's affections is such a wrong does not admit of question.

The foregoing is well supported by authority elsewhere referred to by counsel for respondent: *Price v. Price*, 91 Iowa, 693, 51 Am. St. Rep. 360, 60 N. W. 202, 29 L. R. A. 150; *Young v. Young*, 8 Wash. 81, 35 Pac. 592. Also the following: *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187. In each of these instances it was conceded, as it seems, that husband and wife, accomplishing by concert of action deprivation of another of his marital rights, are both liable for the resulting damage.

3, 4. These branches of the case we shall not discuss at length, analyzing and showing the bearing of evidence. It is the opinion of the court that the case is by no means so barren of evidence, either on the subject of concurrence of appellants with bad intent to rob respondent of the affections and society of his wife or that of the accomplishment of such purpose with like intent, as to warrant reversing the trial court in those regards.

We will say in passing and coming to the foregoing conclusion, we have given due consideration to the fact that what a father and mother may do in relation to their daughter continuing to reside with her husband, without inference of bad intent arising therefrom, is quite different from what a stranger may safely do as regards such an interference. True, parents may properly, to some extent, watch over the welfare of a daughter after marriage as well as before. True, they may advise her, under some circumstances, contrary to the inclination of her husband and even to the extent of advising desertion of him, and may act upon the mind of the wife successfully to that end from proper motives. Indeed, under some circumstances they might be very derelict in their duty to their daughter if they did not take that extreme course. The relations of a parent and child in their ⁴⁸⁷ moral aspects, and legal as well, begin at the inception of life, and do not wholly end until life ends; and those relations carry with them certain duties and privileges as to advice and protection and helpfulness in case of need, the observance of which is so natural and so laudable and so essential to the family happiness and welfare that acts ostensibly promotive thereof are not to be lightly held to have had a wicked purpose for their mainspring. Acts done by a stranger might well be regarded as malicious, while similar acts by the parents would not give rise to a well-grounded suspicion of bad intentions. We fully recognize such to be the case, and that the true test to be applied to the evidence in this class of cases is, Were the defendants in what they did actuated with reasonable parental regard for their child, or were they actuated by unreasonable ill-will toward the husband or the wife, as the case may be? If the former, and they yet, from the standpoint of a better or the best judgment, were wrong, excusably mistaking the true situation, the resulting injury is *damnum absque injuria*. The cases cited to our attention on this line are fully appreciated, and the fullest effect the doctrine they declare can reasonably have in reviewing the evidence, it seems, has been given thereto. We will preserve here counsel's citations and others: *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Oakman v. Belden*, 94 Me. 280, 80 Am. St. Rep. 396, 47 Atl. 553; *Brown v. Brown*, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638; *Tucker v. Tucker*, 74 Miss. 93, 19 South. 955, 32 L. R. A. 523; *Burnett v. Burkhead*, 21 Ark. 77, 16 Am. Dec. 358; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; *Bennett*

v. Smith, 21 Barb. 439; Smith v. Lyke, 13 Hun, 204; Hutcheson v. Peek, 5 Johns. 196; Huling v. Huling, 32 Ill. App. 519; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; Fratini v. Caslini, 66 Vt. 273, 44 Am. St. Rep. 843, 29 Atl. 252; Higham v. Vanosdol, 101 Ind. 160; Campbell v. Carter, 3 Daly, 165.

Some complaints are made of rulings on evidence, all of ⁴⁸⁸ which have received proper attention without harmful error having been discovered.

Several errors are assigned as to refusals to instruct and imperfections in instructions given. It would unnecessarily extend this opinion to a very great length to discuss them in detail. Therefore, we will not do so, but rest those matters in the main by expressing our opinion that so far as requests were refused, which were applicable to the case, they were substantially covered in the general charge.

Counsel's requests Nos. 3, 5, 7, 9, 10, 14, 15, and 16 all appertain to the right and duty of parents to, in good faith, advise their children for such children's welfare, not being responsible for mistakes, and, as to whether the acts done and expressions indulged in and advice given by appellants were of that character, the jury should consider the conduct of respondent as shown by the evidence and all the evidence bearing thereon. All that was said to the jury in a charge commendable for its conciseness and restraint to the legal questions involved.

A charge to the jury is not required to contain a discussion of the evidence in connection with legal propositions applicable thereto, nor to state any such proposition more than once, nor adopt any particular phrasing of a proposition by counsel, nor is it advisable to state any such proposition in an argumentative way, and, of course, it is not necessary to indulge in enlarging upon the importance of a particular proposition in its moral or other aspects. To present a multitude of requests invoking a trial judge to do such things is counsel's right, but whether it is advisable may, at least, well be doubted, if not criticised.

Here, the jury were told that "acts of parents" under the circumstances of this case "are presumed to be in good faith, and for the purpose of promoting the child's welfare unless the contrary is established by the evidence." "So that to recover it is not only necessary to establish by a preponderance ⁴⁸⁹ of the evidence that the parents brought about the" result complained of, "but in so doing they acted maliciously, that is, in bad faith, not with a view of promoting the

daughter's welfare." "If parents who have knowledge of a child's actual situation act in the honest belief that a course taken or advised is for the child's welfare, . . . their acts cannot be deemed malicious, although such conduct in fact appears detrimental to the child's interests." In those few words substantially all that was material in the numerous requests we have referred to was given, rather restrictive, however, in favor of appellants, in that the term "knowledge of the child's actual situation" was used, instead of knowing or reasonably apprehensive of the child's needs, or words of similar import, showing that the parents may advise upon reasonable appearances of necessity therefor as well as upon actual knowledge. Thus incidentally we have answered an assignment of error made further along, grounded on the use of the words which we have seen to have been error in appellants' favor, if error at all.

Error is assigned because the court failed to instruct the jury not to consider advice or statements which may have been given or made to the wife subsequent to the separation. No evidence is referred to calling for such an instruction and we have not discovered any. True, counsel cites us to evidence introduced on behalf of appellants of a letter written to respondent's counsel by his wife some over a month after she ceased living with him, to the effect that appellants were not concerned in the separation and that she would not live with respondent on any account, but how her declaration out of court long after the alleged wrongful act was done could be evidence against respondent or suggest the charge requested, especially when introduced in evidence on behalf of the adversaries, is not perceived. At all events, if the jury considered the letter, as we must assume they did, it having been received as competent evidence, they must have disbelieved ⁴⁹⁰ it, as they found there was no such separation as it suggests, but was one produced by malicious connivance of appellants to that end.

Complaint is made because the court charged the jury, in effect, that respondent could recover on account of the loss of the affections and society of his child. We do not find any such instruction. The language referred to by counsel is a part of the court's statement to the jury of respondent's claim. Nowhere is any such element submitted to the jury. Moreover, it was plainly excluded in the instructions as to the elements of damage.

Again, error is assigned that the jury were instructed the burden of proof was on plaintiff to "establish the facts essen-

tial to his cause of action by a preponderance or greater weight of evidence." The point of attack is at the word "establish," the claim being that its use made the instruction fall short of informing the jury that it was necessary, in order to entitle plaintiff to a verdict, for them to be satisfied by a preponderance of the evidence of the existence of all the facts essential thereto. The point is not well taken. True, it were better to use the term so often sanctioned by this court, "satisfied by a preponderance of the evidence," or, what is still better, in the judgment of the writer, "satisfied to a reasonable certainty by a preponderance of the evidence": *Pelitier v. Chicago R. etc. Co.*, 88 Wis. 521, 60 N. W. 250; *Ward v. Chicago etc. R. Co.*, 102 Wis. 215, 78 N. W. 442. But the use of the word "establish" was rather putting it too strong as against respondent than otherwise: *Eberhardt v. Sanger*, 51 Wis. 72, 8 N. W. 111; *Knights of Pythias v. Steele*, 107 Tenn. 1, 63 S. W. 1126. In 3 Words and Phrases, 2471, the author, citing these cases, gives as the rule thereof, and quite properly, that the word "establish," as applied to the quantum of evidence necessary to warrant the existence of a fact in issue, is more appropriate to a criminal than a civil case.

⁴⁹¹ Lastly, complaint is made because the court submitted the question of punitive damages to the jury. Notwithstanding counsel's criticism of the fact and manner of submission, we are at a loss to discover any which is well grounded. Moreover, no harm was done, in any event, since no punitive damages were awarded.

All matters referred to in the brief of counsel for appellant which we have not referred to in some way have received careful attention, it is thought, resulting in the opinion of the court that the record is free from any harmful error.

By the COURT. Judgment affirmed.

While a Parent may not, with Hostile, Wicked, or Malicious Intent, break up the marital relations between his daughter and her husband, simply because he is displeased with the marriage, or because it is against his will, or because he wishes the marriage relation to continue no longer, yet he may advise his daughter in good faith and for her good to leave her husband, if the father, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health or destroy her peace of mind so that she would be justified in leaving her husband. In such a case, a parent may persuade his daughter, and use all proper and reasonable arguments, but the motive and the means employed are always to be considered. It may be shown that the parent acted upon mistaken premises or upon false information, or his advice and interference may have been unfortunate, still if he acted in good faith and for the daughter's good, upon reasonable grounds of belief, he is not lia-

ble to the husband: *Oakman v. Belden*, 94 Me. 280, 80 Am. St. Rep. 396.

A Father has the Right to Advise His Son, and if he acts with proper motives and in good faith in doing so, cannot be regarded as an intermeddler; but a father who, maliciously and with a view to separating his son and the latter's wife, aids, advises and assists, and by promises or threats procures his son to leave his wife, is liable to an action by her: *Gernerdt v. Gernerdt*, 185 Pa. 233, 64 Am. St. Rep. 646; *Brown v. Brown*, 124 N. C. 19, 70 Am. St. Rep. 574.

If the Parents of a Husband Act in Concert to bring about a separation between him and his wife, they are jointly liable to her for the alienation of his affection, although each of them does not participate in all of the acts of the other: *Price v. Price*, 91 Iowa, 693, 51 Am. St. Rep. 360.

CASES

IN THE

SUPREME COURT

OF

WYOMING.

WHITING v. STRAUP.

[17 Wyo. 1, 95 Pac. 849.]

MINING LAWS AND CLAIMS.—Lands Containing Petroleum or Other Mineral Oils or a Deposit of Natural Gas may be located as placer claims under the mining laws. (p. 1102.)

MINING LAWS—Discovery, Necessity for.—The discovery of mineral within the limits of a claim is essential to the valid location of a mining claim on the public domain, whether it be a lode or placer claim. (p. 1102.)

MINING CLAIM—Discovery, When must Take Place.—Though the validity of the location of a mining claim is dependent on discovery, it is not required, in the absence of intervening rights, that discovery shall precede other acts of location. If made prior to any intervening rights, though subsequent to the marking of boundaries and recording, the claim or location, if otherwise good, will be valid at least from the date of discovery. (p. 1102.)

MINING CLAIMS—Discovery, What Required.—To constitute a prior discovery which will support a location of an oil placer claim under the mining laws, the locator must have actually discovered oil within the limits of his claim. Mere surface indications, however strong, are not sufficient, nor is the existence of oil on adjacent lands. (p. 1103.)

MINING CLAIMS, Size of and Amount Protected by One Discovery.—A placer claim is limited to twenty acres for each locator, but an aggregation may be located of one hundred and sixty acres by an association of eight or more persons, in which event one discovery is sufficient for the entire claim. (p. 1103.)

MINING CLAIM, Right of Possession of.—On the valid location of a mining claim, the legal right to its possession follows. (p. 1103.)

MINING CLAIM, Location by Agent.—In locating a mining claim, the locator may act by his agent, and the latter may act without the knowledge of his principal, if the local rules authorize it. There may be either an antecedent authorization or a subsequent ratification. (p. 1103.)

MINING CLAIM, Invalid cannot be Validated by Acts Done for Another.—One who has made the location of a mining claim, invalid for want of discovery, and subsequently working the same land as agent of another and making a valid and sufficient discovery, does

so for his employer and not for himself, and does not validate the previous void location. (pp. 1103, 1104.)

MINING CLAIMS—Grantee of Locator of a Void Location, Rights of.—If one makes a location of a mining claim without a sufficient discovery and conveys the property to another, after which he becomes the agent of a third person, and in such capacity makes a valid discovery on a portion of such ground, his act is the act of his principal or employer and does not inure to the benefit of his prior grantee. (p. 1104.)

MINING CLAIM—Estoppel Against Locator of Void, Effect of on His Subsequent Employers.—If the locator of a mining claim, invalid for want of a discovery, conveys it and then enters the employment of third persons, they cannot be estopped by his prior acts, and are entitled to enforce for their benefit any discovery which he may make on any part of the lands contained within his prior location. They are not in privity with his prior grantee, and any estoppel existing against their agent and employé does not affect them as against such prior grantee. (p. 1105.)

MINING CLAIM, Location of, When not Prevented by Prior Possession.—As a general rule, the mere naked possession will not avail against a location peaceably made, and hence confers no right against a bona fide prospector who enters upon the land peaceably for the purpose of acquiring title thereto as a mining claim. (pp. 1105, 1106.)

MINING CLAIM, Location of Founded on Trespass.—The right to locate a mining claim cannot be based on trespass. (p. 1106.)

MINING CLAIM, Possession for the Purpose of Completing Location.—Where one seeks in good faith to make a location, he is entitled to exclusive possession of the land sought to be located for a reasonable time to complete his location, or for such time as may be allowed by the customs and rules of miners or the statutes of the state or territory. (p. 1106.)

MINING CLAIM—Character of Possession Which will Protect a Locator.—Possession, to be available in favor of a locator or prospector to enable him to complete his location, must be actual and connected with active, diligent work of exploration, with a bona fide intention, if mineral is found, to make a location. (p. 1106.)

MINING CLAIM—Possession, When not Sufficient to Preclude an Entry and Location by Another.—Persons holding a conveyance from the locator of a mining claim, void for want of discovery, and who for a year have done nothing on the property, except to dig a hole as preliminary to the erection of a drill machine and going across and watching the land, have not such actual possession as will preclude another from entering thereon and making a valid discovery for his own benefit or that of his employers. (p. 1107.)

APPEAL AND ERROR—Immaterial Finding.—The fact that one B., as well as the corporation defendant, was adjudged and held to be entitled to the possession of the premises in controversy is not material where there is no adverse claim on the part of B. as against the corporation. (p. 1108.)

W. R. Stoll, for the plaintiffs in error.

F. H. Harvey and Burke & Clark, for the defendants in error.

⁹ POTTER, C. J. This action was commenced in the district court of Converse county, October 24, 1903, by the plaintiffs

in error, J. Bevan Phillips and X. Whiting, against the defendants in error, Erastus Straup, Moses Bijur, and the La Prele Oil Company. The object of the suit is to enjoin the defendants from trespassing and particularly from driving ¹⁰ or sinking an oil or gas well upon a forty acre tract of land in the county aforesaid, described as the southeast quarter of the southeast quarter of section 3, in township 32 north, range 73 west. The contest is between rival claimants of the land as oil and gas placer mining ground on the public domain, the legal title being in the United States. The plaintiffs claim under an oil placer mining location covering the east half of the southeast quarter of said section, alleged to have been made June 14, 1899, by the defendant, Erastus Straup, and three associates, and the plaintiffs allege that, as a part of that claim, the tract in controversy had been transferred to them by mesne conveyances, that they had taken possession thereof, and were in possession actively engaged in working and developing the same at the time of the entrance thereon by the defendants and the trespasses complained of.

On the ground that the mining location aforesaid was neither preceded nor followed by a discovery by the locators thereof or their grantees of oil, gas, or other mineral within the limits of the claim, its validity is denied by the defendants, and they rest their right to possession upon a discovery of gas upon the tract in controversy and its location as a part of an oil and gas placer mining location in October, 1903, when, as they allege, the tract was vacant and unoccupied public land of the United States, the right to such possession being alleged to have vested in the La Prele Oil Company, one of the defendants, as the successor in interest of the persons for whom such discovery and location were made.

Upon the trial the district court found generally for the defendants and that the temporary restraining order against them which had been granted at the commencement of the suit should be dissolved, and a judgment was entered in favor of the defendants for costs, and ordering that the possession of the premises in controversy do vest in the defendants, Moses Bijur and the La Prele Oil Company. The judgment is here complained of on error.

¹¹ It is admitted in the pleadings that previous to June 14, 1899, the land here involved was vacant and unoccupied public land of the United States; that on said date, in connection with the adjoining north forty acres, under the description of the east half of the southeast quarter of said section 3, it was staked and marked as an oil placer mining

claim by Straup and his said associates, that the proper notices were posted thereon, and a location certificate recorded, and that said claim was designated as "Gusher No. 2." It seems to be conceded, as it must be upon the evidence, that at the time of locating said claim there had been no discovery within its limits of oil, gas, or other mineral authorizing the location of a placer mining claim, and further, that no such discovery had occurred up to the time that the tract in controversy was conveyed to the plaintiffs nor thereafter until sometime in the fall of 1903, when gas was discovered upon the north forty of the claim (the part not transferred to plaintiffs) by Straup, while engaged in drilling a well thereon for and under the direction of the defendant Bijur.

On November 18, 1899, the locators of the "Gusher No. 2" claim conveyed the premises covered thereby, viz., the east half of the southeast quarter of said section 3, together with other premises, by quitclaim deed, to Erastus Straup & Co., describing the premises conveyed by legal subdivisions and referring to the same as "oil placer mining ground as located, surveyed, recorded and held by said parties of the first part." By a similar conveyance, Erastus Straup & Co., on September 24, 1901, conveyed the premises so located, together with other lands therein described to Erastus Straup, reciting that the lands described were covered by oil placer mining claims. On August 16, 1902, Erastus Straup conveyed by quitclaim deed to J. Bevan Phillips, one of the plaintiffs, the tract here in controversy, designating it, in addition to its usual description, as "oil placer mining ground, located, surveyed, recorded and held by said party of the first part." On August 18, 1902, by a like conveyance and description, said Phillips conveyed an ¹² undivided one-half interest in and to the premises in controversy to X. Whiting, his coplaintiff.

It will be observed that the premises thus conveyed to the plaintiffs is the south forty of the eighty acres embraced in the oil placer claim aforesaid.

On December 28, 1899, an affidavit of Erastus Straup and another was filed and recorded in the office of the county clerk of Converse county to the effect that the necessary annual assessment work for the year 1899 had been performed upon various tracts of land consisting of eight thousand four hundred and thirty acres, more or less, therein referred to generally as oil placer mining claims and described by legal subdivisions, in which was included the land in controversy. In describing the lands they were not separated into distinct claims, nor was any claim designated by name. A similar

affidavit of said Straup was filed for the years 1900, 1901 and 1902, each one describing several hundred acres, including the land in controversy.

In January, 1903, the La Prele Oil Company was incorporated under the laws of this state with the defendant, Moses Bijur, as one of the incorporators, and Straup was named in the certificate as one of the seven trustees for the first year, and it appears that he became a stockholder of the company. Under the date of May 5, 1903, a written contract was entered into between the defendants, Straup and Bijur, whereby the former, in consideration of one hundred dollars per month, to be paid him as salary and expenses, agreed to look after, direct, manage, and attend any work, labor or interest the said Bijur might require of him, and to devote his best energy and ability in safeguarding and advancing the interest of said Bijur, and to devote all his time during such employment for said Bijur's benefit. The latter is a merchant, residing in New York City, and Straup is an oil and gas driller, and, at the time of trial, had been engaged in that occupation between seven and eight years in Converse county. They appear to have contemplated by their contract the performance of services by Straup in Converse county in ¹³ prospecting and developing oil and gas lands or claims in the interest of and as directed by Bijur. It is admitted that Bijur was the agent of eight other persons named in the answers, for whom he acted in directing the work to be done by Straup under said contract of employment.

It appears that sometime in July, 1903, under Bijur's instructions, Straup went upon the northeast quarter of section 3 aforesaid, the same being the north half of the land previously marked, designated and recorded as "Gusher No. 2," and drilled a well of considerable depth thereon, resulting in striking a good flow of gas, the well being located near the southeast corner of said tract. Thereafter, also at Bijur's direction, on or about October 13, 1903, he moved the drilling machinery upon the premises here in controversy, and proceeded to drill an oil or gas well thereon at a point about one hundred and fifty feet south from the well above mentioned, and thereby, October 22, 1903, discovered gas at a depth of about four hundred and eighty feet. It is admitted in the pleadings that in drilling this last-mentioned well and thereby striking gas Straup acted for and represented Bijur and the eight persons whose names are set out in the answer whom Bijur represented as agent. For and on behalf of the eight persons aforesaid, and in their names, a placer mining claim was located by Straup, acting by the direction of Bijur and

as his employé, embracing as a part of the claim so located the land here in controversy, and it is admitted that the La Prele Oil Company is the successor in interest of said parties, though it is denied that it or they thereby acquired any interest in the land as against the plaintiffs.

The fact that Straup's discovery of gas on the land in 1903 was made by him while employed by and representing Bijur and through the latter those he represented was alleged in the answers filed in the case and admitted by the replies, but that admission does not stand alone. A leading contention of the plaintiffs was and is that as they held a conveyance by Straup describing the premises as oil placer mining ground, located, held and recorded by ¹⁴ him, he and the defendants are estopped from questioning the validity of his original location or the right of plaintiffs to the possession of the land conveyed. The petition alleged in substance in that connection that in January, 1903, the said Straup induced the defendant, Bijur, to become associated with him for the purpose of jumping the said claim, and thereby deprive the plaintiffs of the same, and to better carry out that purpose, they, with others, organized the defendant corporation, the La Prele Oil Company; and further, that Straup, acting for himself and as the agent of the other defendants, with a large force of employés, during the temporary absence of plaintiffs and their employés from the claim, surreptitiously, secretly and fraudulently carried upon the same a portable drilling rig, and commenced to drill an oil and gas well thereon, for the purpose of driving the same to gas or oil, which he did continue to do, and of depriving the plaintiffs of all use of their said land. The allegation that Straup acted for himself as well as agent is probably eliminated as the effect of the admission in the reply that he acted for and represented the other parties named in the answer; but the averment remains for whatever it may be worth, that his act was surreptitious, secret and fraudulent.

The petition alleged that through said Straup the original locators of the claim located in 1899, claimed by the plaintiffs as the source of their title, and their respective grantees, were in continuous and exclusive possession of the claim, while they held the same respectively, and that the plaintiffs went into possession of the tract in controversy upon receiving the conveyance thereof, and that from and after August 18, 1902, they immediately proceeded to work upon the claim for the purpose of developing the oil and gas which was underneath its surface, that their possession was open, exclusive and notorious, and that the land was not vacant and unappro-

priated when the defendants entered upon the same in October, 1903. The defendants by their separate answers denied the allegations as to the possession of the plaintiffs and their grantors.

¹⁵ The plaintiffs base their right to recover and their contention that the findings and judgment are erroneous upon three principal propositions: 1. That the claim located in 1899, though previously lacking a discovery, was validated in that respect by the discovery upon the north forty acre tract embraced in the claim, through the well drilled thereon by or under the supervision of Straup as aforesaid, which discovery it is claimed inured equally to the benefit of the south forty acre tract that had been conveyed to plaintiffs, so as to perfect the title of the latter thereto. 2. That the plaintiffs were in actual possession of the forty acre tract in controversy, working and exploring the same for oil and gas, and it was therefore not open to exploration or location as a placer mining claim by others intruding upon their possession without their consent. 3. That Straup and the other defendants, including those for whom it is admitted he acted in making the discovery and location under which the defendants claim, were and are estopped by his deed to the plaintiff, Phillips, from claiming the premises or any right therein as against the plaintiffs.

Before proceeding to a discussion of the questions involved in these propositions, it will be well to state the effect of the evidence touching the actual possession of the land in controversy. There is very little, if any, conflict in the evidence concerning that matter. Counsel for plaintiffs in error has stated in his brief the facts as to their possession as strongly as the evidence will justify, and we quote what is there said:

“The land herein involved is in immediate vicinity of, and adjoining other lands owned by the company represented by the said Phillips and his two brothers. A county road runs a little northeast and southwest near the center of the forty acres in question. At all times involved in this case work was being done on the claim in which the plaintiffs in error were interested in the vicinity of this particular tract of forty acres, and Phillips and his two brothers, also officers of the company they represented, and the ¹⁶ employés of the said company, were passing to and fro along this county road two and three times a week and sometimes oftener, and from the time the deed was given to Phillips, the said three brothers and their employés doing work in that vicinity were constantly

watching the land in question, looking over it and going over it not only along the county road, but over the land itself.

"In November, 1902, J. Bevan Phillips set a man, Morris, to work digging a hole south of the county road and near the southeast corner of the subdivision in question, the hole being ten feet deep and six by four feet in lateral dimensions. Plaintiffs in error assuming that Straup's affidavit made on December 30, 1902, showing that the development had been done covering the land in question for the year ending December 31, 1902, did not consider that they were required to do any assessment work for the year 1902; but for the purpose of showing their possession of the claim and to prepare a place for the better setting of their drilling machine at a subsequent date, had this hole dug. The man digging the hole did not work at it continuously, but worked at it during parts of several days in the month of November, 1902, the value of his work being computed at about seven or eight dollars. There was no fence put around this forty acre strip, nor were any buildings erected on the same by plaintiffs in error, nor was it the custom of prospectors in that field, or of defendants in error, or of plaintiffs in error, to fence each claim, or to fence at all, the claims which were located; but on October 21, 1903, the land was surveyed at the request of plaintiff in error, Whiting, and the boundary line between the north forty and the south forty of 'Gusher No. 2' was distinctly pointed out by the surveyor, who had, about two weeks previous thereto, surveyed the same at the request of defendants in error, Straup, and Bijur, both of whom were present and both of whom knew the said boundary line, though probably this survey was made as early as June 28, 1903.

"Nothing further was done by plaintiffs in error, or on their behalf, except to watch the land to keep it free from ¹⁷ entry by any prospectors, and especially by defendants in error; and their employes who were working under the supervision of Phillips and his two brothers in the immediate vicinity were instructed to keep a strict watch over the land in question. Other than doing these things and constantly watching the land themselves in going over it along the county road, nothing was done in the way of work by the plaintiffs in error until December 16, 1903, at which time plaintiffs in error moved a portable drilling rig upon the forty in question and commenced drilling a well at the hole. This well was dug down a distance of one hundred and eighty-five feet at an expenditure of four hundred dollars. At this distance the work was stopped on December 24th, to enable the drill to be taken

off for the purpose of enabling assessment work to be done on adjoining claims for the year 1903.

“On January 5, 1903, the plaintiff in error, Phillips, left for Europe, making his brother, Arthur, his agent in the meantime, to look after the claim in question, and under his supervision, in the absence of his brother, the work of watching the land to prevent its being occupied by what is known as ‘claim jumpers,’ was carried on, and in September, 1903, a man by the name of Greenwood was employed to work upon and look after the Mitcham and Ravensbury claims located by the said Phillips and others, and adjoining the claim in question, as well as to look after the claim in question, during which time arrangements were being made to bring a portable machine upon the land and to drill with the same at the hole in question, the said Phillips and his brothers not deeming that they had a right to use the machine which belonged to the company they represented, and which was being used in drilling upon the company’s lands, without permission of the company, which had to be obtained from London, and as soon as this permission was obtained, the machine was brought upon the land at the time above stated. The particular reason why Greenwood was instructed to watch these claims was because notices of filing upon many claims in the immediate locality, including the claim in question, were ¹⁸ being made by defendants in error, and Greenwood was instructed particularly to watch the lines of the Mitcham and Ravensbury claims and of the claim involved in this case.” The moving upon the premises of the drilling machine by the plaintiffs in error, December 16, 1903, and the drilling therewith, occurred after the drilling of the well on the premises for Bijur by Straup, and after the commencement of this action.

There is no evidence that prior to his conveyance to Phillips, Straup or either of his coclaimants of the claim located in 1899 as “Gusher No. 2” had been in the actual possession or occupancy of the ground covered thereby. Though his assessment affidavits stated that work had been done on the land embraced in that claim, the locality and character of such work was not shown. In going upon the north forty of the claim in 1903 and drilling the well thereon, as well as upon the south forty, Straup testified that he went thereon and did, or rather, superintended the work for Mr. Bijur, and at his direction, and not for himself, and that is corroborated by the testimony of Bijur, and does not seem to be contradicted. According to their testimony such

work was not done for the La Prele Oil Company, but the intention was at the time, so Bijur says, to organize a separate company, but subsequently the claim that was located was conveyed to the La Prele Company. Straup knew when he was engaged in drilling the second well that it was on the forty conveyed by him to Phillips, and it may be that Bijur also knew that fact. Straup and Bijur both knew, however, that there had been no previous discovery on the Gusher claim, and that the plaintiffs were not actually occupying or working the ground.

Aside from the fact of the knowledge of Straup and possibly of Bijur of the previous attempt to locate and appropriate the premises, and the fact that they entered thereon under the circumstances mentioned, from which their purpose might be inferred, there is no reasonable support in the evidence of the averments of the petition as to a collusive arrangement between them to deprive the plaintiffs ¹⁹ of the land in controversy. We think the fact must be regarded as established upon the evidence that in all that Straup did in connection with drilling the wells aforesaid, and locating the claim or claims based upon the discovery or discoveries thereby made, he acted as the employé and under the instruction of Bijur, and not for himself. Neither does the evidence sustain the averment that the entrance of the defendants upon the premises in controversy was secret or surreptitious, at least in the sense that it occurred in a manner calculated to mislead or take advantage of one actually occupying and exploring the same, or as distinguished from an act done openly and without concealment.

Lands containing petroleum or other mineral oils or a deposit of natural gas may be located as placer claims under the mining laws: 29 U. S. Stats. at Large, 526; 2 U. S. Comp. Stats. 1901, p. 1434; 27 Cyc. 558. It is well settled that whether it be a lode or placer claim a discovery of mineral within the limits of the claim is essential to a valid location of a mining claim on the public domain. Though such a location must rest upon discovery and will not be complete until the discovery is made, it is not required, in the absence of intervening rights, that discovery shall precede the other acts of location. If made prior to any intervening rights, though subsequent to marking the boundaries and recording the claim, the location, if otherwise good, will be validated at least from the date of discovery: 1 Snyder on Mines, sec. 354; 1 Lindley on Mines, 2d ed., sec. 330; 27 Cyc. 556; Creede etc. Min. & Mill. Co. v. Uinta Tunnel etc.

Co., 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 401. It is said in Snyder on Mines at the section cited that the location in such case will be good from the date of discovery, "and generally from the first act toward claim and appropriation—this by relation." In Nevada-Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, Circuit Judge Ross said in the opinion: "To constitute a prior discovery which will support a location on public ground as an oil placer claim under the mining laws, the locator must have actually discovered ²⁰ oil within the limits of his claim. Mere surface indications of the existence of oil therein, however strong, are not sufficient, nor is the existence of oil upon adjoining lands."

A placer claim is limited to twenty acres for each individual locator, and the aggregate that may be located as one claim by an association of persons is limited to one hundred and sixty acres. When more than twenty acres is located as one claim, it is now settled that one discovery is sufficient for the entire claim: 27 Cyc. 559. Upon a valid location a legal right of possession follows.

It is conceded that there was no discovery upon the Gusher claim located in 1899, nor on the land covered thereby, until the discovery that was made upon the north forty acre tract in September, 1903, by means of the well drilled thereon under the circumstances above stated. Waiving the question whether that discovery might have been held to validate the Gusher claim, not only as to the forty upon which it was made, but also as to the forty that had been conveyed to Phillips, if Straup had made it in his own interest for the benefit of such claim, which question we expressly refrain from deciding, the facts are that in entering upon the land at the time stated in 1903, in drilling the well and making the discovery, Straup acted not for himself, but as the employé and agent of Bijur and the other parties whom the latter represented.

Now, it is not required that a party shall act in person in locating a mining claim, but he may act by an agent, and a location may even be made by an agent without the knowledge of the principal, if there is a local rule authorizing it, or otherwise there may be antecedent authority or subsequent ratification: 1 Lindley on Mines, sec. 331. And it is said that when a location is made by one in the name of others, the persons in whose names it is made become vested with the legal title to the claim: 1 Lindley on Mines, sec. 331. Not only was Straup acting for and in the interest of Bijur, but it appears that at or about the time of the

discovery Bijur was present and personally directed his acts. We cannot conceive that, under the circumstances, Straup could ²¹ have appropriated to his own benefit the work performed by him at the expense and under the direction of his employer, so as to validate his own previous location, which without a discovery was not valid. The plaintiffs are not in any better situation. The discovery on the north forty was made by strangers to the claim that had been located in 1899, and in the interest of another claim antagonistic thereto. We are aware of no reason why it was not competent for Straup to abandon that part of his previous location not conveyed to Phillips, or to consent to others entering upon and exploring the same in their own interest. The fact that Straup did the work or superintended it for the other parties did not constitute him the discoverer in any other capacity than that in which he was employed and acted. His work, and his possession in the meantime, amounted in legal effect to the work and possession of those whom he represented. It is clear, therefore, that the discovery upon the north forty cannot be regarded as having validated the previous location under which the plaintiffs claimed. That being true, the plaintiffs were not holding the premises in controversy under a valid location, and if they had any right to the land, it was because they were in such actual possession thereof as to prevent others from making a valid location thereon, or because the defendants were estopped from challenging the validity of the previous location as against them.

Taking up first the question of estoppel: If it be conceded that Straup would be estopped by reason of his conveyance from denying the validity of the former location, that would not estop the other defendants. The possession was not awarded to him, nor was he found by the trial court to be entitled to possession. It was found, and so adjudged, that the right to possession had vested in the other defendants who had filed a separate answer. In Straup's separate answer he practically disclaimed any interest, and alleged that his acts were performed as the paid employé of Bijur, and that the La Prele Oil Company ²² was entitled to possession as the successor in interest of the locators.

The company and Bijur were not claiming under Straup, nor under the location of 1899, nor any previous location made or held by Straup in his own interest. They were not in privity with him as to such previous location. If they knew anything about it they knew that there had not been

a discovery to support that location, and that the land was therefore vacant and unappropriated, except so far as it might be in the actual possession of someone. The employment of Straup to do the work of exploration, discovery and location for another claim did not bring Bijur and those whom he represented into privity with him, so as to render them bound or estopped by his former acts or conveyance. We find no evidence of fraud in the conduct of the defendants. We think it cannot be held that because Straup had once assumed to make a location of the land without having made a discovery such as would justify or validate it, and to have conveyed the premises or a part thereof as a placer claim, he could not in good faith be engaged by others as an agent or employé to enter for them into peaceable possession of the premises so conveyed, and at their expense, in their names and behalf, explore the same for mineral and make a valid location thereon as against those claiming under his conveyance. The doctrine of estoppel does not go that far. Neither does the fact that Straup was a stockholder of the La Prele Oil Company, to whom the claim located in 1903 covering the premises in controversy had been conveyed by the locators, estop that company from claiming the premises or questioning the right of the plaintiffs thereto. The company did not acquire any right or privilege from Straup, nor was he one of the locators of the claim conveyed to it; and there is nothing in the evidence upon which it could be held that the company had entered into a collusive or fraudulent agreement with Straup for the purpose of assisting him to regain the property conveyed to Phillips through a new location, and ²³ thereby avoid the effect of his conveyance. Straup acquired no new interest, but by his acts as agent for others lost whatever interest in the Gusher claim he had previously retained.

This brings us to a consideration of the question whether the predecessors in interest of the defendant company were prevented by the facts as to the possession of the plaintiffs from peaceably entering upon the premises in controversy through their representatives, Bijur and Straup, or otherwise, and exploring the same for the purpose of making a location under the mining laws.

Although a valid location is necessary to vest the legal right of possession in a claimant to land under the mining laws, yet possession without location is good as against a mere intruder. As a general rule, the mere naked posses-

sion will not avail against a valid location peaceably made, and hence it confers no right against a bona fide prospector who enters upon the land peaceably for the purpose of acquiring title thereto as a mining claim. It is well settled also that the right to make a location cannot be based upon a trespass: 27 Cyc. 560, and cases cited. But owing to the necessity of a discovery upon which to base the location of a mining claim, and the policy of the law to avoid breaches of the peace through conflicts between rival prospectors, the rule has been enunciated, and may be regarded as well settled, that where one seeks in good faith to make a location, he is entitled to exclusive possession of the land sought to be located for a reasonable time to complete his location, or for such time as may be allowed by the customs or rules of miners, or the statutes of the state or territory: 27 Cyc. 559; 1 Snyder on Mines, secs. 233-235; 1 Lindley on Mines, 2d ed., sec. 219.

To be available for the purpose aforesaid, however, the possession, where that is alone relied on, must be actual, and connected with active diligent work of exploration with the bona fide intention, if mineral is found, to make a location: 1 Snyder on Mines, sec. 236; *Miller v. Chrisman*, ²⁴ 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *New England & Coalinga Oil Co. v. Congdon*, 152 Cal. 211, 92 Pac. 180; 1 Lindley on Mines, 2d ed., secs. 216-219.

In *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444, after stating that a discovery might follow the other acts of location and thus make the location good as against all the world, saving those whose bona fide rights have intervened, the court said: "One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession."

And in *New England & Coalinga Oil Co. v. Congdon*, 152 Cal. 211, 92 Pac. 180, it was said: "But where the alleged locator has not made a discovery and has not retained possession for the purpose of prosecuting work looking to a discovery, his mere posting of notice and marking the boundaries upon the ground will not serve to exclude others who may peaceably enter upon the land which he is not actually working or occupying."

Tested by the above rules, it is clear that at the time the predecessors in interest of the defendant company, through

their agents, Bijur and Straup, entered upon the land, erected the drilling machinery thereon, and thereby made the discovery of gas, the plaintiffs were not maintaining, and for some time at least had not maintained, such a possession as, unaided by a valid location, would exclude other bona fide locators or prospectors. They were neither in the actual possession nor occupancy of the land, nor engaged in prospecting or exploring the same for mineral. Although they acquired whatever rights they had under the conveyances aforesaid in August, 1902, the only actual work done by them upon the premises was the digging the hole above mentioned in November of that year, which confessedly was not expected to uncover a deposit of oil or other mineral, but was intended chiefly, as it seems, to show their claim of possession, and also to serve as preliminary to the erection of a drilling machine. But whatever the reason ²⁵ for the delay, more than a year elapsed after digging the hole before they took a machine upon the premises and commenced the actual work of exploration, and, in the meantime, the parties under whom the defendants claim had peaceably gone upon the land and made their discovery and location; and when they went upon the land it is conceded, and indeed alleged by the plaintiffs, that the latter and their employés were absent therefrom.

Neither the fact that in going to and fro between other lands or places the plaintiffs frequently crossed the land by traveling along the county road thereon, nor that they watched the land to see that it was not interfered with by others, is entitled to much consideration as showing actual possession of an incomplete mining claim. As said in *Creede etc. Min. & Mill. Co. v. Uinta Tunnel Co.*, 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 401, the principal thought of the chapter of the federal statutes concerning the location of mining claims is the exploration and appropriation of mineral. Merely watching a tract of land or an intended claim for a considerable time as in this case to see that it is not intruded upon by others, without the performance of any work calculated to assist in its exploration or development, will not conduce materially to either the discovery or appropriation of mineral. In the case of *New England & Coalinga Oil Co. v. Congdon*, 152 Cal. 211, 92 Pac. 180, it appeared that a watchman had been employed by a party to watch the land in controversy as well as others, which is the situation here, and it was held insufficient to show actual possession, and the trial court was held to have been justi-

fied in concluding that there had not been actual possession, but merely a pretense of occupation without any intention of actually proceeding to development for mineral oils.

For the reasons above stated we are of the opinion that the plaintiffs failed to show a right to the premises as against the defendant, the La Prele Oil Company, or a right to an injunction as prayed for, and that the district court properly found against them. The fact that Bijur as well as the La Prele Oil Company was adjudged to be entitled to possession is not material so far as the plaintiffs ²⁶ are concerned, and it does not appear that Bijur claims adversely to or independently of the company. The judgment will be affirmed.

Beard, J., and Carpenter, D. J., concur.

Honorable Charles E. Carpenter, judge of the second judicial district, sat in the place of Scott, Justice, who, as district judge, had presided at the trial below.

The Validity of the Location of a Mining Claim, according to Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, depends primarily upon the discovery of a vein or lode within its limits, and is valid from the time of such discovery only, a discovery not relating back to the date of the original location: See, also, McMillen v. Ferrum Min. Co., 32 Colo. 38, 105 Am. St. Rep. 64.

A Location of Oil Lands is Invalid if the locator had at the time made no discovery of mineral on the land: Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63.

If the Location of an Oil Claim is not Valid, its abandonment is not necessary to the making of a subsequent location: Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63. But the mere cancellation of an entry of a mining location does not render the ground open to relocation: Rebecca Gold Min. Co. v. Bryant, 31 Colo. 119, 102 Am. St. Rep. 17.

The Location of Oil Lands is Governed by the mineral laws of the United States, applicable to the location of placer mining claims. To the location of oil lands, two requirements are essential: There must be a distinct marking of the location so that the boundaries can be readily traced, and the discovery of mineral must be made within the limits of the land located: Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63.

PATRICK v. STATE.

[17 Wyo. 260, 98 Pac. 588.]

APPEAL AND ERROR.—Where there is no bill of exceptions, the only alleged errors that can be considered on appeal are such as appear on the record, which, in case of a criminal prosecution, presents but two questions, namely: the sufficiency of the information or indictment and the jurisdiction of the court over the matter or proceeding. (p. 1110.)

CRIMINAL PROSECUTION—Information Charging What the Defendant did and also that He Caused the Act to be Done.—An information charging the defendant with bringing into the state sheep infected with scab, and also that he caused such sheep to be brought into the state, is not bad because of the latter charge, for if it is not a crime, it is mere surplusage, and the statute provides that a surplus allegation shall not render the indictment or information invalid where there is sufficient matter alleged to indicate a crime. (pp. 1110, 1111.)

INTERSTATE COMMERCE—Statute Against Bringing into the State Sheep Infected with Scab.—A statute making it criminal to bring into the state sheep infected with scab or other infectious or contagious disease, or that have in any manner been exposed thereto, is not an attempt to regulate interstate commerce, but is a reasonable exercise of the police power. (p. 1111.)

APPEAL AND ERROR—Unintelligible Brief.—A brief assailing a statute as unconstitutional, citing a section of the constitution having no reference to the matter and statutes immaterial to the question sought to be presented, and incorrectly quoting other statutes and their titles, is so far unintelligible that it presents no question. (p. 1112.)

CRIMINAL LAW—Venue of Prosecution for Bringing Diseased Sheep into the State.—The venue for a prosecution for bringing diseased sheep into the state is not necessarily in the county where they first passed the state line, but may be in an interior county to which the sheep were shipped by rail. (p. 1112.)

Allen G. Fisher, for the plaintiff in error.

W. E. Mullen, attorney general, for the state.

263 BEARD, J. An information was filed by the county and prosecuting attorney of Natrona county in the district court of that county charging the plaintiff in error, E. W. Patrick, with the crime of bringing into the state sheep that were infected with scab. The charge contained in the information being as follows: "That E. W. Patrick, late of the county aforesaid, on or about the sixth day of December, A. D. 1906, in the county of Natrona, in the state of Wyoming, did **264** willfully and knowingly bring into the state of Wyoming, and county of Natrona and did willfully and knowingly cause to be brought into the county and state aforesaid one hundred and eighty-eight head of bucks, the

said bucks being then and there infected with scab." To this information he pleaded guilty and was sentenced to pay a fine of seven hundred and twenty-five dollars, and costs. From that judgment he brings the case here on error.

There is no bill of exceptions in the case, and hence the only alleged errors that can be considered here are such as appear upon the face of the record. The record contains the information, the plea of guilty by the defendant, the judgment, and what is entitled a motion in arrest of judgment, and the order of the court denying said motion. The assignments of errors as contained in the petition in error are: "1. The district court of Natrona county was without jurisdiction of the subject matter of said prosecution; 2. The said information filed herein on December 8, 1906, wholly failed to state facts which constitute any violation of the laws of Wyoming; 3. The court was without jurisdiction to give judgment; 4. The court erred in overruling the motion of defendant in arrest of judgment; 5. The court erred in overruling the motion of defendant to set aside his plea of guilty."

In the absence of a bill of exceptions it is clear that this record presents but two questions, viz.: The sufficiency of the information to state an offense; and the jurisdiction of the district court of the subject matter of the action. The statute upon which the information is based is section 2090, Revised Statutes of 1899, as amended and re-enacted by section 4, chapter 98, Session Laws of 1905, and is as follows: "It shall be unlawful for any person to bring into this state any sheep infected with scab or any other infectious or contagious disease, or that have in any manner been exposed to such disease. If any person shall violate the provisions of this section, he shall, upon conviction thereof, be punished by imprisonment in a county jail for a term of not exceeding sixty days or a fine of not ²⁶⁵ less than five hundred nor more than one thousand dollars, or both."

It is argued that the information is bad because it alleges that the defendant brought diseased sheep into the state, and also that he caused them to be brought in; and that the court could not know by defendant's plea which of these acts he committed, and that the latter is not a violation of the statute. It is not claimed that the information does not sufficiently charge the offense of bringing diseased sheep into the state; and if it be true that the fact that he only caused them to be brought in is no crime, then that allegation was mere surplusage and by the express provision of

our statute "no indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected: . . . for any surplusage or repugnant allegation where there is sufficient matter alleged to indicate the crime or person charged": Rev. Stats. 1899, sec. 5301. And, again, the objection is to the manner in which the offense is charged and the defect, if any, was waived by pleading to the merits. By pleading guilty the defendant admitted the facts that were sufficiently pleaded. He admitted that he brought the sheep into the state and that they were infected with scab; and that constituted the offense.

It is also claimed that the statute is void because it conflicts with the clause of the constitution of the United States that ordains: "Congress shall have power to regulate commerce with foreign nations and among the several states," etc. But we do not regard our statute as an attempt to regulate interstate commerce or as in fact doing so; but is rather a reasonable and necessary exercise of the police power of the state to exclude from its borders diseased sheep, the introduction of which would endanger the sheep industry of the state. A statute of Colorado which made it a misdemeanor for anyone to bring into the state diseased animals or those that had been brought in contact with such diseased animals within ninety days ²⁶⁶ prior to their importation; and also prohibiting the bringing into the state of horses or cattle from a state or territory south of the thirty-sixth parallel of north latitude during certain seasons, unless the importer should procure from the state veterinary sanitary board of Colorado a certificate that the animals were free from all infectious or contagious diseases, was attacked upon the ground that it violated the constitutional provision above referred to. The case went to the supreme court of the United States, and it was held that the statute was valid; and in the opinion that court said: "Now, it is said that the defendant has a right under the constitution of the United States to ship livestock from one state to another state. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a state, against its will, livestock affected by a contagious, infectious or communicable disease, and whose presence in the state will or may be injurious to its domestic animals. The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, tak-

ing care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the constitution of the United States": *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. Rep. 92, 47 L. ed. 108. And in *Hannibal & St. J. R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, the right of a state to pass sanitary laws for the protection of life, health or property within its borders, and to prevent persons and animals suffering from contagious or infectious diseases from entering the state, is expressly admitted, so long as such laws do not interfere with transportation into or through the state beyond what is necessary for its self-protection. It might not be out of place to suggest that it may at least be questionable whether either animals infected with an infectious or contagious disease, or articles containing the germs of disease, the introduction of which into a state would endanger the health of its domestic animals ²⁶⁷ or its inhabitants, can be regarded as articles of commerce exempt from state police regulations.

It is further contended that the statute is unconstitutional by reason of some defect in its title; and counsel for plaintiff in error cites section 23 of article 3 of the constitution of Wyoming, but that section has no reference to the title of an act. He then purports to quote from another provision of our constitution but does not quote it correctly. He then quotes the title to chapter 57, Session Laws of 1897, and states in his brief that "the legislature of 1897 enacted chapter 30, headed 'Sheep Inspectors,' entitled 'An act to amend chapter 57 of the Session Laws of 1897, approved March 1, 1897,' " etc. Chapter 30, Session Laws of 1897, has no reference whatever to chapter 57, Session Laws of 1897, and relates to an entirely different subject. The brief in this respect is so unintelligible that it presents no question.

It is further contended that the district court of Natrona county had no jurisdiction of the offense, for the reason that Natrona is an interior county and that the offense, if committed at all, must have been committed in the county which the sheep first entered. We think the point is not well taken. It is stated by counsel in argument that the sheep were shipped by rail to a station in Natrona county, that being their destination, and there is nothing in the record to the contrary. The statute does not attempt to prohibit shipments in that manner of such sheep through the state or through any county, but prohibits the bringing into any

part of the state diseased sheep, the effect of which would be to endanger the health of its domestic sheep.

We find no error in the record, and the judgment of the district court is affirmed.

Potter, C. J., and Scott, J., concur.

A Statute Prohibiting the Bringing of Cattle into the State from below its southern line at all seasons of the year unless inspected by some inspector authorized by the livestock commissioner or by the bureau of animal industry of the interior department of the United States, and passed under a health certificate, and making persons violating the statute guilty of misdemeanor and punishable, does not impose an unreasonable restraint upon interstate commerce: *State v. Asbell*, 74 Kan. 397, 121 Am. St. Rep. 345. See, also, *Reid v. People*, 29 Colo. 333, 93 Am. St. Rep. 69; *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653. But in *State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, it is held that a statute making it unlawful to bring sheep into the state without having them inspected and dipped is repugnant to the commerce clause of the federal constitution.

WELTNER v. THURMOND.

[17 Wyo. 268, 98 Pac. 590, 99 Pac. 1128.]

CONTRACT, Reform of for Mistake Due to Inattention and Negligence.—One is not entitled to have a contract reformed because it does not express his intention, if he did not read it nor have it read to him, and the mistake, if any, was due to his inattention and negligence without his being in any way misled as to the contents of the contract. (p. 1121.)

MORTGAGE—Deed With an Agreement that if the Property is Sold, the Proceeds shall be Applied to Paying a Sum Designated.—If a mortgagor conveys the mortgaged premises to the mortgagees, and they give an agreement reciting that the mortgage has been paid by the conveyance and declaring that if the property is sold, the grantor shall have all the proceeds of the sale over and above the sum required to satisfy the mortgage indebtedness, with interest and taxes and other expenses, this does not constitute a mortgage where the evidence is not conclusive of the continuance of the debt as a personal obligation of the original mortgagor, and the mortgage has been released on the record. (pp. 1122, 1123.)

MORTGAGE.—A Conveyance cannot be a Mortgage Unless given to secure the payment of a debt. (p. 1123.)

TRUST, When Created by an Agreement that if Property is Sold, Another shall have the Proceeds Above a Stated Amount.—An agreement given by the grantees of a deed received from their mortgagor that if the property is sold for more than enough to pay certain claims and expenses, all sums over and above this shall be paid to such grantor, amounts to more than a simple promise, and creates a trust under which the title is held for the purposes stated in the agreement. (p. 1124.)

A TRUST is an Obligation upon a Person Arising Out of a Confidence reposed in him to apply property faithfully and according to such confidence. (p. 1124.)

TRUST, Duty to Sell Property, When Creates.—A contract that if property shall sell for more than enough to pay certain claims, the balance of the proceeds shall be paid to a designated party, imposes a duty on the person holding the title to make sales for the purpose of paying the claims and realizing the balance to be paid as provided. Though there is some discretion as to the time of sale, it is only such as will enable the trustees to deal with the property prudently and reasonably in carrying out the evident purpose of the contract. (p. 1125.)

TRUST TO SELL PROPERTY, When Requires an Accounting for Rents and Profits.—Where persons hold property under a trust to sell and to pay over all the proceeds after satisfying certain claims to another, he is entitled to have them account for rents and profits received, when it appears that they did not sell the property when they might have done so, and, on the other hand, refused, though a sale might have been effected and the claims thereby paid and the balance realized. (p. 1133.)

INTEREST, When Allowable and at What Rate Under an Agreement to Sell Property and Apply the Proceeds.—If mortgagees receive a conveyance of the mortgaged premises and execute an agreement specifying that such conveyance has been received in satisfaction of the mortgage debt, but stipulating that if the property is sold for more than enough to pay all the claims of the grantees, including interest, insurance, taxes and all other legitimate expenses, then all sums of money over and above all of the grantees' lawful claims are to be paid to the grantor, the grantees are entitled to interest, but at the legal rate only, and not at a rate specified in the notes which the mortgage was given to secure. (p. 1134.)

LIMITATION OF ACTIONS.—In the case of an express and continuing trust, the statute of limitations does not begin to run until the repudiation or adverse possession by the trustee and the knowledge thereof on the part of the beneficiary. (p. 1134.)

LIMITATION OF ACTIONS.—Under an agreement that if land sells for more than enough to pay certain claims, the balance shall be paid to one of the parties to the agreement, the statute of limitations does not run against him until he knows that the other party repudiates the agreement or denies holding the property under the trust. (p. 1134.)

LACHES, When not Fatal to a Demand that Property be Sold and Proceeds Applied.—Under an agreement between a grantor and the grantees in a conveyance that if the premises conveyed sell for more than enough to pay specified claims, interest and expenses, the grantor shall have the remainder of the proceeds of the sale, he is not guilty of laches precluding his enforcing the agreement by the failure to bring any suit thereon until nine years after its execution, if the grantees had not repudiated nor denied the agreement until within a few days prior to the commencement of the suit, and did not appear to have suffered any loss or inconvenience from the complainant's delay, unless, possibly, the loss of a higher rate of interest than they might have realized had they sold the property at an earlier day. (p. 1134.)

SPECIAL MASTER COMMISSIONER.—The allowance of five hundred dollars as compensation to a special master commissioner under the facts of this case is not excessive nor illegal. (p. 1135.)

TRUST TO SELL REAL PROPERTY and Apply the Proceeds—Right of the Beneficiary to Pay Obligation and Avoid the Sale.—

Under an agreement that if property conveyed sells for more than enough to pay specified obligations, the grantor shall have the remainder of the proceeds, a decree permitting him to satisfy such obligations and thereupon to receive a conveyance of the property is not improper where, though having had an opportunity to make the sale themselves, the grantees did not do so. (p. 1136.)

Stotts & Blume, for the plaintiffs in error.

Lonabaugh & Wenzell, for the defendant in error.

²⁸³ POTTER, C. J. In 1893, John D. Thurmond was the owner of certain lands in the county of Sheridan, in this state, and mortgaged the same to John C. Weltner and Frederick H. Weltner to secure his promissory note to them for \$2,500, bearing interest at eighteen per cent per annum. In 1895 he executed a second mortgage upon the premises to John C. Weltner to secure a note for \$500, bearing the same rate of interest. On January 13, 1897, the indebtedness being past due, and a balance remaining unpaid, Thurmond executed and delivered a warranty deed conveying the premises to John C. Weltner and Frederick H. Weltner, for the stated consideration of \$4,000, and on the same date and as a part of the transaction the parties made and signed the following contract in writing:

“This agreement made this 13th day of January, 1897, between John C. Weltner and Frederick H. Weltner of Sheridan County, Wyoming, parties of the first part, and John D. Thurmond of Sheridan County, Wyoming, party of the second part.

“Witnesseth: That in consideration of a warranty deed, bearing even date herewith and executed by said second party to said first parties, upon lots 5, 6, 7 and 8 in block sixteen, original town of Sheridan, Wyo., and lots B, C, E, G and H, Thurmond 3rd Addition to the town of Sheridan, Wyoming, and N $\frac{1}{2}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 24, Tp. 56 N., R. 83 W, and W $\frac{1}{2}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 13, Tp. 56, N., R. 83 W., all in Sheridan County, Wyoming, and in payment of two certain mortgages upon said above described premises given to said first parties by said second party, the amount now being due and owing to said first parties from said second party being about \$4,000.

“It is hereby agreed by and between the parties hereto, that in case said property sells for more than enough to pay off the claim of said first parties, including principal, interest, insurance, taxes and all other legitimate and legal expenses, then all sums of money over and above all of ²⁸⁴ first

parties' just and lawful claim is to be paid to said second party.

"Witness our hands this 13th day of January, 1897.

"(Signed) J. C. WELTNER.

"(Signed) F. H. WELTNER.

"(Signed) JOHN D. THURMOND.

"Signed in the presence of J. F. HOOP."

This suit was commenced January 29, 1906, and was brought by Thurmond against John C. and Frederick H. Weltner to redeem or have the property sold and the proceeds applied according to the agreement. The deed is alleged to have been executed and delivered in consideration of the aforesaid agreement, and in payment of the mortgage indebtedness, also as security for the payment of a claim of the defendants against the premises in the sum of \$4,000, and in trust for plaintiff's use and benefit, to sell the property and apply the proceeds as stated in the contract. A demand for an accounting under the contract is admitted by the pleadings to have been made and refused on January 27, 1906, and plaintiff alleges that the defendants then for the first time repudiated the trust and advised plaintiff that they would not be bound by the contract.

The answer denies that the deed was executed as security or in trust as alleged in the petition, but admits that it was executed in payment of the mortgage indebtedness, and denies that there was any consideration for an obligation on the part of defendants to sell the property, if such an obligation was imposed upon them by the contract. The agreement for the payment to plaintiff of the proceeds of sale in excess of the claim of defendants is alleged to have been limited to "not to exceed three years," and that a sale during that period could not have been made for an amount equal to the claim of defendants, and a reformation of the contract is prayed for in accordance with such agreement. Other defenses are set out in the answer which will be stated when we come to their consideration. The cause was referred to a special master commissioner to take the evidence and report the same with his conclusions of fact and law.

²⁸⁵ Upon the evidence and stipulations as to the facts, the master reported in substance as his conclusions of fact that the deed and written contract were executed pursuant to an agreement between the parties that if the plaintiff would convey the mortgaged premises to the defendants, the latter would enter into a written agreement giving the plaintiff further time to pay the sum of \$4,000, the amount of the

debt then secured by the mortgages, together with interest, insurance, taxes and all other legitimate and legal expenses, and to redeem the property, without any rate of interest being mentioned; that defendants would sell the property, and if the same should sell for more than enough to pay said sum of \$4,000, with interest, insurance, taxes and all other legitimate and legal expenses, then the excess should be paid by defendants to the plaintiff. That no definite time was fixed either before or at the time of the execution of the deed and written contract for the payment of the claim of defendants with interest and other lawful charges, and the redemption of the property by plaintiff, or for the sale of the property by defendants. That the stipulated net amount of the rents and profits, viz., \$250, together with the sum of \$1,000, received by defendants upon the sale of certain of the town lots should be credited against their claim, as of date July 22, 1901. That after allowing such credit there remained due and owing to defendants the sum of \$5,549.36. That defendants still held title to the property, except certain lots sold as aforesaid, and that the value of the same is \$36,000. That at the time of the commencement of this action, and for a long time prior thereto, the property could have been sold by defendants for a sum greatly in excess of their claim, including interest, insurance, taxes and all other expenses referred to in the written agreement. That the demand of plaintiff on January 27, 1906, for an accounting was refused by defendants, who then for the first time repudiated their said agreement, but before that time had ever recognized and acknowledged the plaintiff's rights under the agreement and ²⁸⁶ his right to redeem upon payment of the lawful claims of defendants against the property. That plaintiff is ready, willing and able to pay the amount found due the defendants; and that the defendants did not at any time expend any money in the care and repair of the premises or for improvements thereon.

As conclusions of law the master found that the defendants are not entitled to a reformation of the written contract; that the deed was conditional and not absolute; that the plaintiff retained an interest in the property and a right to redeem upon the payment of the just claims of defendants against the property; that the defendants were charged with the legal duty to sell the premises, or portions from time to time, in such manner as they could do profitably, and out of the proceeds to first satisfy their own lawful claims, as provided in the agreement, and pay the balance,

if any, to the plaintiff. That the defendants have a lien against the property in controversy for the amount found due them, and that plaintiff is entitled to redeem the property upon payment of said amount, with legal interest from the date of the master's findings. That upon plaintiff's failure to pay said amount with interest and so redeem the property, the same should be sold as upon execution, and the proceeds be applied first to the satisfaction of the costs of sale and the amount found due the defendants with interest as aforesaid, and the surplus paid to the plaintiff.

Exceptions were filed by the defendants to the master's report and his conclusions of fact and law, and upon the hearing thereof and of a motion of plaintiff to confirm the report and findings, the latter motion was sustained and the report and findings approved and confirmed in all respects, and the exceptions were overruled, to which the defendants excepted. Thereupon, following the conclusion and recommendation of the master commissioner, a judgment was entered to the effect that the sum found to be due the defendants be adjudged a lien upon the property still in controversy, being that to which the defendants retained title; ²⁸⁷ that upon the payment by plaintiff of said sum with interest from September 14, 1907, to the day of payment, within thirty days after the date of the judgment the plaintiff be permitted to redeem the property; that upon such payment the defendants execute and deliver to plaintiff a deed conveying the property free and clear from encumbrance; that if such deed be not executed the judgment to stand as and for a conveyance, and the defendants, their heirs and assigns, be thereafter enjoined from claiming or setting up any right, title or interest in the property adverse to the plaintiff, his heirs or assigns; that a writ of restitution be awarded upon the execution of such deed by defendants, or their failure to execute the same, to place the plaintiff in possession; that if the plaintiff should fail to pay the amount found due the defendants within the time specified, then upon a praecipe filed by either party an order of sale be issued to the sheriff directing him to sell the property as upon execution, and out of the proceeds to satisfy first the amount due the defendants with interest as aforesaid, and the costs of sale, and pay the balance to the plaintiff; and that plaintiff have and recover the costs of the action. The defendants complain of the judgment on error.

It appears that upon the execution of the deed and contract aforesaid the mortgages were released on the record,

and the notes and contract were left with Mr. Hoop, the attorney who drew the deed and contract, and they remained in his hands until the taking of the evidence in this case. The purpose for which he was to hold the notes is not clearly shown, for nothing seems to have been said about it at the time. J. C. Weltner, one of the defendants, on his direct examination as a witness, testified that he left the notes with Mr. Hoop for Mr. Thurmond. On cross-examination he said that it was by agreement with Mr. Thurmond. F. H. Weltner, the other defendant, was asked whether Hoop was to hold the papers as trustee for both parties, and his answer was that "they were left with him. I don't know as there was anything said as to what he ²⁸⁸ should be." On being further questioned he admitted that Hoop represented all the parties, and had kept the papers in his possession from the time they were left with him. When the notes were offered in evidence they were produced by John C. Weltner, who said that he got them from Mr. Hoop.

The defendants went into possession of the property described in the deed immediately upon its execution and the execution of the contract, and have continued in possession and to hold the title, except as to lots 5, 6, 7 and 8 in block 16 in the town of Sheridan, which were sold by them for \$1,000, on July 22, 1901.

There is no dispute concerning the value of the property at the time of the trial as found by the special master, and the finding that the property remaining unsold was worth \$36,000 is clearly supported by the evidence. There is some conflict respecting the value at the time the deed and contract were executed. It is admitted by all the witnesses that there was then very little demand for such property, and the defendants testified that it could not have been sold for enough to pay the amount of their claim. One witness, however, testified that the property was then worth \$5,000, and another that it was worth \$8,000. In 1899 or 1900, if not before, the value of the property commenced to increase. From at least as early as 1900 there was a gradual increase each year, and the witnesses who place the value of the property still in controversy in 1906 and 1907 at from \$36,000 to \$40,000, testified that in 1900 the value was fifty per cent less. The gradual increase in value is illustrated by the testimony of one of the witnesses that in 1902 the property was worth \$20,000; in 1903, \$25,000; in 1904, \$28,000; in 1905, \$30,000; and in 1906 and 1907, \$36,000. The other testimony is in substantial accord with this. Although there was a

demand for such property for several years before the commencement of this suit, the defendants made no effort to sell it, but whenever approached on the subject of selling a part of it by those wishing to purchase ²⁸⁹ the defendants refused to consider the matter, declaring as their reason when testifying that they had not desired to sell a part, believing that to do so would injure the sale of the remainder.

During the taking of the evidence it was stipulated that if the defendants should be held accountable for rents and profits, the sum of \$250 might be allowed for the use of the farm lands as of July 22, 1901, and that the other rents and profits equaled the expenses of taxes, insurance, repairs and other charges in caring for the property; but the defendants reserved the right to object to any evidence of rents and profits as incompetent, irrelevant and immaterial.

We do not understand it to be contended that the evidence is sufficient to authorize a reformation of the contract on the ground of mistake in its failing to limit the time for the continuance of the provision entitling the plaintiff to the proceeds of sale in excess of the claim of defendants. The evidence is not clear, satisfactory and convincing of a mistake in that respect. The plaintiff testified that a limitation as to time was not mentioned or discussed by the parties, but that the terms of the contract expressed their actual agreement, and before being signed was read over to all of them and was satisfactory. Each of the defendants testified that in the conversation preceding the preparation and signing of the deed and contract they proposed to the plaintiff that if he would deed the property to them they would give him one or two years further time in which to redeem the property, or, as they also state it, for them to go ahead and sell the property so that he, the plaintiff, would have eighteen months longer time to redeem beyond the six months allowed by law in case of a foreclosure. J. C. Weltner states the conversation or proposal as follows: "I told him that if he would turn me the property, saving the expense of foreclosure, I would give him advantage of it in this way. I would give him a year or two longer for him to sell the property if he would turn the property over to me, make a deed to me of the property, which he ²⁹⁰ agreed to do. I told him I would try to sell that property within a year or two, and after I sold it if there was anything over and above what he owed me I was to turn it over to him. And we drew up a contract to that effect." The testimony of F. H. Weltner is substantially the same.

Neither of the defendants testify or claim that the alleged omission or mistake was the result of any misrepresentation or deceitful practice on the part of anyone, but they say that it was an oversight on the part of Mr. Hoop, who drew the contract. Although Mr. Hoop was a witness on behalf of the defendants he was not questioned in relation to this matter, and the testimony of the defendants themselves is not convincing that they limited the time in stating the terms of the agreement to Mr. Hoop for his information in writing the contract. According to their testimony a definite time would not seem to have been agreed upon prior to the signing of the contract, for they repeatedly speak of the time proposed by them as "one or two years," one of them saying that one or two years after the date of the deed was intended, and the other, that length of time beyond the usual redemption period. J. C. Weltner says that they did not agree whether the plaintiff was to have one or two years, and when asked on cross-examination how Hoop was to determine whether to mention the time in the contract as one or two years, he answered: "He could write it that way, one or two years." Each defendant testified that he did not read the contract before signing it, giving as the only excuse therefor that it was not his custom to read a paper drawn for him by an attorney. But each testified that it may have been read to him, though he had no recollection of it. It does not appear that Mr. Hoop had previously represented Mr. Thurmond in any matter, but it does appear that he had been employed in other matters by the defendants, and the indication is that he was selected by the latter for the purpose of putting this agreement into proper shape for signing. The inference is strong, therefore, that if a time limit was mentioned ²⁹¹ in any previous conversation, it was abandoned or not insisted upon when finally expressing the agreement in writing.

But if it be a fact that defendants did not read the contract or have it read to them that would not put them in a position to complain of the alleged mistake, for the mistake would then be the result of their own inattention and negligence, without having been misled in any way as to the contents of the contract: *Grieve v. Grieve*, 15 Wyo. 358, 89 Pac. 569, 9 L. R. A., N. S., 1211. Moreover, there is evidence of their subsequent conduct and admissions inconsistent with the theory of a mistake in the contract. Two witnesses testify that at or about the time of the trial one of the defendants stated as his reason for not having sold the property

that they could not give a good title to it; and another witness testified that as agent of the plaintiff he interviewed the defendants sometime in 1903 for the purpose of a settlement, and that the defendants then proposed to accept from the plaintiff the principal sum of \$4,000, with interest at twelve per cent per annum, compounded semi-annually, they to account for the sale price of the town lots previously sold and for the rents collected, and to be reimbursed for taxes, insurance and repairs; upon the basis of which proposal the defendants would have received about the sum of \$10,000. The witness testified that the defendants then said nothing about there having been a limit upon the time for a redemption or sale of the property.

The rights and remedy of the plaintiff below, defendant in error here, if any, depend upon the construction to be given to the deed and contract. It is maintained on his behalf, first, that the deed in connection with the contract constitutes a mortgage giving the grantor a right to redeem upon payment of the debt secured; and, second, that if not a mortgage, it amounts to a conveyance to the grantees named in the deed in trust to sell the property and apply the proceeds in the manner stated in the contract.

292 On behalf of the defendants below, plaintiffs in error here, it is contended that the transaction is neither a mortgage nor a trust, but that the provision for the payment of a part of the proceeds of the sale of the property to the plaintiff is a mere promise or personal contract, if anything, on the part of the defendants which did not create a lien or a trust in or upon the real estate described. It is insisted that the contract contains no obligation upon the defendants to sell the property: that it is void for uncertainty; that the only contingency upon which the money is to be paid to the plaintiff, viz., the sale of the property, has not arisen, and that, therefore, the plaintiff has no present cause of action; that the cause of action, if any, is barred by the statute of limitations, and by the plaintiff's laches; that upon a theory of either a trust or mortgage the amount due the defendants is much more than the amount found to be due by the master commissioner and approved by the court.

We are not convinced that the transaction is to be regarded as a mortgage. The difficulty in construing it to be such arises from the inconclusiveness of the evidence respecting the continuance of the debt as a personal obligation of the grantor. The contract recites that the deed was received in payment of the mortgages; the latter appear to have been

released upon the record as "paid in full, satisfied and discharged"; and we fail to find anything in the evidence showing that either of the parties subsequent to the transaction in question treated the debt previously due as a continuing obligation of the plaintiff. The defendants were given immediate possession of the property conveyed, and although the notes formerly representing the indebtedness were not returned into the hands of the debtor, they were left together with the contract in the custody of the attorney who drew the papers, and do not seem to have been called for by the defendants until obtained for the purpose of introducing them in evidence in this case. On the occasion in 1903 when an agent of the plaintiff interviewed ²⁹³ the defendants with reference to a settlement of the matter, the defendants proposed to accept the principal sum of \$4,000, named in the contract, with interest at twelve per cent per annum, thus ignoring the rate of interest provided in the notes. In view of the improbability that the defendants would have voluntarily proposed to release their mortgages to accept another conveyance of the same character without any provision as to rate of interest, the evidence relied upon to show that such was their intention is, to say the least, unsatisfactory. The evidence discloses that the debt was past due, that the plaintiff was unable to pay it, that there was practically no demand for the property at the time, and at a forced sale it seems probable that it would have realized no more than the amount of the encumbrance. That the property might later rise in value was evidently within the contemplation of the parties, as well as that the plaintiff should have the benefit thereof, and hence it is reasonable to suppose that the defendants were willing to cancel the debt with the understanding that in case the property could at some future time be sold for an amount greater than the amount they had advanced, with interest, taxes and other expenses, they would pay such excess to the plaintiff, and otherwise they would take the property for the debt.

Although it is held that the absence of a covenant to repay the money in a transaction of this nature is not conclusive evidence of the nonexistence of a debt, and that a conditional sale rather than a mortgage was intended, the same authorities hold that fact to be entitled to considerable weight as tending to show that a mortgage was not intended. And it is well settled that a conveyance cannot be a mortgage unless given to secure the payment of a debt; a debt either pre-existing or created at the time, or contracted to be created,

is an essential requisite to a mortgage: 1 Jones on Mortgages, 6th ed., secs. 265, 272. It is true that the defendants when relating the proposal made by them prior to the execution of the deed and contract say that the plaintiff was to be given one or two years to ²⁹⁴ redeem the property, but that does seem to us sufficient in itself to show an intention that the deed was to operate only as security for the debt, and hence as a mortgage. The word "redeem" may have been used by them in the sense of a repurchase rather than a redemption of the property as from an encumbrance. Indeed, they refer to the conveyance of the property to them as a foreclosure, and it would seem that they regarded it as such in effect, subject, however, to the agreement as to the proceeds of sale. Again their statement that further time was to be given the plaintiff to redeem is coupled with the explanation that they were to sell the property and pay the plaintiff any surplus over and above the indebtedness.

We are not inclined, therefore, to regard the transaction of the deed and contract as a mortgage. But though the deed conveyed the fee it was not unconditional. The purpose of the conveyance of the fee is stated in the contract made and entered into at the same time as the deed and as a part of the transaction. The agreement of the defendants set forth in the contract is, therefore, something more than a simple promise on their part. They assumed thereby certain duties in relation to the property for the benefit of the plaintiff as well as themselves as the condition upon which the property was conveyed to them, and thus they became trustees holding the title for the purpose stated in the contract.

A trust in its technical sense is defined as "an obligation upon a person arising out of a confidence reposed in him to apply property faithfully, and according to such confidence": 1 Perry on Trusts, sec. 2. "An obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed": 28 Am. & Eng. Ency. of Law, 2d ed., 858. Not only do the defendants concede in their testimony that they understood they were to sell the property, but the contract is to be construed as imposing that duty ²⁹⁵ upon them. The language employed, "if the property sells for more," indicates that a sale was contemplated by the parties. Unless a sale was intended, the agreement to pay a surplus of the proceeds to the grantor would have little meaning, and the defendants would be vested with absolute discretion to render their agreement effective

or the contrary. They undoubtedly had some discretion as to the time of sale, but only such as would enable them to deal with the property prudently and reasonably in carrying out the evident purpose of the conveyance. We are satisfied that the contract created an express trust, and that the defendants received the deed upon that consideration. This conclusion is well sustained by numerous cases where similar transactions and contracts have been construed: *Cooper v. Whitney*, 3 Hill. 95; *Freer v. Lake*, 115 Ill. 662, 4 N. E. 512; *Diefendorf v. Spraker*, 10 N. Y. (6 Seld.) 246; *Johnson v. Johnson*, 40 Md. 189; *Urann v. Coates*, 109 Mass. 581; *Sawyer v. Cook*, 188 Mass. 163, 74 N. E. 356; *McGinness v. Barton*, 71 Iowa, 644, 33 N. W. 152; *Harris v. Clark*, 94 Iowa, 327, 62 N. W. 854; *Byers v. McEniry*, 117 Iowa, 499, 91 N. W. 797; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Cadman v. Peter*, 118 U. S. 73, 6 Sup. Ct. Rep. 957, 30 L. ed. 78; *Arms v. Ashley*, 4 Pick. 71; *Potter v. Langstrath*, 151 Pa. 216, 25 Atl. 76; *Ogden v. Grant*, 6 Dana (Ky.), 473; *Given v. Sands*, 216 Pa. 463, 66 Atl. 70; *Maxwell v. Barringer*, 110 N. C. 76, 28 Am. St. Rep. 668, 14 S. E. 516; *Cook Co. v. Bell*, 114 Mich. 283, 72 N. W. 174; *Nesbitt v. Stevens*, 161 Ind. 519, 69 N. E. 256; *Eaton v. Barnes*, 121 Ga. 548, 49 S. E. 593; *Freeman v. Lafferty*, 207 Pa. 32, 56 Atl. 230; *Armor v. Spalding*, 14 Colo. 302, 23 Pac. 789; *Shields v. Whitaker*, 82 N. C. 516; *Lance's Appeal*, 112 Pa. 456, 4 Atl. 375.

In several of the cases cited the duty to sell was expressly stated, but in others it was held to be implied from the agreement to apply the proceeds of sale in a specified manner. The agreement in the case of *Johnson v. Johnson*, 40 Md. 189, provided that a stated sum should be paid out of the first payment made on the sale of a certain farm, and another stated sum out of the second payment. The Maryland court said: "The covenant does not, as may be observed, stipulate in express terms that the land shall be ²⁹⁶ sold and the proceeds of sale applied to the discharge of this particular debt. But we think that is the fair and reasonable implication from the terms employed."

In *Diefendorf v. Spraker*, 10 N. Y. 246, the grantee agreed in writing that "if and whenever I dispose of said tavern stand and appurtenances, or any part thereof, I shall realize from such sale more than \$2,500 and interest thereon to the day of sale, that I will pay to them such overplus." etc. The contract was held to create a trust, and it was said that the premises were conveyed "for the express purpose of

being converted into money by sale," and that the trustee was bound to execute the trust "with fidelity and reasonable diligence, and he could only be discharged by administering the trust himself or putting the administration in the hands of the court of chancery."

In the Illinois case of *Freer v. Lake*, a case very like the one at bar except that the property was to be held for a stated time, the promise contained in a letter was in these words: "I shall consider myself honorably bound, if anything can be made out of the property during the next three years, more than the interest, taxes, insurance and repairs, to give Mrs. Lake the benefit of it." The court said that "by the terms of the letter, Freer required an absolute deed to the property . . . in consideration for which he agreed to hold the property for three years, and all that could be made out of the property . . . he would give to Mrs. Lake," and further, that under the terms of the letter "Freer bound himself, in the event that the value of the property advanced within three years, to sell, retain certain specified amounts, and pay over the surplus to Mrs. Lake. Here was a trust." The duty to sell was implied from the promise to give the grantor the surplus if anything could be made out of the property. It was also held in that case that the transaction was not a mortgage, for the reason that the previous debt of the grantor which had been a lien on the property conveyed was extinguished upon the delivery of the deed and she was released from its payment.

²⁹⁷ In *Cooper v. Whitney*, 3 Ill, 95, certain land upon which three mortgages were outstanding was conveyed by the mortgagor to one of the mortgagees in fee, and the latter on the same date covenanted to pay the mortgage debts, and that "if he shall be enabled in a reasonable time thereafter to sell said premises for more than a sufficient sum to pay the three aforesaid mortgage debts with charges and expenses which he may incur in relation to said premises, he will pay to said Sidney (the grantor) or his legal representatives such excess." The court said: "This was a trust. . . . Although there was no express covenant on the part of Burlew to sell, his duty to sell can easily be gathered from the agreement, and there can be no doubt that the performance of that duty would have been enforced by a court of equity. Burlew would not have been permitted to hold the land to his own use, after an opportunity presented of selling for more than enough to pay the debts."

In *Jones v. Kent*, 80 N. Y. 585, the court was called upon to construe a written instrument in these words: "Received of J. W. Jones by agreement, one thousand shares of St. Joe Lead Stock for which I have paid him \$3,000. The understanding is that I am to give said Jones one-half of whatever price the same is sold for, when sold over and above that sum." Though it was held that there was evidence to sustain the finding of the trial court that instead of a trust being created, the shares of stock were sold for a price named and one-half of whatever price the same should be sold for when sold over and above that sum, it was held that the agreement imported an obligation to sell which could be enforced. The court said: "It does not in words say that the stock shall be sold, but as Jones can have the price or consideration of his transfer from no other source, it seems manifest that the event should at some time happen. . . . One contingency was clearly in the minds of the parties—the possibility of a sale at a price above \$3,000. Until that came to pass Jones could have no interest in a ²⁹⁸ sale, and whether a sale should be made prior to that time was optional with Rockwell. It is urged that it was also for Rockwell alone to determine at what time after that event happened he should sell. . . . It is not necessary to determine the soundness of this contention, for Rockwell is now dead, and the property unsold, and because it is no longer in his power to comply with the terms of his agreement and bring about the event, on the happening of which his promise was to be performed, is the plaintiff to lose the consideration for which he bargained, or the fruition of it to be postponed until the representatives of Rockwell may in the course of administration deem it proper, or find it necessary to make a sale? . . . This would be unreasonable, and might render it impossible for the plaintiff to avail himself of the advantage for which he contracted."

In *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492, the defendant had taken a deed from his debtor and in a separate writing acknowledged that he received the deed as collateral security for the debtor's note and also to indemnify the defendant as the debtor's surety upon a note to a third party, and agreed that if the notes were not paid he would "raise the amount from the property and pay the balance to said Tucker (the debtor and grantor), if any remains." This was held to create a trust which equity would enforce by requiring a sale of the property and an accounting of the rents and profits. In *Cadman v. Peter*, 118 U. S. 73, 6 Sup. Ct. Rep.

957, 30 L. ed. 78. the plaintiff being indebted to the defendant executed a deed conveying certain land to the latter pursuant to an agreement that the defendant should hold the land until he should sell it, and then share in any profit from the sale. It was claimed that the transaction was a mortgage, and relief was asked upon that ground, the agreement not being in writing. In the opinion Mr. Justice Blatchford, speaking for the court, said: "Under that agreement, even if it was valid, the deed cannot be turned into a mortgage, although the execution of the agreement, if valid, might be compelled, when the land ²⁹⁹ could be sold at a considerable profit. If the agreement is obnoxious to the statute which declares that no trust concerning or in any manner relating to land shall be created by parol, it cannot be enforced specifically nor employed to turn the deed into a mortgage. The agreement, if valid, would make Cadman a beneficiary under the deed, and create a trust in Peter concerning or relating to land, and, not being in writing and properly signed, is void under the statute of frauds."

In the early Kentucky case of *Ogden v. Grant*, 6 Dana, 473, Grant had conveyed to Ogden a certain tract of land "with this understanding and agreement between the parties, that the said Ogden is, as soon as possible, to sell said land for the best possible price, and dispose of the money arising from the sale, by paying himself" a sum acknowledged to be due to him from Grant, and the residue to the latter, or to his order. The court said: "There can be no doubt that the land was conveyed to Ogden, not absolutely as his own, but merely in trust, for the purpose of being sold by him as a trustee, for securing his own debt, and paying the residue of the avails of the sale to Grant, as residuary cestui que trust." The case cited from Michigan, *Cook Co. v. Bell*, 114 Mich. 283, 72 N. W. 174, disclosed a written contract whereby the mortgagee of lands situated in Michigan, who had at the same time received a deed from the mortgagor of lands situated in Wisconsin, agreed to sell the Wisconsin lands and apply the proceeds, after deducting expenses, upon the mortgage. It was held that as to the deeded lands the grantee was a trustee, and as such obligated to sell the lands and apply the proceeds upon the mortgage, and having failed to make a sale, and thereby lost the benefit of the lands to the debtor, he was chargeable, in a suit to foreclose the mortgage on the Michigan lands, with the Wisconsin land that he had refused to sell.

In the case of *Sawyer v. Cook*, 188 Mass. 163, 74 N. E. 356, above cited, it appeared that a large tract of unimproved land had been deeded to three parties, two of them paying part of the ³⁰⁰ purchase price, the balance being secured by mortgage to the grantor. The third grantee, who had paid nothing in money, subsequently conveyed his interest to the other grantees, and it was agreed in writing that the latter should first repay themselves from the money received from sales for all advances at the time of purchase, and further to pay therefrom the outstanding mortgage and an unsecured note of the three parties, and that after such payments the parties should share in the money received from the remaining lots sold in stated proportions. It was there claimed as here that the agreement was to be treated as a simple contract, and that the party who had conveyed his interest gained no equitable interest in the real estate. But it was held that while the fee was conveyed, it was only for the accomplishment of the objects recited in the agreement, that no particular form of words is required to create a trust, but whether one exists or not is to be ascertained from the intention of the parties, and that the grantees had engaged and become bound to deal with the property not only for their own benefit but for that of the grantor, and the court say: "In doing so they were under an obligation to proceed diligently, to act in good faith in its management, to account for all sales, and to pay over his share of the common fund, which upon sales being made took the place of the land. Although not nominally so designated they thus became trustees under an express trust." In a much earlier case in the same state one who had received from his debtor by indorsement a note against a third party recovered a judgment upon it, and after levying an execution upon the rents and profits of certain land of the maker of the note, promised the plaintiff, the son of the indorser of the note, to pay him all sums of money received on the judgment after his demand against the plaintiff's father should be paid, or to allow him the use and improvement of the land after such payment. As against the contention that there was no trust but only a personal obligation of the promisor, the court announced itself satisfied that the writing ³⁰¹ was a sufficient declaration of trust: *Arms v. Ashley*, 4 Pick. 71.

In support of their contention that the contract under consideration did not create a trust but a mere personal obligation, counsel for defendants cite several cases which are not in point and are clearly distinguishable from the case at bar.

Any attempt to refer to all or any great number of them would unduly extend this opinion, but a few have been selected for comment to show that the cases more strongly relied on do not touch the question or affect the principle here involved.

Counsel first refer to authorities upon the proposition that a condition in a deed inconsistent with the estate conveyed cannot be enforced, and a case is cited holding that where a deed conveys a fee and provides that any part of the property owned by the grantee at the time of his death shall revert to and become the absolute property of the grantor, the condition is inconsistent with the fee and therefore unenforceable. The application of that principle to the case at bar is not apparent. It will hardly be contended that a fee simple title cannot be conveyed in trust, for that is a very common transaction universally upheld and enforced if the trust has been lawfully declared, and indeed it is a general rule that the trustee takes an estate commensurate with the trust to be performed, and hence a fee simple title if he is authorized to sell and convey the fee. The contract here is not inconsistent with the title conveyed, nor is it a limitation upon it except in the sense in which every trust is a limitation. It determines the purpose for which the conveyance was made, and the duties to be performed by the grantee as a trustee holding the legal title.

Again, counsel cite *Kickland v. Menasha W. W. Co.*, 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471; *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 219, and *Miller v. Kendig*, 55 Iowa, 174, 7 N. W. 500, as sustaining the proposition that a contract like the one under consideration does not create an interest in or a trust relating ³⁰² to land. In these cases the statute of frauds was invoked to defeat recovery of money upon an oral contract, and they maintain the right of a grantor or former owner of real estate to recover from the grantee an agreed proportion of the proceeds realized by the latter on a subsequent sale, though the agreement for the payment of such proceeds to the grantor was not in writing; it being held in such cases that the contract sued upon was not obnoxious to the statute of frauds, as it did not create an interest in or relate to the sale of the land, but pertained merely to the purchase price or the consideration for the conveyance.

The case of *Kickland v. Menasha etc. Co.*, 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471, involved an oral agreement made upon the sale of certain land whereby the grantee, in

addition to a stated sum paid at the time of the sale, was required "whenever and at such time" as it shall sell the premises to pay to the grantor one-half of the excess it shall receive as the consideration of such sale over and above the amount of the original payment, after deducting from such excess the costs, expenses and improvements. It was held that parol proof might be given to show an additional consideration not inconsistent with the deed, that the land having been sold, the share of the proceeds agreed upon could be recovered, and that the contract was not void by the statute of frauds, since it was not sought thereby to impeach the deed as a valid conveyance. In other words, the contract there sought to be enforced was one for the payment of money as part of the agreed consideration for the purchase of the land.

In *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 219, the owner of the equity of redemption agreed verbally with another that the latter should advance money necessary to redeem the property from a foreclosure sale, taking a deed from the former to enable him to do so, and that he should hold the property until it could be sold, and upon a sale, after deducting his advances with interest and taxes, pay the balance of the proceeds to such original owner. The agreement was carried out until the land was sold, and thereupon the former owner sued to recover ³⁰³ his agreed share of the proceeds. His right to recover was upheld on the ground that the contract sued upon was not an agreement for the sale of land or the creation of any interest therein, but merely one for the payment of money agreed upon as the consideration for which the plaintiff executed to defendant the conveyance.

The Iowa case of *Miller v. Kendig* is similar to the case of *Kickland v. Menasha etc. Co.* The plaintiff averred that he had sold and conveyed to the defendant certain land for an agreed stated price, and for one-half of what the defendant would realize above that sum in case of a sale for a larger amount; that the land had been sold by defendant for a larger amount, and defendant had refused upon demand to pay the plaintiff the share of the proceeds to which he was entitled under the agreement. The court held that the contract pertained merely to the purchase price; that as it did not obligate the grantee to sell, the grantor retained no interest in the land, and the agreement was therefore valid though not in writing. But the court said: "Where land is conveyed under an agreement that it shall be resold upon the joint account of grantor and grantee, there is much reason for holding that

the grantor retains an interest in the land. We are inclined to think that if the agreement in such case were in writing, and the grantee should refuse or neglect to sell, and should appropriate the land to his own use, the grantor would be entitled to have the agreement enforced in a court of equity."

That these cases are not in conflict with those decisions, such as have been above cited, declaring a trust relating to land to be created by a contract like the one before us is apparent. The statement found in the opinions that the agreement sued on was not one for the sale of, or the creation of, an interest in the land refers to the unperformed part of the agreement, where it also provided for a sale of the land, upon which part only the action was based. The sale having occurred, the trust, if any, or the interest of the plaintiff, attached to the proceeds, in respect of ³⁰⁴ which the agreement was not required to be in writing. This is made plain, and the principle upon which the cases are correctly decided clearly stated in other cases of the same class, showing that the right to maintain such an action after a sale is independent of the question whether the agreement for the sale created a trust. Among such cases are the following: *Michael v. Foil*, 100 N. C. 178, 6 Am. St. Rep. 577, 6 S. E. 72; *Sprague v. Bond*, 108 N. C. 382, 13 S. E. 143; *Trowbridge v. Wetherbee*, 11 Allen, 361; *Hess v. Fox*, 10 Wend. 436.

In *Trowbridge v. Wetherbee*, 11 Allen, 361, the agreement required a sale of the property, and the same had been sold. The suit was to recover a surplus of the proceeds. The court, observing that whether the plaintiff had an interest in the property by way of resulting trust need not be considered, said: "The defendant did not agree to convey any part of the land to the plaintiff, but to sell and convey it to some other person and pay the plaintiff his share of the net proceeds in money. The first part of this promise, namely, the promise of the defendant to sell the land, was within the statute, and if he had refused to sell, the plaintiff could not have maintained an action to enforce the promise to sell. . . . But the promise to sell has been performed, and when a promise which was within the statute has been performed, the contract is no longer within the statute."

In *Sprague v. Bond*, 108 N. C. 382, 13 S. E. 143, it is said: "The enforcement of the alleged agreement, after the sale of the land, does not in any respect impinge upon the terms of the conveyance, but relates entirely to the payment of the consideration. It is true that the plaintiff could not have compelled the defendant to execute her agreement to sell the

land, as there was no enforceable trust, and the agreement was within the statute of frauds, but this part of the agreement has been voluntarily performed, and the other part, not being within the statute, may now be enforced."

In *Hess v. Fox*, 10 Wend. 436, the court said: "The part of the agreement which was incapable of being enforced had been ³⁰⁵ performed. Fox, I am inclined to think, had the money in his hands for the use of Hess, and ought, in equity and good conscience, to pay it over to him. No question can arise here as to the validity of the agreement to sell; that was performed, and the remaining part was to pay over money, supported by the consideration of land conveyed to the promisor." In Iowa, where the case of *Miller v. Kendig*, 55 Iowa, 174, 7 N. W. 500, was decided, a trust relating to land is held to be created by a contract providing for a sale of the land conveyed and a payment of the net proceeds to the grantor or another party: *Harris v. Clark*, 94 Iowa, 327, 62 N. W. 854; *McGinness v. Barton*, 71 Iowa, 644, 33 N. W. 152. We shall not attempt a discussion of other lines of cases which have been cited. We do not regard them as applicable or persuasive upon the question of the relation between the parties under the contract here in controversy, since the cases cited were decided upon a much different state of facts.

We do not regard the question of rents and profits as very material. The only amount involved in that connection upon the evidence is \$250. The expense of the defendants for taxes, insurance and other incidental matters is not shown, the record upon that subject disclosing only a stipulation that the rents and profits equaled such expenses, except that, if allowable, \$250 is agreed upon as the value of the use by the defendants of the farm lands. Whether the plaintiff would have been entitled to rents and profits had the defendants proceeded within a reasonable time to sell the property need not be considered, since it does not seem unreasonable or inequitable that the above-mentioned sum should be allowed as of the date agreed upon, viz., July 22, 1901, in view of the fact that although the lands might have been sold at and before that time, and ever since then, at a price far in excess of the claim of the defendants, the latter neglected or declined to sell, and used and occupied the property.

The amount of the claim of the defendants is, we think, correctly determined by the findings and judgment. A ³⁰⁶ reasonable construction of the contract as to the principal

amount of the claim is that the parties agreed upon the sum of \$4,000 as the amount then due the defendants and as the principal of their claim, and that this was so understood by them is borne out by the evidence. The debt previously represented by the notes and mortgages having become extinguished as a personal obligation of the plaintiff, and no agreement having been made as to the rate of interest upon the claim after the date of the contract, it is evident that the defendants are only entitled to the rate fixed by law in the absence of an agreement stating a different rate, viz., eight per cent per annum. It is not contended that upon this basis the computation was erroneous.

It is contended that the plaintiff's cause of action is barred by the statute of limitations and also by his laches. But in the case of an express and continuing trust—and the one here is of that kind—the statute does not begin to run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the beneficiary: *Perry on Trusts*, 5th ed., secs. 228, 863; 28 *Am. & Eng. Ency. of Law*, 2d ed., 1133, 1134. It is at least doubtful if the period prior to a known repudiation of breach of the trust is to be considered in determining the question of alleged laches. It is said that time does not bar a direct trust where the relation of trustee and cestui que trust is admitted to exist, but diligence must be used to establish a constructive trust on the ground of fraud: *Perry on Trusts*, sec. 228. It does not appear in this case that the repudiation of the trust was brought to plaintiff's knowledge until two days before this suit was commenced. The defendants had not erected any improvements on the premises or done any other act with relation thereto which would plainly indicate adverse possession or repudiation of the agreement at an earlier date, or which would render the granting of the relief prayed for injurious to them or inequitable by reason of delay in bringing the action. The defendants do not ³⁰⁷ appear to have suffered any loss or inconvenience from the plaintiff's delay in demanding a sale of the property, except possibly the loss of a higher rate of interest or profit upon the money invested had it been previously realized from the property, but that loss they might themselves have obviated by a sale of the property. Upon the facts in the case, even if the entire period subsequent to the contract should be taken into consideration, we are satisfied that plaintiff is not chargeable with such laches as would justify the court in refusing relief: *Perry on Trusts*, secs. 228-230. The cases cited by counsel for defendants on

this question are strikingly dissimilar to the case at bar, and involve the right to recover upon the theory of a constructive or resulting trust, or an allegation of fraud or illegality in the acquirement of property.

The costs taxed in the case include an allowance of five hundred dollars as the compensation of the special master commissioner. The defendants moved to retax the costs on the ground that said compensation was excessive and illegal, which motion was overruled. That ruling is here complained of. The matter is also involved in another case brought here on error by the defendants from the order allowing the compensation, and the evidence taken upon the question is brought into that record but not into the record of this case. We have therefore disposed of the question in the other case affirming the allowance, and as our reasons are fully stated in the opinion in that case, we need not here further discuss the matter, it being sufficient to say that we hold the allowance to be neither excessive nor illegal.

It follows from the conclusions above stated that the defendant in error, who has been referred to in this opinion as plaintiff, his title in the court below, is entitled to have the agreement enforced as a trust. The relief granted ought to be such as will effectually give to the plaintiff that for which he contracted, without depriving the defendants of their rights under the contract save such as may have been lost through their failure to perform the trust. It is contended ³⁰⁸ that the judgment complained of erroneously converts the right of the plaintiff to a surplus of the proceeds of a sale of the property into an interest in the property itself, and therefore improperly awards to him the legal title upon payment of the claim of defendants. But this suit invokes the equitable jurisdiction of the court, and it is a fundamental principle that equity regards and treats that as done which in good conscience ought to be done. The defendants assumed the duty of selling the property to carry out the purposes contemplated by the contract, and it ought to have been sold by them, since it is clear upon the evidence that it might have been sold for a price largely in excess of their claim, leaving a substantial surplus for the plaintiff. Having repudiated the trust without performance or reasonable excuse for nonperformance, they are not entitled in this suit, brought for an enforcement of the trust, to insist that the agreement be strictly and technically enforced according to its terms by a sale of the property, so long as they receive all that they were to have in case of a sale.

It is said that "equitable remedies are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is, in fact, no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties": 1 Pomeroy's Equity Jurisprudence, 3d ed., sec. 109. It is shown, and indeed conceded, that the value of the land in controversy greatly exceeds the amount of the claim of the defendants; it appears to consist of separate tracts, and no good reason is apparent for requiring a sale unless it be necessary to pay the amount to which the defendants are entitled. If the plaintiff is able and willing to pay the amount, the land may, under the circumstances, be regarded in equity as taking the place of the proceeds.

Upon the face of the findings and the judgment, it would seem that the transaction was treated as both a ³⁰⁹ mortgage and a trust. We are unable to assent to the theory that it was a mortgage, and for that reason we think that the judgment should be modified so that instead of adjudging the amount due the defendants a lien upon the premises, it be adjudged that they were trustees holding the legal title for the purpose of selling the property and applying the proceeds according to the terms of the contract; that without reasonable excuse they have refused to perform the trust and have repudiated it, wherefore the plaintiff is entitled to have the property sold and the surplus paid to him after satisfying the costs of sale and the claim of defendants, or, at his election upon his payment of said claim within the time specified in the judgment, to have the lands restored to him. In all other respects the judgment will be affirmed.

Beard, J., concurs.

Scott, J., did not sit.

ON PETITION FOR REHEARING.

SCOTT, J. This case was decided at the present term of this court: 98 Pac. 590. Plaintiffs in error have filed their petition for a rehearing. No new question has been presented in the brief or argument which was not considered in the opinion filed. The opinion discussed thoroughly all questions sought to be raised by the petition. The court adheres to the views expressed in the former opinion. The writer did not

participate in that decision, but upon examination of the questions involved fully concurs in that decision.

Rehearing denied.

Potter, C. J., and Beard, J., concur.

A Separate Appeal was Prosecuted assailing the allowance of the five hundred dollars compensation to the special master, and the opinion of the supreme court affirming the order appealed from appears in *Weltner v. Thurmond*, 17 Wyo. 310, 98 Pac. 601, 99 Pac. 1128. The appellate court held that the statutes of the state prescribing a per diem fee for the services of a district court commissioner in probate matters and hearings did not fix or control his compensation, or that of a special commissioner, for taking evidence, making findings and reporting the same in a cause or proceeding brought in the district court under the Code of Civil Procedure; that such special master commissioner was entitled to such compensation as the court should deem just and proper, which should be an amount reasonable in view of the services rendered; that a wide discretion was vested in the district court in allowing the compensation, and its judgment would not be disturbed unless a clear abuse of its discretion appeared; that the value of the property and the legal knowledge and skill to conduct the proceedings properly and fairly and to consider and pass upon the questions of law and fact involved were to be taken into consideration in fixing the compensation; that such compensation was not necessarily to be measured by the standard of judicial salaries paid in the state; and finally, that the allowance of five hundred dollars to the special master appointed to take the evidence and report the conclusions of law and fact in the case did not appear to be excessive.

A Conveyance Absolute upon Its Face may be shown by parol to have been intended as security, and when so shown is a mortgage: *McElroy v. Allfree*, 131 Iowa, 112, 117 Am. St. Rep. 412. In determining whether a deed is a mortgage, the principal test is whether the relation of the parties toward each other of debtor and creditor continued after the execution of the deed: *Plummer v. Ilse*, 41 Wash. 5, 111 Am. St. Rep. 997. The mere form of an instrument cuts very little figure in respect to whether it is enforceable as a mortgage or not, upon its character being questioned in either a legal or an equitable action. If its purpose is security, and this is established in any action involving the subject, the instrument is treated as a mortgage and nothing else: *Smith v. Pfuger*, 126 Wis. 253, 110 Am. St. Rep. 911. If a person acquires the legal title by purchase at a sheriff's sale of land under execution, in pursuance of a parol agreement with the judgment debtor to hold the title thus obtained as a security for a loan of money paid to relieve the land from the judgment lien, and that he will reconvey when the money is refunded, the case is not distinguishable from any other where the deed, though absolute in terms, is designed simply as security for a loan, and parol evidence is admissible to show the nature of the transaction: *Dickson v. Stewart*, 71 Neb. 424, 115 Am. St. Rep. 596. An agree-
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ment by a grantee in a sheriff's deed, made at the time the certificate is outstanding, to purchase the latter and hold the title to the land as security for the money paid and other debts of the owner, may be shown by parol evidence: *McElroy v. Allfree*, 131 Iowa, 112, 117 Am. St. Rep. 412.

Where a Deed Expressly Declares on Its Back that the grantee holds the land conveyed thereby for the joint benefit of himself and another person named, and that it is to stand as security for certain notes and for the balance of the purchase money paid by such other person, and that the profits realized above these sums shall be equally divided between the grantee and such other person, such declaration creates an express trust in the land for the benefit of such other person, or in the event of his dying intestate before the land is sold, for the benefit of his heirs at law; but it does not create a power of sale in the trustee, or impose such duties as could not be performed without such power, and a sale of the land by the trustee after the death of such intestate is void as against his heirs at law: *Maxwell v. Barringer*, 110 N. C. 76, 28 Am. St. Rep. 668.

DUXSTAD v. DUXSTAD.

[17 Wyo. 411, 100 Pac. 112.]

DIVORCE.—A Wife's Residence is that of Her Husband, save in exceptional cases, when she can, on account of necessity, establish and claim a separate residence. (p. 1140.)

DIVORCE—Wife, When may Claim the Residence of Her Husband Though She has Gone Without the State.—A husband cannot by his wrongful acts compel his wife to change her residence, as where by mistreatment he compelled her to go elsewhere. In such circumstances, if he continues to reside in the state, she may claim her residence here for the purpose of maintaining suit against him for divorce, at least until she has established a residence elsewhere. (p. 1140.)

RESIDENCE.—A Change of Residence does not Consist Alone in Going to and Living in Another Place, but it must be with the intention of making a permanent residence. (p. 1140.)

A RESIDENCE Once Established Continues until a new one is acquired. (p. 1140.)

DIVORCE—Residence After the Commencement of the Suit.—It is the residence of the plaintiff for the required time at the filing of the petition that determines the jurisdiction of the court, and it is not material where she may have resided after that time. (p. 1141.)

M. A. Kline and Sullivan & Squires, for the plaintiff in error.

No appearance for the defendant in error.

415 BEARD, J. This is an action for divorce, brought by the plaintiff in error against the defendant in error, in the district court of Laramie county; the alleged grounds for such

divorce being extreme cruelty, and such indignities offered by the defendant to plaintiff as to render her condition intolerable. The petition was dismissed by the district court on the ground that the plaintiff had not resided in this state for one year immediately preceding the filing of her petition, and that therefore the court was without jurisdiction. The correctness of that decision is the only question necessary to be determined on this appeal.

Our statute, section 2989, Revised Statutes of 1899, as amended by chapter 2, Session Laws of 1901, provides that: "No divorce shall be granted unless the plaintiff shall have resided in this state for one year immediately preceding the filing of the petition, or unless the marriage was solemnized in this state, and the applicant shall have resided therein from the time of the marriage until the filing of the petition." In this case the parties were married in the state of Nebraska on April 6, 1904, plaintiff being a resident of that state, and the defendant being a resident of Laramie county, in this state, where he owned a ranch and was engaged in raising sheep. Immediately after their marriage they went to defendant's ranch, where they established their home and lived together as husband and wife until about March 16, 1906. About a year after their marriage, they began to have trouble between them and during the year they had several quarrels, the last one being on March 7, 1906, when she attempted to leave their home, after a combat, but was forcibly prevented from doing so by the defendant. She left, however, on March 16, 1906, and went to the house of a neighbor, where she remained for two or three weeks, and from there she went to the home of her parents in Nebraska about April 1st, and she filed her petition May 8, 1906. Between those dates she had been in this state for a few days. She testified to a number of acts of cruelty and to indignities, and that she left on that account. That she was enceinte and had not been in good health for some time; that it was necessary for her to have care, and that she had no place to go but to her parents' home, and that she went there temporarily until the trouble between her and her husband was settled. She remained with her parents up to the time of the trial in July, 1907, her child being born there about October 13, 1906. She also testified that she did not intend to return to Wyoming and live with her husband, and that she did not know what she would do. The defendant in his testimony denied many of the charges made against him, but admitted that at

one time he swore at her and at another time applied to her the most vile epithet that can be applied to a woman; that at one time while they were in bed together he put his hand over her mouth and told her to hush up, and that when she was about to leave in March he took her cloak from her and then followed her and caught her by the wrist and brought her back. Without stating the evidence more in detail, we think it sufficiently appears that her condition was such that she needed care which she could not, or at least did not, receive from her husband at their home. We think the rule is that the wife's residence is that of her husband, save in exceptional cases, when she can, on account of necessity, establish and claim a separate residence. One of such exceptions is when he has given her cause for divorce. In that case it has been generally held that she may acquire a separate residence in another jurisdiction which will entitle her to maintain an action for divorce in that jurisdiction. This she may do; but her husband cannot by his wrongful acts and by mistreating her compel her to do so, when, as in this case, both parties have resided in the state for more ⁴¹⁷ than one year, that being the matrimonial domicile, and the husband still continuing to reside here; she may still claim his residence as hers, at least until she has established a residence elsewhere: *Ensign v. Ensign*, 54 Misc. Rep. 289, 291, 105 N. Y. Supp. 917; *Masten v. Masten*, 15 N. H. 159; 14 Cyc. 584. There is no evidence in this case that the plaintiff intended, at the time she left her home to go to her parents or when she filed her petition, to make her parents' home her permanent residence, except the inference that may be drawn from the fact that she remained there up to the time of the trial, and the further fact that she stated that she did not intend to return and live with her husband. But she repeatedly and positively stated that she was living with her parents temporarily, and that her residence was in Laramie county. A change of residence does not consist alone in going to and living in another place, but it must be with the intention of making that place the permanent residence. A residence once acquired continues until a new one is acquired: *Watkinson v. Watkinson*, 68 N. J. Eq. 632, 60 Atl. 931. In that case the court said: "To construe the temporary residence of appellant with his wife in New York to be a change of domicile seems to me to be unwarranted, for, as Mr. Justice Depue said, in *Harral v. Harral*, 39 N. J. Eq. (12 Stew.) 279. 51 Am. Rep. 217, 'to the factum of residence must be added the animus

manendi, and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home.' The doctrine laid down by the courts of the United States is that domicile having been once acquired continues until a new one is actually acquired *animo et facto*: 10 Am. & Eng. Ency. of Law, 15; Cadwalader v. Howell, 18 N. J. L. (3 Harr.) 138; Clark v. Likens, 26 N. J. L. (2 Dutch.) 207." See, also, Boreing v. Boreing, 114 Ky. 522, 71 S. W. 431; Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90. The case at bar differs from one ⁴¹⁸ where the parties have never resided in the state but one of them comes to the state and attempts to establish a residence here. In such a case the question is, Did the party acquire a residence here? While in this case the question is, Did plaintiff lose her residence here on account of her absence from the state for about six weeks under the circumstances attending her absence? We are of the opinion that she did not, and that the district court erred in so holding. It is the residence of the plaintiff for the required time at the time of filing the petition that determines the jurisdiction of the court, and it is not material where she may have established her residence after that time: Waltz v. Waltz, 18 Ind. 449.

For the reasons above stated the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Potter, C. J., and Scott, J., concur.

The Question Whether the Domicile of a Wife is the domicile of her husband, in actions for divorce, is discussed in the note to McGrew v. Mutual Life Ins. Co., 84 Am. St. Rep. 30. According to Wilcox v. Nixon, 115 La. 47, 112 Am. St. Rep. 266, if a husband fails to provide a domicile for his wife, takes her to the home of her parents, and without further notice to her leaves the state for an indefinite period of time, she is entitled to a divorce on the ground of abandonment.

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2. **DEEDS, Acknowledgment of by a Corporation Before a Disqualified Officer.**—The acknowledgment of a deed of trust, executed by a corporation grantor to secure payment of certain promissory notes, is a ministerial act. Where such an instrument is acknowledged before a notary public, who was at the time a director and treasurer of the grantor corporation, and also indebted for unpaid subscriptions to its stock, which facts were known to the grantor, but there was nothing on the face of the instrument or acknowledgment indicating such relationship, the deed of trust was entitled to registration, and the registry thereof was notice to subsequent purchasers, encumbrancers or lienors. (Okl.) *Ardmore Nat. Bank v. Briggs M. & S. Co.*, 747.

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ACTIONS.

1. **ACTIONS, Right to Dismiss or Discontinue.**—One who institutes a civil action has the right to dismiss or discontinue it at any time before verdict. (Ala.) *Huffstutler v. Louisville Packing Co.*, 57.

2. **ACTIONS, Right to Dismiss not Affected by a Claim of Set-off.**—Though the defendant has pleaded a setoff and introduced evidence in its support, the plaintiff may dismiss his action at any time before the verdict in the absence of any statute expressly taking away this right. (Ala.) *Huffstutler v. Louisville Packing Co.*, 57.

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ADJOINING OWNERS — Removal of Lateral Support.—The Negligence of a lot owner in making an excavation for buildings or leaving it exposed to inclement weather for an unreasonable time before putting in foundation walls renders him liable to adjacent proprietors for injuries to their buildings from the caving in of the bank. (S. D.) *Hannicker v. Lepper*, 938.

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(1155)

ADVERSE POSSESSION.*In General.*

1. **PRESCRIPTIVE TITLE to a Ditch and the Waters Thereof.**—If a ditch was constructed as early as 1855 for the purpose of conducting water from its point of diversion to a rancho, and was used for that purpose for the succeeding seventeen years continuously, openly and notoriously, with the full knowledge of the owners of the lands whence the water was diverted and through which the ditch was maintained, and without anything to indicate that their consent was obtained or sought, this is sufficient to sustain a finding of prescriptive title. (Cal.) *Strong v. Baldwin*, 149.

2. **PRESCRIPTION, Effect of Statute Imposing Additional Requisites for.**—A statute requiring the payment of taxes by a person holding adverse possession, in order to perfect his title by prescription, has no effect when prescription has been fully completed before its enactment. (Cal.) *Strong v. Baldwin*, 149.

3. **ADVERSE POSSESSION, Continuity of, When not Broken by Cessation in Use.**—Persons claiming adverse possession of a ditch and the water flowing therein do not have the continuity of their possession broken by the fact that the ditch was used only during that portion of the year when water was needed for irrigation. (Cal.) *Strong v. Baldwin*, 149.

4. **PRESCRIPTION, Title by not Devested by Admissions.**—Where title has already been acquired by prescription, it is not defeated by any admission which may be subsequently made. (Cal.) *Strong v. Baldwin*, 149.

5. **A TITLE Acquired by Prescription is as Effectual as if acquired by conveyance, and continues until conveyed or lost by adverse possession for the required time.** (Cal.) *Strong v. Baldwin*, 149.

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7. **ADVERSE POSSESSION—Color of Title.**—A Deed, Void for Defect Apparent upon its face, constitutes color of title, open, notorious, exclusive and hostile possession under which for a period of ten years gives title under the statute of limitations. (W. Va.) *Russell v. Tennant*, 1024.

Tenancy in Common.

8. **COTENANCY—Disseizin.**—Color of Title and Mere Possession thereunder by one or more of a number of tenants in common, however long continued, does not amount to a disseizin of the cotenants out of possession, and is, therefore, not adverse. The possession of one tenant in common is the possession of all. (W. Va.) *Russell v. Tennant*, 1024.

9. **COTENANCY—Disseizin.**—If One Tenant in Common be in Possession and a stranger enter into possession with him, the cotenants out of possession are not thereby disseized, and such joint occupancy of the tenant in possession and the stranger is not adverse to the tenant out of possession. (W. Va.) *Russell v. Tennant*, 1024.

10. **COTENANCY—Adverse Possession Against Co-owners.**—A tenant in common in sole possession of the land may make his possession adverse to his fellow-tenant, by repudiating or disavowing the relation of tenancy in common between them, and any act or conduct of his signifying intention to hold, occupy and enjoy the premises exclusively of which the tenant out of possession has knowledge, or of which he has sufficient information to put him upon inquiry, amounts

to an ouster of such tenant, and from the time when he has notice thereof the possession of the other party is adverse. (W. Va.) *Russell v. Tennant*, 1024.

11. **COTENANCY—Ouster and Adverse Possession.**—Such ouster may be effected by mere acts or matter in pais, unwitnessed by any written memorial thereof, such as a verbal partition or exclusive occupation of the premises with notice of hostility of claim. (W. Va.) *Russell v. Tennant*, 1024.

12. **COTENANCY—Ouster of Co-owner.**—A Void Deed, executed by one tenant in common to another, though inoperative to pass title, and whether regarded as constituting color of title or not, is sufficient to prove a disseizin of the party who executed it; it being a written memorial of a hostile claim asserted by the grantee and notice thereof on the part of the grantor. (W. Va.) *Russell v. Tennant*, 1024.

13. **COTENANCY.**—When Title by Adverse Possession is Established in one tenant in common against his cotenants, the deed, will, patent or other instrument under which both had claimed originally operates in favor of the claimant by adverse possession as color of title, so as to extend his possession to uninclosed lands. (W. Va.) *Russell v. Tennant*, 1024.

14. **COTENANCY—Ouster and Adverse Possession.**—A Tenant in Common in possession of the land may not, by means of his possession alone, disseize any of his cotenants, nor can a stranger, by possession alone, disseize one tenant without disseizing all, but either may disseize one or more of the tenants out of actual personal possession by adding an act of ouster to his sole occupancy of the land. (W. Va.) *Russell v. Tennant*, 1024.

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1. **DOGS—Liability of Owner.**—One Who Willfully Provokes and Abuses a Dog, in consequence of which it bites him, cannot recover from the owner, although there is a statute making the owner or keeper of a dog liable for all damages done by it to person or property. (Conn.) *Kelley v. Killonrey*, 220.

Importation of Infected Sheep.

2. **CRIMINAL PROSECUTION—Information Charging What the Defendant did and also that He Caused the Act to be Done.**—An information charging the defendant with bringing into the state sheep infected with scab, and also that he caused such sheep to be

brought into the state, is not bad because of the latter charge, for if it is not a crime, it is mere surplusage, and the statute provides that a surplus allegation shall not render the indictment or information invalid where there is sufficient matter alleged to indicate a crime. (Wyo.) *Patrick v. State*, 1109.

3. INTERSTATE COMMERCE—Statute Against Bringing into the State Sheep Infected with Scab.—A statute making it criminal to bring into the state sheep infected with scab or other infectious or contagious disease, or that have in any manner been exposed thereto, is not an attempt to regulate interstate commerce, but is a reasonable exercise of the police power. (Wyo.) *Patrick v. State*, 1109.

4. CRIMINAL LAW—Venue of Prosecution for Bringing Diseased Sheep into the State.—The venue for a prosecution for bringing diseased sheep into the state is not necessarily in the county where they first passed the state line, but may be in an interior county to which the sheep were shipped by rail. (Wyo.) *Patrick v. State*, 1109.

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1. APPEAL AND ERROR—Verdict, When Should be Set Aside. If the amount of a verdict cannot be justified by any hypothesis established by the evidence, the appellate court should set it aside. (Okl.) *Meyers v. Fear*, 795.

2. APPEAL AND ERROR—Conclusiveness of Verdict.—In case of a mere conflict of evidence, the conclusions of the trial jury and the judge are final, and will be disregarded by the appellate court. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

3. APPEAL AND ERROR, Assumption in Support of the Judgment, When cannot be Indulged.—Where the ground upon which an order or judgment of dismissal was made appears as part of the judgment, the appellate court cannot assume that the trial court acted on a different ground. (Okl.) *Goodwin v. Bickford*, 729.

4. APPEAL AND ERROR—Questions of Fact, When not Presented.—Where in his "reasons of appeal" the appellant does not assign any error in the findings of fact, the correctness of such findings cannot be questioned. (Me.) *Merrill Trust Co. v. Hartford*, 415.

5. APPEAL AND ERROR—Immaterial Finding.—The fact that one B., as well as the corporation defendant, was adjudged and held to be entitled to the possession of the premises in controversy is not material where there is no adverse claim on the part of B. as against the corporation. (Wyo.) *Whiting v. Straup*, 1093.

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6. APPEAL.—A Defendant Who Pays Off the Judgment may nevertheless prosecute an appeal from it, and have restitution of what he has paid with interest if he secures a reversal. (Ky.) *Nashville, C. & S. L. Ry. Co. v. Bean*, 333.

7. APPEAL.—Where the Defendant Replevies a Money Judgment by executing a bond, and thereby stays it for three months, this merges the judgment in the replevin bond but it does not affect his right of appeal. (Ky.) *Nashville, C. & S. L. Ry. Co. v. Bean*, 333.

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8. APPEAL AND ERROR, Exceptions, When not Necessary.—Errors apparent upon the judgment-roll or record of a cause will be considered by this court, although no exceptions were taken thereto in the trial court. (Okl.) *Goodwin v. Bickford*, 729.

9. BILL OF EXCEPTIONS, Construction of.—A bill of exceptions should be construed strongly against the party excepting. (Ala.) *Dozier v. State*, 51.

10. APPEAL AND ERROR.—Where there is no bill of exceptions, the only alleged errors that can be considered on appeal are such as appear on the record, which, in case of a criminal prosecution, presents but two questions, namely: the sufficiency of the information or indictment and the jurisdiction of the court over the matter or proceeding. (Wyo.) *Patrick v. State*, 1109.

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11. APPEAL.—The Connecticut Statute Which Provides that When Notice of appeal has been filed all proceedings to make or complete the record shall be suspended during July and August, does not prevent court or counsel from filing the necessary papers during those months, to become operative upon the expiration of that period. (Conn.) *Young v. Lemieux*, 193.

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12. APPEAL AND ERROR—Unintelligible Brief.—A brief assailing a statute as unconstitutional, citing a section of the constitution having no reference to the matter and statutes immaterial to the question sought to be presented, and incorrectly quoting other statutes and their titles, is so far unintelligible that it presents no question. (Wyo.) *Patrick v. State*, 1109.

Law of Case.

13. APPEAL—Law of the Case.—A Decision on a Former Appeal that a devisee takes a "base fee," whether right or wrong, becomes the law of the case and binds the parties. (Wis.) *Steele v. Korn*, 1051.

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2. PARTIAL ASSIGNMENT.—Where a Debtor Refuses to Consent to a partial assignment of the debt, the creditor can maintain his action to recover the entire debt, although there are outstanding orders drawn by him in favor of third persons. (Wis.) *Thiel v. John Week Lumber Co.*, 1064.

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ASSIGNMENTS FOR CREDITORS.

1. ASSIGNEE FOR CREDITORS—Liability for Breach of Duty.—An assignee for the benefit of creditors is bound to exercise the same care that an ordinarily prudent person would use in his own affairs under like circumstances, and for losses, deficiencies or injuries occasioned by his affirmative or negative violation of this rule he is answerable. (Ky.) *Comingor v. Louisville Trust Co.*, 322.

2. ASSIGNEE FOR CREDITORS—Loss of Right to Compensation.—An assignee for creditors, guilty of fraud or misconduct in the management of the estate, is not entitled to compensation. (Ky.) *Comingor v. Louisville Trust Co.*, 322.

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BANKS AND BANKING.

1. BANKING CORPORATIONS, Contract of, When Ultra Vires. A note or contract executed by a bank, organized and existing under and by virtue of the laws of the territory of Oklahoma, as a subscription to secure the construction and operation of a railroad, is ultra vires and void, and the courts will not enforce it. (Okl.) *Arkansas V. & W. Ry. Co. v. Farmers' & M. Bank*, 782.

2. BANKING CORPORATION—Liability for Deposit on Suspending Business.—When a banking corporation votes to stop business and its assets are sequestered, its deposits become immediately due and payable without any formal demand, and the bank becomes liable for legal interest. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

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1. BILLS AND NOTES—Conflict of Laws.—The Negotiability of a note is determined by the law of the place where it is payable. (S. D.) *Barry v. Stover*, 941.

2. NEGOTIABLE INSTRUMENTS—Drafts or Bills of Exchange are commercial paper governed by the law-merchant. (Ala.) *Stouffer v. Smith-Davis Hardware Co.*, 59.

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2. BOUNDARIES—Repugnancy Between Calls for Adjoiners and for Monuments.—Calls for adjoiners must yield, generally, to calls for monuments, where there is repugnancy between them in a description of land. (W. Va.) *Matheny v. Allen*, 984.

3. BOUNDARIES—Rejection of Call.—A call irreconcilable and incongruous with another call of a grant which appears to have been inserted by mistake may be wholly rejected and disregarded. (W. Va.) *Matheny v. Allen*, 984.

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2. BROKERS, Counterclaims Against for Receiving Commissions from the Adverse Party, When Sufficiently Proved.—In an action by a principal against his agent to recover in part certain commission alleged to have been erroneously paid, where upon answer and counterclaim for the balance of said commission the original action is dismissed and the cause is tried to the court upon the counterclaim and answer thereto, and where the evidence adduced on the part of the plaintiff shows that defendants, while acting as his agent in the purchase of certain lands, at the same time and unknown to him, received a commission on the sale from the agents of the vendor, sufficiently proves a defense to the action on the counterclaim, and a demurrer to such evidence was improperly sustained. (Okl.) *Plotner v. Chillson*, 776.

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CARRIERS.

In General.

1. **COMMON CARRIERS—Owners of Parks Operating Excursions Thereto—Right of to Exclude Persons.**—Persons owning an island in a navigable river, maintaining there places of resort and amusement and operating a ferry thereto and carrying various excursions, are not common carriers, and therefore are not obliged to receive every person who offers himself for transportation and tenders the requisite fare. (Mich.) *Meisner v. Detroit, B. I. & W. Ferry Co.*, 493.

2. **CARRIER OF PASSENGERS—Duty of to Receive Persons Desiring Transportation.**—A common carrier of passengers must receive for transportation anyone presenting himself and offering to pay his fare, irrespective of his past or present character, if there is nothing in his condition or conduct when he so presents himself to justify his exclusion. (Mich.) *Meisner v. Detroit, B. I. & W. Ferry Co.*, 493.

3. **CARRIERS—Limitation of Liability.**—The Assent of a Shipper to a stipulation in the bill of lading limiting the amount of the liability of the carrier is presumed from his signature, in the absence of fraud, misrepresentation or concealment, and he is bound by such stipulation. (S. C.) *Baker v. Atlantic Coast Line R. R. Co.*, 873.

Sleeping-car Companies.

4. **RAILWAYS.**—Sleeping-car companies are under the duty of notifying a passenger of his arrival at his destination. (Ala.) *Pullman Car Co. v. Lutz*, 67.

5. **RAILWAYS—Sleeping-car Companies, Liability of for Carrying a Passenger Beyond His Destination.**—A sleeping-car company is liable for carrying a passenger beyond his place of destination, and may be subjected to exemplary damages where the place and manner of putting the passenger off of a car are attended with circumstances of aggravation. (Ala.) *Pullman Car Co. v. Lutz*, 67.

See Railroads.

CEMETERIES.

1. **CEMETERIES, Limitations upon Municipal Control of.**—A municipality can prohibit the opening or the continuance of a cemetery in case it is or will likely become a nuisance, but it cannot prohibit an owner from devoting his land to cemetery purposes in a sparsely settled locality, although within the corporate limits or police jurisdiction, unless burials are likely to impair the public health. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

2. **CEMETERY, Continuance of, When not Shown not to Impair the Health of the Community.**—Evidence to the effect that the drainage

of a city does not run over the lands of the witnesses, and that they do not object to it, does not of itself show that the public health would not be impaired by its continuance, nor that an ordinance prohibiting it is unreasonable. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

3. CEMETERIES—Discrimination Between, on the Part of a Municipality.—If there are several cemeteries in a city and the conditions are similar as to location, surroundings, drainage, etc., and the other cemeteries are as close to the populous parts of the city and not conducted with a greater degree of precaution as to burials, the city may not prohibit the use of the complainant's cemetery while permitting the continuance of the use of the others. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

4. CEMETERIES—Unlawful Discrimination Between, in a Municipal Ordinance, When not Shown.—If an ordinance prohibiting the maintenance of a cemetery within prescribed limits is assailed as an unreasonable discrimination between cemeteries within and those without such limits, and it appears that the complainant's cemetery is nearer the city than the others, is separated from them by a highway, that there are houses between the highway and the cemetery, and that many houses were built nearer to the prohibited cemetery than to the others, and there is no evidence to show that the city had not adopted the highway as a line to separate cemetery from noncemetery area, nor that the sanitary conditions may not make it dangerous to maintain the cemetery on one side of the highway, he does not show that the ordinance prohibiting the continuance of the cemetery is invalid or unreasonably discriminatory. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

5. CEMETERIES.—A Burial Ground is not Necessarily a Nuisance to persons living in the immediate vicinity. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

6. CEMETERIES, Legislative and Municipal Control Over.—The legislature has the right to provide for the establishment or discontinuance of cemeteries, and to regulate their use, and this authority can be delegated to municipal corporations; but the exercise of this power must not be for the purpose of discriminating against any citizen in favor of the municipality or another citizen, or create in the city or others a monopoly, but the health and well-being of the city are to be the prime consideration in attempting to regulate the burial of the dead. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

CHATTEL MORTGAGES.

1. EVIDENCE, Recital in a Chattel Mortgage as Proof of Ownership.—As the law presumes that all acts are done in good faith until there is evidence to the contrary, a chattel mortgage in evidence containing the statement that the "mortgaged property is owned entirely by and is now in possession of said party of the first part at his home in Lincoln townsite, Blaine county, Oklahoma," fairly tends to prove the same, and will be regarded as prima facie evidence of the truth of the statement, in the absence of evidence to the contrary. (Hayes, J., dissents.) (Okl.) *Cockrell v. Schmitt*, 737.

2. MORTGAGE, When not Restricted to the Present Interest of the Mortgagor.—An agreement to place a lien on after-acquired property is not restricted to the interest of the mortgagor in the property itself, and if the property is already mortgaged, the additional mortgage is not restricted to the mere equity of the mortgagor over and above the first mortgagor. (Okl.) *Garrison v. Street & Harper F. & C. Co.*, 799.

3. CHATTEL MORTGAGE, Effect of Possession Taken Under an Imperfect.—A chattel mortgage, good only between the parties be-

cause not filed of record, is, after condition broken and delivery by mortgagor to mortgagee of the mortgaged chattels, good as to all others. (Okl.) *Garrison v. Street & Harper F. & C. Co.*, 799.

4. CHATTEL MORTGAGES, Priority Acquired by First Taking Possession.—In a case where W. executes and delivers to G., on November 29, 1904, a chattel mortgage, which is not filed for record until December 31, 1904, and without knowledge thereof, and for value, S. on December 15, 1904, accepts a mortgage on the same goods, which is not filed until January 3, 1905, and after W. had delivered possession of the chattels to G., after condition broken in his mortgage, G. will, by virtue of such possession, take title thereto free from the lien of S.'s mortgage. (Okl.) *Garrison v. Street & Harper F. & C. Co.*, 799.

See Executions, 9, 10.

CLAIMS.

See Negligence, 1.

CLERK OF COURT.

CLERK OF THE COURT, Power of to Act by Deputy.—Under the act of Congress of February 9, 1906 (34 Stats. 11, c. 155), a deputy clerk could perform the purely ministerial duties directed to be performed by the clerk of the court, in the matter of recording the list of the jurors upon the journals of the court, and certifying to the correctness thereof. (Okl. Cr.) *Reed v. Territory*, 861.

COLOR OF TITLE.

See Adverse Possession, 7, 8.

COMMERCE.

1. INTERSTATE COMMERCE—Navigable Waters.—The power given to the Congress of the United States to regulate commerce includes jurisdiction over the avenues and vehicles of commerce, and hence extends to all navigable waters of the country irrespective of state lines. (La.) *State v. Leech*, 336.

2. SALE OF PERSONAL PROPERTY, Where Consummated—Interstate Commerce.—Where an order is taken and given for the enlargement of a photograph and is accompanied by an agreement for an appropriate frame, which the person giving the order is entitled to accept at the factory prices, and he does accept and pay for such frame, its sale is to be regarded as taking place in the state where the frame is so accepted and paid for, rather than in a state where the enlargement was made, and it does not constitute interstate commerce. (Ala.) *Dozier v. State*, 51.

3. CONSTITUTIONAL LAW—Interstate Commerce—Discrimination Against Nonresident, What is not.—A statute providing that each person who solicits orders for the enlargement of photographs or pictures or picture frames shall pay a license tax, but that the act shall not apply to merchants or dealers having a permanent place of business within the state and keeping picture frames as a part of their stock in trade, does not conflict with the federal constitution in discriminating against merchants residing without the state. (Ala.) *Dozier v. State*, 51.

See Animals, 2-4; Intoxicating Liquors, 6, 7.

CONFLICT OF LAWS.

See Bills and Notes, 1; Mortgages, 21; Wills, 17, 18.

CONFRONTING WITH WITNESSES.

See Criminal Law, 6-8.

CONGRESSIONAL DISTRICTS.

See Constitutional Law, 6.

CONSPIRACY.*Criminal Liability.*

1. **CONSPIRACY, Homicide as the Result of.**—If several persons conspire to do an unlawful act, and death happens in the prosecution of the unlawful object, all are guilty of homicide. (Mo.) *State v. Darling*, 526.

2. **CONSPIRACY to Whip Another, When Renders All the Conspirators Liable for the Use by One of Them of a Deadly Weapon.**—If two or more persons enter into a conspiracy that one of the number shall assault and whip another, and all go together to the place where such other is for the purpose of encouraging the assault upon him, and one of them makes an assault with a deadly weapon resulting in the death of the person assaulted, the use of such weapon must be regarded as the act of all the conspirators, though they did not know that the one who used it had it in his possession or had formed any design to kill, and an instruction in such a case that the jury might return a verdict of manslaughter in the first degree is more favorable to the defendant than he had the right to request. (Mo.) *State v. Darling*, 526.

3. **CRIMINAL LAW—Conspirator, Right of to Abandon the Design.**—Although several conspire to do a criminal act, there is a place of repentance, so that before the act is done either may abandon his design and thus avoid committing the criminal act. (Mo.) *State v. Webb*, 518.

4. **EVIDENCE of One Conspirator Against Another.**—After a conspiracy has been formed, evidence of the acts and expressions of one of the conspirators is admissible against the others, whether the one against whom it is introduced was present or not, but when the evidence of an act or expression of an alleged conspirator is offered against another, the primary questions to be determined are, first, had the conspiracy been formed at the time of the act or expression, and second, if so did it still continue. (Okl. Cr.) *Driggers v. United States*, 823.

5. **CONSPIRACY—Implied Adoption by the Person Joining the Conspiracy as to Acts Done Previously.**—If a conspiracy has been formed between certain persons, and subsequently another joins the conspiracy, his joining is an adoption by him of the things said and done by the others in pursuance of the general plan formed prior to the joining. (Okl. Cr.) *Driggers v. United States*, 823.

6. **CONSPIRACY—Preliminary Evidence to Warrant Admission of Acts and Declarations of One Conspirator Against Another—Question for the Court.**—Whether there is any evidence of a conspiracy is primarily a question for the court. There must be some tangible material evidence of the conspiracy or a promise of its production before the court can properly admit evidence of statements made in the absence of the party against whom they are used, when he, in fact, was not present and knew nothing of them. This evidence need not be direct and positive and conclusive, but there should be some, and it is for the court in the first instance to say whether or not it exists. (Okl. Cr.) *Driggers v. United States*, 823.

7. **CONSPIRACY—Evidence of the Declarations of a Conspirator Made Before Joining the Conspiracy.**—Where the guilt of one of

several defendants, jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the others for the commission of the crime, evidence as to acts or statements of the others must be confined to such statements as were made, or acts done, at times when the proofs in the case permit of a finding that a conspiracy existed, and where the acts or statements of one of the defendants, prior to the formation of the conspiracy, are inadmissible as evidence against others. (Okl. Cr.) *Driggers v. United States*, 823.

Civil Liability.

8. **CONSPIRACY—Gist of Civil Action.**—In a civil action for damages for an executed conspiracy, the gist of the wrong is the damages. The combination may be of no consequence except as bearing upon the rules of evidence. (Wis.) *Jones v. Monson*, 1082.

9. **CONSPIRACY—Liberal Rules of Pleading.**—In deciding whether a pleading states facts reasonably indicating the execution of a conspiracy, it must be tested by the broad liberal rule of the statute that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties." (Wis.) *Jones v. Monson*, 1082.

CONSTITUTIONAL LAW.

1. **HEIGHT OF BUILDINGS—Power of State to Regulate.**—Under the police power the legislature may regulate the height of buildings in a city, but the regulations adopted must be reasonable in their character and adapted to accomplish the purposes for which they are designed. (Md.) *Cochran v. Preston*, 432.

2. **HEIGHT OF BUILDINGS—Purposes for Which may be Restricted.**—A statute limiting the height of buildings to seventy feet above the surface of the street at a certain point, within a designated part of a city where there are handsome edifices, beautiful monuments, and valuable works of art is valid. Such statute is not enacted for purely æsthetic purposes, but rather to protect the vicinity from fire. (Md.) *Cochran v. Preston*, 432.

3. **HEIGHT OF BUILDINGS—Statute Restricting—Discrimination.**—A statute limiting the height of buildings in a designated part of a city is not unconstitutional because under the rule which it prescribes persons owning property on low ground may build higher structures than owners of higher ground, for the danger from fire in the latter case is greater than in the former. (Md.) *Cochran v. Preston*, 432.

4. **HEIGHT OF BUILDINGS—Statute Restricting—Exemption of Churches.**—A statute limiting the height of buildings in a certain portion of a city is not unconstitutional because it exempts churches, for they do not present the same danger from fire to surrounding buildings as do other structures. (Md.) *Cochran v. Preston*, 432.

5. **CONSTITUTIONAL LAW.—The Term "Police Power"** has at bottom no other meaning than the general power of governing its people and dominions belonging to every sovereignty. (Conn.) *Allyn's Appeal from County Commrs.*, 225.

6. **CONSTITUTIONAL LAW—Congressional Apportionment.**—A legislative division of the state into congressional districts cannot be reviewed by the courts, where there is no constitutional limitation on the power of the legislature to make such apportionment. (Ky.) *Richardson v. McChesney*, 299.

7. **CONSTITUTIONAL LAW—Protection of Corporations.**—Corporations and individuals are entitled to the same protection under

the contract clause of the federal constitution. (La.) *Shreveport Traction Co. v. Shreveport*, 345.

8. **CONSTITUTIONAL LAW—Municipal Ordinance, When Regarded as a Contract.**—An ordinance granting a right accepted and acted upon by the grantee becomes an irrevocable contract. The right cannot be amended or diminished without the consent of the grantee. (La.) *Shreveport Traction Co. v. Shreveport*, 345.

9. **CONSTITUTIONAL LAW—Surrender of Governmental Powers.**—It is generally true of governmental power, especially the police power, that it cannot be surrendered or alienated. (La.) *Shreveport Traction Co. v. Shreveport*, 345.

10. **CONSTITUTIONAL LAW—Grant by Municipality, Power to Change.**—The power retained after the grant does not include the authority to repeal, change, or modify the right granted. (La.) *Shreveport Traction Co. v. Shreveport*, 345.

See Criminal Law, 6-8; Intoxicating Liquors; Jury.

Note.

Constitutional Law, confronting the accused with the witnesses. See Criminal Law.

CONTINUANCES.

1. **CRIMINAL TRIAL, Continuance of Because of the Pendency of Another Indictment or Information.**—The pendency of an indictment or information, when there has been no jeopardy upon it, cannot be set up as ground for continuance, when trial is sought on a new indictment or information presented against the defendant for the same offense. (Okl. Cr.) *Reed v. Territory*, 861.

2. **CRIMINAL TRIAL, Continuance, Application for, What must State.**—An application for a continuance should allege that the defendant could not prove, by other witnesses, the same facts which he desires to prove by the absent witness, unless the testimony of the absent witness is intrinsically more valuable than that of the witnesses by whom the same facts could be proven, and then the facts which make this true must also be stated in the application. (Okl. Cr.) *Reed v. Territory*, 861.

3. **CRIMINAL TRIAL, Continuance, Application for Stating Only Negative Conclusions.**—An application for a continuance, which consists of a statement of negative conclusions of fact, is not sufficient. (Okl. Cr.) *Reed v. Territory*, 861.

CONTRACTS.

CONTRACT—Alterations, Presumption as to When Made.—Where a contract prepared by the use of a typewriter appears to have been changed after the first impression is made, the presumption is that such change was made before execution and delivery. (Neb.) *Barber v. Stromberg-Carlson Tel. Mfg. Co.*, 703.

See Reformation of Instruments.

CONVERSION.

See Trover.

CONVEYANCES.

See Deeds; Vendor and Vendee.

CORPORATIONS.

Charters.

1. **CORPORATIONS—Acceptance of Amendment of Charter, When Sufficiently Appears.**—The fact that after the enactment of an amend-

ment to a corporate charter the stockholders allowed the corporation to continue in business and exercise new powers conferred by the amendment, and to make contracts, debts and engagements thereunder, is sufficient evidence of their acceptance of the liability imposed by the amendment. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

Powers of Corporation—Ultra Vires.

2. **CORPORATIONS—Express and Implied Powers.**—A corporation possesses only such powers as are granted to it, and such further ones as are necessary to the enjoyment of the rights and privileges granted. (Neb.) *Allison v. Fidelity Mut. Fire Ins. Co.*, 694.

3. **CORPORATIONS—Ultra Vires, Defense of, When not Admissible.**—If a corporation has, under its charter, the power to issue commercial paper for any purpose, and issues such paper not showing the purpose for which it issued, the defense of ultra vires is not available against an innocent purchaser thereof before maturity. (Ala.) *Stouffer v. Smith-Davis Hardware Co.*, 59.

Guaranty by Corporation.

4. **GUARANTY BY CORPORATION, Demand, When not Necessary.**—If, a banking corporation having guaranteed sundry notes, the directors of the corporation vote to stop payment and a sequestration of its assets immediately follows, no demand is necessary to perfect the liability on the guaranty, and interest at once begins to accrue thereon. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

5. **GUARANTY OF CORPORATION, Stockholders' Liability on Though There is No Proceeding Against the Original Promisors.**—If a banking corporation guarantees the payment of certain promissory notes, it is not necessary for the holders to proceed first against the original promisors before seeking to enforce the liability of the stockholders. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

6. **CORPORATIONS—Holders of Guaranties of, When not to be Prejudiced by the Action of the Receiver.**—If the holders of notes and mortgages guaranteed by a banking corporation after the appointment of a receiver, though it assigned the notes and mortgages to him and permitted him to collect of the makers, and such collections, if properly applied, would have proved sufficient to have discharged the claims under the guaranties, but the receiver turned all collections into the general fund, which was administered by the court and distributed among the creditors, leaving a balance due in favor of the persons holding the guaranties, they are entitled to recover for such balances against the stockholders. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

Authority of Officers and Agents.

7. **CORPORATION—Authority of Manager to Contract.**—The manager of sales of a manufacturing corporation has power to direct and contract in regard to the usual running business of selling its wares, and persons contracting with such corporation are not bound to know of a by-law thereof limiting the power of such manager to make the customary contracts. (Neb.) *Barber v. Stromberg-Carlson Tel. Mfg. Co.*, 703.

8. **CORPORATION—Contract not Signed by Requisite Officer.**—The rule that where the charter provides that a corporate contract shall be signed by certain persons, instruments not so signed are unenforceable, is so harsh and inconvenient that it has been widely departed from and practically abandoned. (Neb.) *Barber v. Stromberg-Carlson Tel. Mfg. Co.*, 703.

9. CORPORATION—By-law Limiting Power of Agent.—Persons contracting with a corporation are not bound to know of a by-law limiting the powers of the agent to make the customary contracts appertaining to the business he is authorized to transact. (Neb.) *Barber v. Stromberg-Carlson Tel. Mfg. Co.*, 703.

10. CORPORATION—Agent Exceeding Authority.—Where a Corporation Ratifies or knowingly accepts the benefits of a contract made by one of its agents, it cannot repudiate the same on the ground that the agent had no actual authority to execute such contract. (Neb.) *Barber v. Stromberg-Carlson Tel. Mfg. Co.*, 703.

11. CORPORATION—Functions and Authority of Officers.—The secretary of an ordinary business corporation is just as much its general managing agent as is the president, both performing interchangeably a wide range of duties and exercising much the same functions in the conduct of corporate business as are exercised by general partners in a partnership business. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

12. CORPORATION—Estoppel to Deny Authority of Agent.—A corporation is estopped from denying that its agents possess all the authority which it gives them the appearance of having. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

13. CORPORATION—Estoppel to Deny Authority of Officers.—A corporation is estopped from denying that a general officer had the power which it has customarily allowed him to exercise. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

Stockholders and Their Liability.

14. CORPORATIONS—Holder of Stock as Collateral Security, Liability of.—Persons whose names appear on the stock books and certificates of a corporation as owners of stock are liable as stockholders, though they hold such stock as collateral security only. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

15. CORPORATIONS—Stockholders Designated as "Trustee," Liability of.—The fact that a person appearing on the books of a corporation as stockholder was there designated as "trustee" does not relieve him from liability to creditors, if there is no evidence that he did not in fact hold such stock as its owner. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

16. CORPORATIONS—Stockholder's Liability not Dependent on the Time of His Purchase.—All the stockholders of a corporation at the time of its default become liable to its creditors, whether the liability of such stockholders arose before or after the acquisition of their stock. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

17. CORPORATIONS—Stockholders' Liability—Limitation of Actions.—The Statute of Limitations does not Begin to Run Against the Creditors of a Corporation and in favor of its stockholders when the debt or other obligation is contracted, but only when the stockholders become subject to a suit to enforce their liability. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

18. CORPORATIONS, Limitation of Actions Against Stockholders, When Commences to Run.—The remedy under the statute to enforce the liability of stockholders does not become perfect, and therefore the statute of limitations does not commence to run, until the assets of the corporation have been exhausted and it has been judicially ascertained in proceedings against the corporation that resort to the statutory liability against the stockholders is necessary. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

19. CORPORATIONS—Stockholders' Liability, Suit to Enforce, When not Premature.—A suit brought to enforce the stockholder's

liability is not premature if a receiver of the corporation has filed his final account showing the disbursement of all his receipts, and it has been settled by a decree declaring the account to be final and to show a complete disposition of the assets of the corporation, and no balance remained in his hands, and there had been a report of the commissioners on claims previously filed and accepted showing the debts of the corporation, and the receiver's report stated how much of the indebtedness of the corporation had been paid. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

20. CORPORATIONS, Debts and Liabilities of and of Their Stockholders.—The creditor's claim is primarily against the corporation and only secondarily against its stockholders. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

21. CORPORATIONS—Stockholders or Creditors, Which must Bear Loss Due to a Receiver.—If, through the misconduct of a receiver, assets of a corporation are lost, such loss must be borne by the stockholders rather than by the creditors. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

22. CORPORATIONS—Stockholders' Liability for Interest.—The creditors of a corporation have the same right to recover interest of its stockholders, not in excess of their maximum liability fixed by statute, as they would have had against the corporation had it continued solvent and possessed of assets. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

23. CORPORATIONS—Stockholders' Liability to Interest When the Principal has been Paid.—Though separate actions cannot be maintained against stockholders of corporations for the payment of interest and principal, yet if the principal has been fully paid by dividends resulting from proceedings against the corporation, and its assets have thereby become exhausted, the creditors may maintain a suit against the stockholders for payment of interest. This rule remains applicable although the whole liability for interest accrued during delays in the administration of the insolvent corporation. (Me.) *Flynn v. American Banking & Trust Co.*, 378.

See Acknowledgments; Receivers.

Note.

Corporations, domestic and foreign, when subject to license and occupation taxes, 287, 288.

COTENANCY.

See Adverse Possession, 8-14.

COUNTERCLAIM.

See Setoff and Counterclaim.

COURTS.

Jurisdiction.

1. JURISDICTION—Decree in Excess of—Failure to Appeal from. The failure, in a suit for the appointment of a new trustee, to appeal from the decree does not give any effect to provisions therein in excess of the jurisdiction of the court, nor protect them from collateral attack. (Mo.) *State v. Muench*, 536.

2. JURISDICTION—Decree in Excess of—Consent to.—The fact that a decree in excess of the jurisdiction of the court was consented to by counsel cannot impart validity or effect as to provisions so in excess. (Mo.) *State v. Muench*, 536.

3. JURISDICTION—Limitations upon Judicial Power.—A court cannot set itself in motion, nor has it power to decide questions except

as presented by the parties in their pleadings. What is decided within the issue is res judicata. Anything beyond is coram non judice and void. (Mo.) *State v. Muench*, 536.

Probate Courts.

4. **PROBATE COURT—Power to Revoke Decree.**—The probate court in Connecticut itself has no power, save in exceptional cases, to revoke its own decree. (Conn.) *Murdoch v. Murdoch*, 231.

5. **WILLS—Modifying or Revoking Ex Parte Orders.**—The power of the probate court to modify or revoke its ex parte orders and decrees conferred by the Connecticut statute rests in its judicial discretion, subject to revision only by the superior court in the exercise of a like discretion on appeal. (Conn.) *Murdoch v. Murdoch*, 231.

6. **A PROBATE COURT has No Authority in Vacation, nor has Its Judge**, to receive evidence in support of a will nor to admit it to probate. Any action so taken by the judge is not judicial. (Me.) *Merrill Trust Co. v. Hartford*, 415.

Rules of Court.

7. **COURTS—Rules of, Power to Make.**—Courts have inherent power to make rules for the regulation of their practice and business, but have no power to make a rule which contravenes a statute or the law of the land. (Okl.) *Goodwin v. Bickford*, 729.

8. **COURTS, Rules of Making Additional Requirements in Matters of Appeal.**—Where a statute provides specifically what is to be done on the taking of an appeal, any rule of court requiring additional things to be done by the appellant contravenes the statute, and is invalid. (Okl.) *Goodwin v. Bickford*, 729.

9. **COURTS, Rules of Requiring a Deposit on Appeal.**—The district court of the territory of Oklahoma has no power to impose a rule requiring that a party appealing a cause from the probate court to the district court shall deposit with the clerk of the district court five dollars for costs of the clerk, and that a failure to do so within twenty days after the transcript of the trial court is deposited with the clerk shall be ground for dismissal of the appeal. (Okl.) *Goodwin v. Bickford*, 729.

10. **APPEAL AND ERROR, Rules of Court, When a Part of the Record.**—The rules of a trial court are part of the record of every cause tried therein. (Okl.) *Goodwin v. Bickford*, 729.

CRIMINAL LAW.

In General.

1. **CRIMINAL PROSECUTION—Right to Hold Defendant in Custody Until a New Indictment can be Procured.**—Where, upon the trial of a case, it appears to the court that there is a variance between the allegations of the indictment or information and the testimony introduced, and the jury is discharged upon this ground, and it is the opinion of the court that a new indictment or information can be framed upon which the defendant can be legally convicted, it is the duty of the court to commit the defendant to custody, or to admit him to bail until such new indictment or information can be presented against him. (Okl. Cr.) *Ex parte Johnson*, 857.

2. **CRIMINAL LAW—Evidence of Other Bribes or Extortions.**—On the trial of such officer charged with having entered into a conspiracy to obtain money from a keeper of a house of prostitution as a consideration for allowing her to carry on her unlawful occupation, and with having for several months received from her the sum of fifty dollars each month for that purpose, proof of payments of other sums of money to the defendant at or about the same dates,

under like agreements by other persons engaged in the same unlawful occupation, may be received for the purpose of corroborating the principal witness upon the material facts of the transaction as alleged in the information. (Neb.) *State v. Routzahn*, 675.

Accomplices.

3. ACCOMPLICE, Instructions Concerning, When not Erroneous.—Whether a witness is an accomplice requiring corroboration to support a conviction is a question of fact for the jury, and hence an instruction that under Mansfield's Digest, section 2259 (Ind. Ter. Ann. Stats. 1899, sec. 1602), a conviction cannot be had on the testimony of accomplice unless corroborated was sufficient, and it was not error not to further charge that a certain witness was an accomplice. If defendant regards the word "accomplice" as a technical one requiring a definition by the court, he should so request, but not ask an instruction that a certain witness is an accomplice, that being a question for the jury. (Okl. Cr.) *Driggers v. United States*, 823.

4. ACCOMPLICES—Officer Exacting Money from Law-breaker.—The keeper of a house of prostitution who enters into a corrupt criminal agreement with a public officer to pay, and does pay, to him certain sums of money at stipulated times, as a consideration for the privilege of carrying on her unlawful business and selling liquor without a license, is an accomplice in crime within the meaning of the law, and on the trial of the officer for that offense it is not error to so instruct the jury. (Neb.) *State v. Routzahn*, 675.

Confronting with Witnesses.

5. CRIMINAL LAW—Right to be Confronted with the Witness—Cross-examination.—The right of the accused to be confronted with the witnesses against him imports the privilege of cross-examining them. (Ala.) *Wray v. State*, 18.

6. CRIMINAL LAW.—The Right to be Confronted with and to Cross-examine Witnesses does not exclude the admission of dying declarations, nor the admission of testimony taken on a prior trial, where the accused had the opportunity to cross-examine the witness. (Ala.) *Wray v. State*, 18.

7. CRIMINAL LAW—Being Confronted by a Witness.—To permit the cross-examination as a witness on a criminal trial of one who is too ill to be subjected to cross-examination amounts to a denial to the accused of the right to be confronted by the witnesses against him. (Ala.) *Wray v. State*, 18.

Reasonable Doubt.

8. CRIMINAL PROSECUTION—Reasonable Doubt, Instruction Concerning, When Erroneous.—An instruction which states "by the term 'reasonable doubt' is meant a doubt that has a reason for it; it is a doubt you can give a reason for;" was erroneous, and is cause for reversal of the judgment. (Okl. Cr.) *Abbott v. Territory*, 818.

9. HOMICIDE—Reasonable Doubt.—It is not Error to Instruct that the oath of a juror imposes upon him no obligation to doubt where no doubt would exist if no oath had been administered. (W. Va.) *State v. Hood*, 964.

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DAMAGES.

1. **DAMAGES, COMPENSATIVE**, What are.—Compensatory damages imply a recompense or award for some loss or service. (Ala.) *Pullman Car Co. v. Lutz*, 67.

2. **DAMAGES, COMPENSATORY**—Fright.—Mere fright unattended by any harmful results to the person frightened in mind or body furnish no ground for the award of compensatory damages. (Ala.) *Pullman Car Co. v. Lutz*, 67.

3. **DAMAGES, COMPENSATORY**, When not Excessive.—Where a plaintiff suing a sleeping-car company for damages resulting from the failure to notify her of her arrival at her place of destination, and subsequently putting her off at another place, is awarded one thousand dollars as compensatory damages, there being no personal injury, and the only loss as to property rights being the payment of a street-car fare, such award will not be set aside as excessive where she suffered mentally from fright because of her surroundings at the time and place of being discharged from the train. (Ala.) *Pullman Car Co. v. Lutz*, 67.

See Death.

DEATH.

1. **DEATH**—Damages Recoverable by Widow.—In estimating the damages caused by the negligent death of a married man the jurors may take into consideration the pecuniary loss to the widow on account of her being deprived of his comfort, protection, society and companionship. (Mont.) *Mize v. Rocky Mt. Bell & Tel. Co.*, 659.

2. **DEATH**—Defective Pleadings and Verdict.—The fact that the complaint and verdict in an action for wrongful death are in unusual form, and not according to the practice, are not such de-

fects as justify a reversal when they could not have prejudicially affected the defendant. (Mont.) *Mize v. Rocky Mt. Bell & Tel. Co.*, 659.

DEDICATION.

DEDICATION and Rights of Dower.—Where lands are conveyed as public streets, the wife of the person making the dedication is thereby divested of her right of dower. It is not material whether such dedication is effected by deed or prescription or acts in pais. (Mo.) *Benton v. St. Louis*, 561.

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DEEDS.

1. **DEEDS.**—Delivery is not only essential, but it is the final act which consummates a deed. (Mo.) *Seibel v. Higham*, 502.

2. **DEEDS.**—To the Delivery of a Deed It is Essential that there be a giving by the grantor and a receiving by the grantee, with a mutual intent to pass the title from the one to the other. (Mo.) *Seibel v. Higham*, 502.

3. **DEEDS, Delivery After Death.**—If a deed is given by the grantor to a third person to be delivered to the grantee without condition or contingency, and be by that person delivered, though after the death of the grantor, the title passes as of the date of the delivery to the third person, if the grantor at the time had parted with the deed, intending it to take effect as a present transfer. (Mo.) *Seibel v. Higham*, 502.

4. **DEEDS.**—If a Deed is Given to a Third Person to be Delivered by Him to the Grantee on the Death of the Grantor, and it is so delivered, the title passes. (Mo.) *Seibel v. Higham*, 502.

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DIVORCE.

Residence.

1. **DIVORCE.**—A Wife's Residence is that of Her Husband, save in exceptional cases, when she can, on account of necessity, establish and claim a separate residence. (Wyo.) *Duxstad v. Duxstad*, 1138.

2. **DIVORCE**—Wife, When may Claim the Residence of Her Husband Though She has Gone Without the State.—A husband cannot by his wrongful acts compel his wife to change her residence, as where by mistreatment he compelled her to go elsewhere. In such circumstances, if he continues to reside in the state, she may claim

her residence here for the purpose of maintaining suit against him for divorce, at least until she has established a residence elsewhere. (Wyo.) *Duxstad v. Duxstad*, 1138.

3. DIVORCE—Residence After the Commencement of the Suit.—It is the residence of the plaintiff for the required time at the filing of the petition that determines the jurisdiction of the court, and it is not material where she may have resided after that time. (Wyo.) *Duxstad v. Duxstad*, 1138.

4. DIVORCE—Residence, Provision Concerning is Mandatory.—The provision of the statute to the effect that no divorce shall be granted unless the parties applying therefor shall have resided in the state for one year immediately preceding the time of filing complainant's petition is mandatory, and no court has authority to act unless such residence affirmatively appears. (Mich.) *Bradfield v. Bradfield*, 468.

5. DIVORCE—Residence for the Purpose of, cannot Consist of Intention Only.—If a wife leaves her husband and his residence in this state and goes to another state, with intent not to return to him, and so informs him, she must be deemed to continue her residence in such other state, if she remains there, excepting during a period of visiting with relatives in this state, though she testifies that she intended to make her residence here and returns here for the purpose of commencing her suit. (Mich.) *Bradfield v. Bradfield*, 468.

6. DIVORCE—Residence of Plaintiff, Failure of Defendant to Deny.—The admission of the defendant in his answer of the residence of the plaintiff to be in the state as alleged in her complaint does not confer jurisdiction on the court, if in fact such residence is shown to the court to be elsewhere. (Mich.) *Bradfield v. Bradfield*, 468.

Grounds, Proceedings, Validity and Relief.

7. DIVORCE—Requisites of Desertion or Abandonment.—The fourth subdivision of section 5328, Annotated Statutes of 1907, construed, and held to mean that not only must the act of desertion or abandonment be willful, but it must be willfully continued for a period of two years. (Neb.) *Kirkpatrick v. Kirkpatrick*, 708.

8. DIVORCE—Abandonment or Desertion by Insane Spouse.—Where the wife abandons the husband without just cause, and thereafter becomes insane, a cause of action for divorce does not accrue to the husband until the lapse of two years, exclusive of the time that she is insane. (Neb.) *Kirkpatrick v. Kirkpatrick*, 708.

9. DIVORCE—Procedure and Notice of Orders.—In the trial of a divorce case the court should exercise a sound legal discretion in matters of procedure as well as in the consideration of the evidence adduced, and in the exercise of such discretion may require such notice of its orders from time to time as are necessary to a full and open presentation of the case by both parties thereto. (Neb.) *Mohr v. Mohr*, 699.

10. DIVORCE—Pendency of Two Actions—Conclusiveness of Decree.—Where a husband and wife, living in different states or jurisdictions, have each commenced against the other a suit for divorce, and in the first suit called for trial both parties appear in person and by attorneys, and, upon issues duly joined, litigate their disputes and grievances to a final decree in said suit, and the court enters a decree of absolute divorce, and said decree is not appealed from, the marriage relation theretofore existing between the parties is completely severed, and the unsuccessful party is without standing to prosecute the suit pending in said other state or jurisdiction. (Neb.) *Mohr v. Mohr*, 699.

11. **DIVORCE—Setting Aside Decree for Fraud and Perjury.**—And if said unsuccessful party proceeds in such other jurisdiction, and obtains a decree of divorce and judgment for alimony, without notice to the other party, upon perjured evidence and without advising the court of such prior divorce, such action constitutes a fraud upon the court as well as upon the other party to the suit, for which a court of equity should set aside said decree and permit the defendant in such suit to appear and defend the same. (Neb.) *Mohr v. Mohr*, 699.

12. **DIVORCE—Petition for Equitable Relief from Decree.**—Petition examined, and held to state a good cause of action for equitable relief. (Neb.) *Mohr v. Mohr*, 699.

13. **DIVORCE—Necessity of Service on Insane Defendant.**—Personal service upon the insane defendant in an action for divorce is necessary to confer jurisdiction. (Mont.) *State v. District Court*, 636.

14. **DIVORCE—Absence of Service on Lunatic—Validity of Decree.**—Where, in an action against an insane man for a divorce, a guardian ad litem is appointed who files a demurrer on behalf of the defendant, a decree subsequently rendered is valid on its face, notwithstanding there was no personal service on the defendant. The summons with the return thereon is no part of the judgment-roll in such a case. (Mont.) *State v. District Court*, 636.

15. **DIVORCE—Relief by Motion or Appeal from Decree Against Lunatic.**—Where a decree of divorce is rendered against an insane defendant who was not personally served, but for whom a guardian ad litem was appointed, who filed a demurrer in the action, relief cannot be had from the decree on appeal, for the reason that the defect in the service of summons does not appear of record. Nor can relief be had by motion in the trial court after the expiration of the statutory limit of six months, for the decree is fair on its face, and its infirmity can be made to appear only by evidence dehors the record. (Mont.) *State v. District Court*, 636.

16. **DIVORCE—Relief in Equity from Decree Against Insane Person.**—Where a decree of divorce is entered against an insane defendant upon whom personal service was not made, but for whom a guardian ad litem was appointed, who filed a demurrer, equity has jurisdiction to grant relief after the expiration of the six months allowed by statute to move for the vacation of a judgment. If the general guardian of the incompetent refuses to institute the suit, his daughter may do so as next friend, and ask for the appointment of a guardian ad litem. (Mont.) *State v. District Court*, 636.

17. **DIVORCE—Relief in Equity—Mandamus to Compel.**—Mandamus is the proper remedy to compel the district court to proceed when it declines to assume jurisdiction of proceedings in equity for relief from a decree of divorce, brought on behalf of a lunatic against whom the decree was entered without personal service, but for whom a guardian ad litem appeared. (Mont.) *State v. District Court*, 636.

Alimony.

18. **DIVORCE—Alimony to Guilty Wife.**—The court has power to allow alimony to a wife against whom a decree of divorce has been granted for her misconduct. (Ark.) *Pryor v. Pryor*, 102.

19. **DIVORCE—Alimony, Altering Decree for.**—The court has power at any time to alter alimony awarded by a decree of divorce. (Ark.) *Pryor v. Pryor*, 102.

20. **DIVORCE—Alimony Altering When Fixed by an Agreement.**—The fact that the alimony awarded to a wife in a decree of divorce

was based on an agreement of the parties does not deprive the court of power to afterward alter it. (Ark.) Pryor v. Pryor, 102.

21. **DIVORCE—Alimony, Validity of Agreement Fixing.**—An independent agreement between a husband and wife, made in anticipation of a divorce and fixing the amount to be paid her as alimony, is valid, and is not avoided by the subsequent decree of divorce. (Ark.) Pryor v. Pryor, 102.

22. **DIVORCE—Alimony Fixed by Contract will not be Altered by the Court.**—Where a husband and wife enter into an agreement, in contemplation of their divorce, fixing the amount to be paid to her as alimony and for the support of their children, and a decree is subsequently entered reciting such agreement, awarding alimony accordingly, and providing for the terms of payment and the method of enforcement, the court will not, in effect, set aside or modify such agreement by setting aside or modifying the provisions relating to alimony contained in the decree of divorce. (Ark.) Pryor v. Pryor, 102.

23. **DIVORCE—Alimony Founded upon an Agreement, Enforcement of.**—Where a decree of divorce recites an agreement between the parties for the payment of alimony and for the support of the children of the marriage, and declares a method by which such payments may be enforced, the court may, instead of requiring the wife to maintain an independent proceeding to recover the amount due under the decree, award execution against him for such amount. (Ark.) Pryor v. Pryor, 102.

24. **ALIMONY, Decree for, Effect of.**—A decree for alimony in the case of a divorce a vinculo made without reserve, although payable in installments, is final, and cannot be changed after its enrollment. (Mich.) Mayer v. Mayer, 477.

25. **ALIMONY, Decree for, Entered in One State, When may be Enforced in Another.**—A decree for alimony in favor of a wife in a suit for divorce a vinculo, where there is no reserve by the court or the statute of the power to change it, may be enforced by a judgment of a court of another state whereof the parties have become residents. (Mich.) Mayer v. Mayer, 477.

26. **DECREE OF DIVORCE Awarding Sum for Support of Children When not Enforceable in Another State.**—Where in a decree of divorce an order is made that the husband pay the wife a specified sum monthly for the support of their children, and a statute of the state authorizes the court to modify its order whenever circumstances render a change proper, an action cannot be maintained in another state to recover arrears alleged to be due under such order. Application must be made to the court wherein the order was entered. (Mich.) Mayer v. Mayer, 477.

27. **ALIMONY, Decree for, When not Enforceable by Contempt Proceedings in Another State.**—Though a decree of a court of another state having jurisdiction of the cause and the parties awards alimony to a wife, and the award is final, and an action may be maintained in this state to obtain judgment for the arrearages, such judgment cannot be enforced by proceedings for contempt, where the only authority given by the statute is to punish disobedience to an order for alimony made in a suit for divorce. The suit in this state based upon a decree in the other state is not a suit for divorce within the meaning of this statute. (Mich.) Mayer v. Mayer, 477.

DOGS.

See Animals, 1.

DOMICILE.

1. **RESIDENCE.**—A Change of Residence does not Consist Alone in Going to and Living in Another Place, but it must be with the intention of making a permanent residence. (Wyo.) Duxstad v. Duxstad, 1138.

2. **A RESIDENCE Once Established Continues** until a new one is acquired. (Wyo.) Duxstad v. Duxstad, 1138.

DORMANT JUDGMENT.

See Executions, 6.

DOWER.

DOWER—Rights of Widow—Adverse Possession.—The dower of a widow confers no right of possession upon her, except as to the mansion house and curtilage, until after assignment, and, before assignment, it is no obstacle to the right of entry on the part of an heir and does not prevent the running of the statute of limitations against him in favor of an adverse claimant in possession who has procured a relinquishment of the dower in his favor by purchase thereof. (W. Va.) Russell v. Tennant, 1024.

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ELECTION OF REMEDIES.

ELECTION OF REMEDIES.—Where a vendor, after the appointment of a receiver to take charge of the property and affairs of an insolvent, nongoing corporation, files its plea of intervention setting up all the facts in relation to certain reservation of title notes taken by the vendor for sales of machinery to the insolvent corporation, and further alleges that the reservation notes are liens on the property, and prays for their foreclosure, and also prays for general relief, this is not such an election as will preclude the intervener from afterward amending its plea of intervention and asserting title and right to possession of the property described in the reservation notes as against one who claims to have a lien thereon subsequent in time to the reservation notes, where such lien, if it attached to the property at all, came into existence after the property fell into the hands of the receiver, notwithstanding the reservation notes were not filed as chattel mortgages. (Okl.) Ardmore Nat. Bank v. Briggs M. & S. Co., 747.

ELECTRICITY.

1. **ELECTRICITY—Guy and Fallen Wires.**—Where a private telephone wire under the control of a telephone company falls across an electric light wire at a point where there are no guards or insulation, where it remains for several hours, and the current from the electric light wire is conducted by the telephone wire some ten or twelve miles to a guy wire, and by the guy wire to a fence wire, and by the fence wire to a point where a man was rightfully at work, the telephone and electric light companies are liable for his

death caused by contact with the fence. (Mont.) *Mize v. Rocky Mt. Bell Tel. Co.*, 659.

2. **ELECTRICITY—Who not a Trespasser.**—Where a railway company has permitted a land owner to construct an irrigating ditch over its right of way, an employé of the land owner at work on such ditch is not a trespasser to whom a telephone company having wires near by owes no duty. (Mont.) *Mize v. Rocky Mt. Bell Tel. Co.*, 659.

3. **ELECTRICITY—Placing Wires Contrary to Ordinance.**—Where an ordinance, which is a grant of a franchise to a telephone company, provides that whenever it is necessary for an electric light or power wire to cross a telegraph or telephone wire, the same shall not approach to or cross such wires at a distance of less than four feet, applies to both the telephone and the light and power company, and a violation thereof is *prima facie* negligence. (Mont.) *Mize v. Rocky Mt. Bell Tel. Co.*, 659.

4. **ELECTRICITY—Failure to Prove All Facts Alleged.**—In an action against a telephone and an electric light company for the death of a person caused by their negligence in the management of wires, it is not necessary for the plaintiff to prove every act of negligence charged; it is enough for her to prove to the satisfaction of the jury facts sufficient to show that the negligence of the defendants directly produced the death. (Mont.) *Mize v. Rocky Mt. Bell Tel. Co.*, 659.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

1. **EQUITY—Abatement for Want of Necessary Parties.**—An answer to a bill, seeking abatement for want of necessary parties, which fails to aver facts showing an interest, on the part of the absent party, in the subject matter of the bill, that will be affected by the achievement of the object of the suit, is insufficient for the purpose. (W. Va.) *Jackson v. Big Sandy E. L. & G. R. R. Co.*, 955.

2. **EQUITY—Denial of Relief in Because Complainant does not Come with Clean Hands.**—If a deed in trust is taken to secure sundry creditors, the principal of whom, holding much the greater part of the indebtedness, subsequently obtain title and attempt to assert it for their own benefit without consideration of the other creditors, and if such principal creditors afterward make further large expenditures for its preservation and benefit, they cannot be said to come into equity without clean hands in the sense and to the extent requiring the court to dismiss their bill. (Mo.) *Seibel v. Higham*, 502.

3. **SPECIAL MASTER COMMISSIONER.**—The allowance of five hundred dollars as compensation to a special master commissioner under the facts of this case is not excessive nor illegal. (Wyo.) *Weltner v. Thurmond*, 1113.

4. **LACHES cannot be Held to Exist When the Party did not Know His Rights** or the facts constituting them, and was not negligent in not knowing them. (Me.) *Merrill Trust Co. v. Hartford*, 415.

See Guardian and Ward; Trusts; Wills, 15, 16.

Note.

Equity. See Wills.

ESCROW.

1. **DEEDS—Escrow, What is and Its Effect.**—The distinguishing feature of an escrow is the delivery of a deed to a third person to await the performance of some condition, whereupon the deed is to be delivered to the grantee and the title is to pass. In such case it

is not a deed until the condition is performed. (Mo.) Seibel v. Higham, 502.

2. **DEEDS**.—**The Depositary of a Deed in Escrow** is not the agent of either party, but is a trustee of an express trust with duties to perform for each, which neither can forbid without the consent of the other. (Mo.) Seibel v. Higham, 502.

3. **DEEDS**.—**Escrow**.—**The Death of a Grantor does not Annul** the depositary's authority to do what he was appointed to do, nor does it impair the right of the grantee to perform the condition and receive the deed. (Mo.) Seibel v. Higham, 502.

4. **DEEDS**.—**Escrow, When Becomes Annulled**.—If a deed is left in escrow, and the time stipulated expires in which the condition should be performed on which the deed was to be delivered, the escrow becomes a dead instrument. (Mo.) Seibel v. Higham, 502.

5. **DEEDS**.—**Escrow, Delivery of Without Compliance with Condition**.—If an escrow is obtained from the depositary without compliance with the condition on which the deed was to be delivered, the title does not pass. (Mo.) Seibel v. Higham, 502.

6. **DEEDS**.—**Escrow, Obtaining Without Compliance with Condition**.—**Innocent Purchaser**.—If a deed is delivered in escrow to be delivered on compliance with a designated condition, and the time stipulated for compliance with such condition passes, and the grantor dies and the depositary delivers the paper to certain persons in good faith, believing that they have a right to demand such delivery and will destroy the paper, but it is delivered to the grantees and placed on record, and a quitclaim deed obtained from them, the title does not vest in them, nor in any grantee of theirs, though he is an innocent purchaser. (Mo.) Seibel v. Higham, 502.

ESTATES OF DECEDENTS.

See Executors and Administrators; Wills.

EVIDENCE.

1. **EVIDENCE**.—**Judicial Notice**.—Courts of this state take judicial notice of the boundaries of the state and of the counties in the state, and also of the geographical locations and positions of the towns and cities within their jurisdictions. (Okl. Cr.) 861.

2. **EVIDENCE**.—**Opinion as to Intoxication**.—Whether or not a person was drunk or sober at a particular time is a proper subject of nonexpert opinion. (S. C.) State v. Stockman, 888.

3. **EVIDENCE**.—**PAROL, to Show that a Writing was to be Altered Before Delivery**.—One sued upon a contract signed by him is entitled to prove by parol evidence that it was delivered to an agent of the principal under a parol agreement that it was to be altered in certain respects before delivery to the agent's principal. (Ark.) Main v. Oliver, 110.

4. **EVIDENCE**.—**General Objection to Admission**.—When a party moves the court to exclude testimony he must specify the particular evidence to be excluded; when some of it is proper the motion may be overruled on account of its generality. (W. Va.) State v. Hood, 964.

See Conspiracy; Homicide, 13-16.

EXECUTION.

In General.

1. **EXECUTION, Justification Under, What Necessary to**.—One justifying on an alleged execution must assume the burden of prov-

ing a valid judgment existing when the writ issued. (Okla.) Cockrell v. Schmitt, 737.

2. **EXECUTION—Stay Bond.**—When a Judgment is Void the stay bond given in the proceedings is also void. (W. Va.) Ferrell v. Simmons, 962.

Return and Deed.

3. **THE RETURN OF AN EXECUTION** is not Necessary to Sustain an Execution Sale. The purchaser has no control over the officer and is not prejudiced by a deficient or incorrect return, nor by the entire absence of any return. (Me.) Cutting v. Harrington, 373.

4. **EXECUTION SALE—Sheriff's Deed as Evidence.**—The giving of the notice of a sale under execution, and how given, may be proved, prima facie at least, by the recital in the officer's deed to the purchaser. (Me.) Cutting v. Harrington, 373.

5. **EXECUTION—Time Limited for Return.**—The sixty days within which an execution is returnable commences to run from the time of its delivery to the officer for service, rather than from the time of its preparation by the clerk. (S. D.) Schroeder v. Pehling, 952.

6. **EXECUTION—Issuance After Five Years.**—When an execution has issued after the lapse of five years from the entry of judgment, it will be presumed in support of the action of the court that leave was obtained or rendered unnecessary pursuant to the statute in such cases provided. (S. D.) Schroeder v. Pehling, 952.

Sale of Property.

7. **EXECUTION—Erroneous Description in Notice of Sale.**—The fact that the description in the notice of an execution sale is erroneous during a part of the time of publication is not a jurisdictional defect, and does not render the sale open to collateral attack after confirmation and an express finding by the court that all the acts of the sheriff were regular and in conformity with the statute. (S. D.) Schroeder v. Pehling, 952.

8. **EXECUTION—Conclusiveness of Confirmation.**—Until reversed or set aside in a direct proceeding instituted for that purpose, the confirmation of an execution sale is conclusive as to everything found that is essential to its legality. (S. D.) Schroeder v. Pehling, 952.

9. **EXECUTION—Sale of Several Mortgaged Articles.**—Where several articles of personal property subject to the same mortgage are seized upon execution, in the absence of any direction or request on the part of the mortgagor, it is the duty of the officer to sell the property included in the mortgage en masse, and subject to the mortgage. (Neb.) Knutson v. Rosenberger, 711.

10. **EXECUTION—Sale of Several Mortgaged Articles.**—Where several articles of personal property subject to the same mortgage are seized upon execution against the mortgagor, who, after being informed that the articles cannot be sold separately without taking care of the mortgage, persists in the request that such articles be sold separately, such action on the part of the mortgagor is sufficient to support a finding that he consented to the sale of the goods free from the mortgage, and to the payment of the same from the proceeds. (Neb.) Knutson v. Rosenberger, 711.

11. **EXECUTION SALE of Lands, Difference Between and Their Transfer by Extent.**—The decisions respecting the officer's return and the transfer of lands by extent requiring the returns of the officer's doings to be drawn with fullness and exactness, and not aided by inferences and presumptions, are allowed little, if any, force, and

do not control, where lands are sold under execution at a public sale and after ample notice. (Me.) *Cutting v. Harrington*, 373.

12. EXECUTION SALE—Notice to Debtor, When Sufficiently Appears.—If the statute requires that the officer about to make an execution sale shall give written notice to the debtor of the time and place of sale, in person or by leaving it at his last and usual place of abode, and when the debtor is not a resident of the county, that the notice may be forwarded by mail, postage prepaid, the recital in a sheriff's deed that he sent the debtor a written notice by mail sufficiently establishes the notice. Taking into account the legal presumption as to the correctness of the action of a public officer, the inference must be indulged that he paid the postage. (Me.) *Cutting v. Harrington*, 373.

See Homestead, 6-8; Injunction, 3, 4.

EXECUTORS AND ADMINISTRATORS.

Suit to Enforce Trust.

1. ADMINISTRATOR, Suit by to Impress Real Property with a Trust.—Where moneys were obtained from a decedent by fraud, artifice and undue influence, and invested in real property to be held for the party guilty of the fraud, the administrator of such decedent may maintain a suit to impress a trust upon such realty as a means of recovering the moneys so invested therein. (Mich.) *Morris v. Vyse*, 472.

Sale of Property.

2. ADMINISTRATOR'S SALE—Allegations of Condition of Estate.—The failure, in a petition for the sale of land of a deceased person, to allege the condition and value of his real estate as required by statute is not a jurisdictional defect, and does not render the sale based thereon void nor open to collateral attack. (Mont.) *Plains Land & Imp. Co. v. Lynch*, 645.

3. ADMINISTRATOR'S SALE—Entry in Minute-book.—An entry in the minute-book of an order to show cause against the sale of the land of a decedent is sufficient evidence that the order was made. If the clerk has affixed the judge's signature to the order, this may be treated as surplusage, for the statute does not require an order made in open court to be signed by the judge. (Mont.) *Plains Land & Imp. Co. v. Lynch*, 645.

4. ADMINISTRATOR'S SALE—Failure of Order to State Terms. The failure of the order to sell a decedent's land to state the terms of sale is cured by the confirmation of the sale, when the return shows that the property was sold for cash and for more than its appraised value. (Mont.) *Plains Land & Imp. Co. v. Lynch*, 645.

5. ADMINISTRATOR'S SALE—Confirmation Cures All Irregularities in the proceedings leading up to the sale of a decedent's property. (Mont.) *Plains Land & Imp. Co. v. Lynch*, 645.

6. ADMINISTRATOR'S SALE—Public or Private Sale.—The court may order a sale of a decedent's land at public or private sale in the alternative. (Mont.) *Plains Land & Imp. Co. v. Lynch*, 645.

7. ADMINISTRATOR'S SALE—Divestiture of Title.—The Order of Court to sell a decedent's land is only a determination that the sale is necessary and an authority to make it. It does not affect the title or grant any right. It is the order of confirmation which finally operates to divest the heirs of their title and to secure the property to the purchaser. (Mont.) *Plains Land & Imp. Co. v. Lynch*, 645.

8. ADMINISTRATOR'S SALE—Misdescription of Land.—A clerical mistake in substituting "range 25" for "range 26" in the order for the sale of a decedent's land does not vitiate the proceedings when there was but a single piece of land involved, and it was correctly described in the petition, notices, confirmation, and deed, and no one could have been injured by the mistake. (Mont.) *Plains Land & Imp. Co. v. Lynch*, 645.

9. ADMINISTRATOR'S SALE—Effect of Irregularities.—Where the petition for a sale of a decedent's land is sufficient to confer jurisdiction upon the court to hear the application, subsequent errors in the proceedings cannot render the sale void and subject to collateral attack. (Mont.) *Plains Land & Imp. Co. v. Lynch*, 645.

See Wills, 18.

Note.

Express Companies, license and occupation taxes, when subject to, 291.

EXTRADITION.

1. EXTRADITION—Right to Try the Accused for Another Crime. As a general rule of international extradition, the state, after procuring the surrender of a fugitive on a specific indictment, has no right to try him upon any other charge until his trial on the original charge has been brought to a final conclusion, and he has been given a reasonable time to return to the country whence he was extradited. (Cal.) *In re Collins*, 122.

2. EXTRADITION—Trying the Accused for a Crime Committed After His Return.—If one extradited from a foreign country upon a specific indictment after his return commits a new crime, as where he perjures himself, on the trial of such indictment he may be accused, tried and convicted of such new crime without first affording him an opportunity to return to the country whence he was extradited. (Cal.) *In re Collins*, 122.

3. EXTRADITION.—The Immunity of an Extradited Prisoner from Prosecution for an offense other than the one for which he was extradited rests not upon his absolute right to have an asylum in the land in which he took refuge, but primarily upon the rights of the sovereignty which surrendered him pursuant to a treaty. (Cal.) *In re Collins*, 122.

4. EXTRADITION—Treaty Between the United States and Great Britain—Prosecution for a Subsequent Crime.—Under the extradition convention between the United States and Great Britain in 1859, the person surrendered is secured from trial for any pre-existing crime other than that upon which he was extradited, but this immunity does not extend to crimes subsequently committed. (Cal.) *In re Collins*, 122.

5. EXTRADITION — Prisoner Surrendered Without Exacting Agreement not to Try Him for Another Offense.—Assuming a foreign country or province has the right to refuse to surrender a fugitive from justice without first receiving a stipulation that he should not be tried on any other offense than that on which he was extradited, still, if it does so surrender him without such stipulation, he may be tried for a subsequent offense. (Cal.) *In re Collins*, 122.

FALSE IMPRISONMENT.

FALSE IMPRISONMENT, What does not Constitute—Restraints, When Deemed Voluntary.—Plaintiff entered upon grounds which were lawfully in possession of schoolboys, who were giving a free picnic, and who had given notice, in advance, that later in the

day a game of baseball would be played, to which a trifling admission fee would be charged. When the game was about to begin he refused, though repeatedly requested so to do, to pay the fee or go out, and he was thereupon taken by the arm by a citizen—one of the assembled guests or patrons—acting in behalf of the boys, though without special authority, and led in the direction of the gate, always with the privilege of paying and staying, and the alternative of not paying and going. Before reaching the gate, he paid the fee, and thereafter stayed and witnessed the game. Held, that the restraint imposed was not total, and did not render it impossible for plaintiff to stay where he was or otherwise control his movements; that, being at all times able to release himself on payment of the fee, for which, if he stayed, he was morally and legally bound, the restraint imposed on him, merely as a means of his ejection, until he elected to pay, was the result of his voluntary persistence in an unlawful act, did not deprive him of “free egress,” and affords no ground for an action in damages for false imprisonment. (La.) *Crossett v. Campbell*, 362.

FELLOW-SERVANTS.

See Master and Servant, 6-15.

FINDING LOST PROPERTY.

1. **TREASURE-TROVE** is the Name Given by the Early Common Law to any gold or silver in coin, plate or bullion found concealed in the earth or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. (Me.) *Weeks v. Hackett*, 390.

2. **LOST PROPERTY, Title and Rights of the Finder of.**—With respect to lost goods and treasure-trove, the title vests in the finder against all the world except the true owner, and ordinarily the place of the finding is immaterial. (Me.) *Weeks v. Hackett*, 390.

3. **TREASURE-TROVE and Lost Property.**—The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of such ownership. (Me.) *Weeks v. Hackett*, 390.

4. **TENANT IN COMMON, Trover by One Against the Other.**—With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, one tenant in common cannot maintain trover against another, because the two are equally entitled to possession, and the one who has it is not guilty of a conversion because he retains it. (Me.) *Weeks v. Hackett*, 390.

5. **JOINT FINDERS OF MONEY, Rights and Duties of.**—Where two or more persons originally find, and thereby become tenants in common of, gold coin, each is entitled to the possession of a moiety and charged with the duty of holding it for the owner until he can be ascertained. (Me.) *Weeks v. Hackett*, 390.

6. **FINDERS OF LOST PROPERTY, Right of One to Maintain Trover Against Another.**—If two or more persons find lost coin, each becomes entitled to the possession of a moiety, and may maintain trover for such moiety against any of his cofinders who became possessed of the whole and refused to surrender such possession. (Me.) *Weeks v. Hackett*, 390.

7. **FINDING OF LOST PROPERTY, When may be Found to have been Joint and Several.**—If, when three persons are making an excavation and joking about the finding of money, one of them discovers the top of an old can and says, “I have found it,” and another commences to take out the stones and gravel and then takes up the can, whereupon coins drop out, and the three continue to

dig for the purpose of taking up coin, and thereby discover two more cans having moneys therein, the conclusion by the jury that there was a joint finding by the three entitling them to share in the moneys found is sustained by the evidence. (Me.) *Weeks v. Hackett*, 390.

FIRES.

See Negligence, 10-14.

FRANCHISES.

See Constitutional Law, 7-10; Street Railways.

FRAUD.

1. FRAUD, PLEA OF.—A plea of fraud by the defendant is not sufficient unless it alleges the facts constituting the fraud. (Ala.) *Stouffer v. Smith-Davis Hardware Co.*, 59.

2. FRAUD, Averment of Sufficient to Invoke the Interposition of Equity Against Persons not Actively Participating in the Fraud.—An averment in a bill that V., by fraud, artifice and undue influence, obtained certain moneys of F., and with them purchased real property, taking conveyances in the name of R. and K. to hold for the use of V. in furtherance of the fraud, sufficiently discloses the fraud to warrant relief against R. and K., as well as V. (Mich.) *Morris v. Vyse*, 472.

3. FRAUD, Suit to Reach Property Acquired by—Remedy at Law.—A suit lies to reach real property purchased with moneys acquired by fraud, artifice and undue influence practiced by one person over another, though the person practicing the fraud is not alleged to be insolvent, and the property has been placed in the names of others to hold for her benefit. (Mich.) *Morris v. Vyse*, 472.

FRAUDULENT CONVEYANCES.

In General.

1. FRAUDULENT TRANSFERS—Evidence to Prove the Consideration.—In a suit by creditors to set aside a transfer as fraudulent, the transferee must assume the burden of proving that he paid a valuable and adequate consideration. (Ala.) *Ledbetter v. Davenport Bros.*, 62.

2. FRAUDULENT TRANSFERS—Burden of Proof as to Notice of Intent.—When a person claiming property under a transfer alleged to be fraudulent as against the creditors of the transferor proves that he has paid a valuable and adequate consideration, then his adversary must prove either that such purchaser had notice of the fraudulent intent, or such facts as put him on inquiry, which, if followed up, would have disclosed the fraudulent purpose. (Ala.) *Ledbetter v. Davenport Bros.*, 62.

3. TRANSFER, Attack upon as Fraudulent—Evidence to Prove.—An officer seeking to impeach a title as fraudulent as against creditors must show a valid judgment and execution. (Okl.) *Cockrell v. Schmitt*, 737.

4. FRAUDULENT CONVEYANCE—Improvements Made by the Grantee.—If one acquiring real property with knowledge that his title is void or is subject to the equity of others, or that the transfer to him may be set aside as fraudulent, places improvements thereon, he is not entitled to have them taken into account in adjusting the equities of the parties to the suit, unless such improvements can be removed without injury to the realty. If it is mining property, the injury meant is that it cannot be repaired by replacing other improve-

ments or equipment of like character at the cost of their present value. (Mo.) *Seibel v. Higham*, 502.

Homesteads.

5. **HOMESTEAD—Fraudulent Conveyance.**—If the transfer of the homestead by a husband to his wife is not colorable nor to enable him to withhold the same from his creditors in case of future abandonment, the conveyance is not rendered fraudulent by the fact that he soon afterward leaves his family in the occupancy of the premises, goes to a remote county, and after filing on a government homestead is joined by his family. (S. D.) *Commercial State Bank v. Kendall*, 936.

6. **HOMESTEAD—Fraudulent Transfer—Fraud on Creditors cannot be Predicated upon the Disposition of a Homestead.**—The homestead of a debtor is not an asset susceptible of fraudulent transfer. (S. D.) *Commercial State Bank v. Kendall*, 936.

GAMING.

See Lotteries.

GIFTS.

See Husband and Wife, 4.

GUARANTY.

See Corporations, 4-6.

GUARDIAN AND WARD.

GUARDIAN—Sale of Land.—A court of chancery has no inherent power to authorize a guardian to sell or mortgage his ward's land. (W. Va.) *Logan Planing Mill Co. v. Aldredge*, 1035.

HABEAS CORPUS.

1. **HABEAS CORPUS.**—The Burden of Proving New Matter is on the petitioner, when the traverse alleges matter tending to invalidate the apparent effect of the process. (Cal.) *In re Collins*, 122.

2. **HABEAS CORPUS—Proceedings and Pleadings on the Part of the Respondent.**—Though the petition is sometimes treated as a traverse, this does not require the respondent to file, in addition to a return, a pleading specifically denying affirmative allegations of the petition, nor does it shift the burden of proof as to such allegations from the petitioner to the respondent. (Cal.) *In re Collins*, 122.

3. **HABEAS CORPUS—Office of Proceedings and Pleadings.**—To adopt the analogy of pleading in civil actions, the return is the complaint, the traverse is the answer; new matter set up in the traverse is deemed denied, and must be proved by the party alleging it. (Cal.) *In re Collins*, 122.

4. **HABEAS CORPUS—Questions not Going to the Jurisdiction of the Court.**—If a prisoner surrendered under a specific indictment on the trial thereof swears to matters forming the basis of the charge under which he was surrendered, and is indicted for perjury for so doing, assuming that a verdict of acquittal or conviction on the first charge will prevent a conviction on the second, still this is a matter of defense not going to the jurisdiction of the court, and does not entitle him to a discharge on habeas corpus. (Cal.) *In re Collins*, 122.

5. **HABEAS CORPUS—Admission to Bail After Denial of.**—If, after a hearing on proceedings by habeas corpus, the prisoner is remanded and prosecutes a writ of error to the supreme court of the

United States, there remains any proceeding to be stayed pending a review of the order so remanding him, the power to admit him to bail belongs exclusively to such officer, if any, as had power to admit him to bail independent of the habeas corpus proceeding, and he must make application for bail in the usual manner as provided by the laws of the state. (Cal.) *In re Collins*, 122.

6. **HABEAS CORPUS**, What are not Grounds for.—Mere errors and irregularities which do not render the proceedings void are not ground for relief by habeas corpus. (Okl. Cr.) *Ex parte Johnson*, 857.

7. **HABEAS CORPUS**—Plea of Former Jeopardy not Available in Support of.—The writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy. (Okl. Cr.) *Ex parte Johnson*, 857.

Note.

Hackmen, license and occupation taxes, when subject to, 286.

HOLOGRAPHS.

See Wills, 11, 12.

HOMESTEADS.

On Public Lands.

1. **HOMESTEAD on the Public Lands, Injuries to.**—A homesteader upon public land, proceeding lawfully to perfect his title, is entitled to compensation for injury done to the premises, but the measure of damages is not the same as if he owned the land in fee simple. (Okl.) *McLeod v. Spencer*, 774.

2. **HOMESTEAD on the Public Lands, Measure of Damages.**—In such a case it is error for the court to instruct the jury that the measure of damages is just the same as if the plaintiff owned the land in fee. The court ought to have defined the rights of the settler in the homestead, and left the question to the jury to determine his interest, and from such interest the liability of the defendant. (Okl.) *McLeod v. Spencer*, 774.

Probate Homestead.

3. **PROBATE HOMESTEAD, Collateral Attack upon.**—An order of a probate court, setting apart a homestead to the use of the wife and family of the deceased husband, in the absence of facts showing a want of jurisdiction in said court to make such order, is not open to collateral attack. (Okl.) *Funk v. Baker*, 788.

4. **PROBATE HOMESTEAD, Effect of.**—The homestead of a decedent set aside to the surviving spouse and the minor children under the laws of Oklahoma does not pass into the hands of the administrator, nor is it subject to distribution as long as the homestead character is preserved and it is occupied and used by the family of the decedent as a home. (Okl.) *Funk v. Baker*, 788.

5. **PROBATE HOMESTEAD, Continuance of.**—When a homestead is set aside to a surviving spouse in proceedings in probate, it does not cease to be such homestead on the settlement of the estate, but continues its homestead character as long as the property is occupied as a home by the family. (Okl.) *Funk v. Baker*, 788.

Judgment Lien and Execution Sale.

6. **HOMESTEAD**—Judgment Lien, When Attaches to.—If one holding lands as a homestead in excess of the amount which he is entitled to retain as exempt from execution is subjected to a judgment against him which is a lien upon his property, such lien attaches

to the excess of the homestead, and the debtor cannot convey such excess to one of his creditors and enable the latter to hold the property so conveyed free from such judgment lien. (Mo.) *White v. Spencer*, 547.

7. **JUDGMENT LIEN, When Attaches to a Homestead.**—Whenever there is a surplus in a homestead, either in value or quantity, there may be a judgment lien as to such surplus, leaving it to future selection and admeasurement to determine the exact dimensions of such surplus. (Mo.) *White v. Spencer*, 547.

8. **HOMESTEAD—Execution Sale of—Admeasurement, When Rendered Unnecessary.**—Where, upon the issuing of an execution, the debtor and the officer holding the writ discuss the fact that the debtor has more land than he can hold under the statute, and he selects a parcel and conveys all the balance to a creditor whom he desires to favor, and the matter of surplus is dependent on quantity rather than value, the judgment debtor and creditor become bound by the selection thus made to the same extent as if he had followed statutory proceedings under the writ, and the sale under execution of the part thus conveyed is valid. (Mo.) *White v. Spencer*, 547.

See Partition, 1; Fraudulent Conveyances, 5, 6.

Note.

Homestead, set aside by the probate court, conveyances and mortgages of, 794.

set aside by the probate court, title to, in whom vests, 794.

HOMICIDE.

Mutual Combat.

1. **HOMICIDE on Mutual Combat, What is and the Guilt of the Persons Engaged Therein.**—A charge that if defendant was informed and believed that the deceased had taken possession of a field claimed by him, and that he would be there with an armed party on the morning of the killing, and that they had made threats against the life of defendant, and the defendant, knowing all of these things, voluntarily organized a party, arming them with deadly weapons for the purpose of meeting said parties in deadly conflict, going to the place of the killing, and a conflict ensued, and the deceased was killed, then such conflict was a "mutual combat," and all parties who knowingly and intentionally engaged in it are guilty of murder, was not, under the theory of the prosecution and the evidence in this case, erroneous. (Okl. Cr.) *Driggers v. United States*, 823.

Self-defense.

2. **HOMICIDE—Self-defense—Opinion Evidence.**—When the plea of self-defense is raised, it is proper to refuse to permit a minor son of the accused to answer the question, "state if your father had not killed him at the time he did what would have happened." (S. C.) *State v. Stockman*, 888.

3. **SELF-DEFENSE—Duty to Retreat Before Taking Life.**—In case of affray, where retreat is necessary before taking the adversary's life in self-defense, that retreat must be in good faith, not as a cover to execute a fixed design to kill. (W. Va.) *State v. Hood*, 964.

4. **HOMICIDE—Self-defense and Reasonable Doubt.**—It is proper to instruct the jury that self-defense is an affirmative defense which must be established by a preponderance of the testimony, when the jury is also instructed that the state must establish the guilt of the defendant beyond a reasonable doubt. (S. C.) *State v. Stockman*, 888.

5. HOMICIDE—Self-defense—Imminence of Danger.—The circumstances under which one may excuse a homicide in self-defense must be such as would justify a belief of the necessity of taking life in the mind of a person possessed of ordinary firmness and reason. (S. C.) *State v. Stockman*, 888.

6. HOMICIDE—Self-defense—Bringing on Difficulty.—To excuse one for taking life on the ground of self-defense he must, as a rule, be without fault in bringing about the difficulty. (S. C.) *State v. Stockman*, 888.

7. HOMICIDE—Defense of Habitation.—To Excuse the Taking of Life in the defense of one's dwelling and its inmates, the danger must be imminent and not past. (S. C.) *State v. Stockman*, 888.

Encouraging Homicide.

8. HOMICIDE, Guilt of Person Encouraging.—One who advises or encourages another to do an illegal act is responsible for the natural and probable consequences that may arise from its perpetration. (Mo.) *State v. Darling*, 526.

Counseling Suicide.

9. MURDER by Counseling Another to Commit Suicide.—At the common law, if one counseled another to commit suicide, and the other, by reason of the encouragement and advice, killed himself, the adviser was guilty of murder as an aider and abettor, if present when his advice was carried out. (Mo.) *State v. Webb*, 518.

10. SUICIDE—Abandonment of Compact or Conspiracy to Commit, When Complete so as to Relieve the Party not Participating.—Under the statutes of Missouri every person deliberately assisting another in the commission of self-murder is guilty of manslaughter, but if, after two have entered into an agreement to commit suicide, one of them changes his mind and endeavors to dissuade the other, the former is not guilty, if, notwithstanding such dissuasion, the other persists and succeeds. It is not essential to the defense of the accused that the decedent led him to believe in good faith that the purpose to commit suicide had been abandoned, and afterward killed himself of his own volition. (Mo.) *State v. Webb*, 518.

11. SUICIDE—Burden of Proof on a Prosecution for Advising and Encouraging.—On a prosecution for assisting another in self-murder, where it appeared that the defendant and the decedent agreed to commit suicide, but the defendant testified that he abandoned his purpose and endeavored to persuade the decedent to do likewise, and thought she had abandoned her purpose, it is error to instruct the jury that the defendant must assume the burden of showing that the killing was done by decedent of her own volition and not under the influence or advice of the accused or assistance of the defendant. (Mo.) *State v. Webb*, 518.

12. MURDER by Assisting in Suicide—Instruction.—On a prosecution for advising, encouraging and assisting in suicide, where the evidence tends to show that the decedent and the defendant first agreed that both would commit suicide, but the defendant testified that he changed his mind and endeavored to dissuade the decedent, an instruction asked by the defendant to the effect that if the jury believe from the evidence that the defendant procured a pistol with which he and the decedent intended to commit suicide, and afterward changed his mind and tried to escape from the consequences of the agreement, but the decedent refused to permit him to do so, and that on account of physical weakness he could not by force leave her, and that she did the shooting, then the defendant did not deliberately assist her in self-murder, and is not guilty of man-

slaughter in the first degree, should be given. (Mo.) *State v. Webb*, 518.

Evidence.

13. **HOMICIDE**.—In Giving Evidence of Threats it is proper for witness to state the language, or the substance of the language, used by the declarant, so that the court and jury may determine whether in fact there was any threat, and the nature thereof. (S. C.) *State v. Stockman*, 888.

14. **HOMICIDE**.—Evidence of Hostility or Threats.—Under a plea of self-defense testimony is not admissible that the deceased had said that he considered himself of "better stock" than the accused; such evidence falls short of showing threats or hostile feeling. (S. C.) *State v. Stockman*, 888.

15. **HOMICIDE**.—Evidence of Bias of Witness.—When, with a view to show bias, it is brought out on cross-examination of a witness for the defense that the deceased had prosecuted him for killing his dog, a question by counsel for the defense whether the deceased ever killed dogs calls for irrelevant matter. (S. C.) *State v. Stockman*, 888.

16. **HOMICIDE**.—When a Witness Testifies that on a Certain Day he purchased goods at the store of the deceased which he had charged, and as he went away heard the deceased make a threat against the defendant, it may be shown in reply on what day the goods were actually bought and that the deceased was at another place at the time. (S. C.) *State v. Stockman*, 888.

17. **HOMICIDE**.—Opinion that Deceased was Sober.—In reply to testimony brought out by the defense that the deceased was drunk on the day of the homicide, a witness may testify that he met the deceased that day and he appeared to be sober. (S. C.) *State v. Stockman*, 888.

18. **HOMICIDE**.—Nonexpert Opinion as to Wound.—The Sheriff may Testify that when the accused arrived at the jail after committing the homicide that he had bruises on his face which in his judgment were made with the fist, if it is shown that he is familiar with that class of wounds. (S. C.) *State v. Stockman*, 888.

Dying Declarations.

19. **DYING DECLARATION**.—Disbelief in God.—It is no ground for excluding a dying declaration that it does not appear that the declarant believed in God and rewards and punishment after death. (W. Va.) *State v. Hood*, 964.

20. **DYING DECLARATION**.—Whether may Include Inadmissible Evidence.—A dying declaration must be such as would be admissible if the party were living and giving evidence. Therefore hearsay evidence cannot be rendered admissible by being included in a dying declaration. (W. Va.) *State v. Hood*, 964.

21. **DYING DECLARATION**.—Hearsay Evidence.—Objection.—A written dying declaration contains matter that is admissible, and other matter not admissible, because hearsay. There is a general objection to the admission of the paper and one item thereof, but no specific objection to matter of hearsay. It was the duty of the objector to specify the objectionable matter, and there is no error in overruling the objection to the admission of the paper for such hearsay. (W. Va.) *State v. Hood*, 964.

See Conspiracy, 1, 2.

Note.

Hotel and Restaurant Keepers, license and occupation taxes, when subject to, 283.

HUSBAND AND WIFE.*In General.*

1. **HUSBAND AND WIFE—His Ownership of Her Apparel and Ornaments.**—The common-law rule that "suitable ornaments and wearing apparel of a married woman, which come to her through her husband during coverture, remain his personal property during his life, and he may sell and dispose of them during his life," has not been abrogated by our married woman's act (Gen. Stats., p. 2012), or by any other statutory provision. (N. J. Eq.) *Farrow v. Farrow*, 714.

2. **HUSBAND'S AUTHORITY to Make or Indorse Paper in Wife's Name.**—A woman who has knowledge that her husband is making loans, taking securities, and indorsing them in her name, and makes no objection thereto, will be deemed to have authorized him so to do. (S. D.) *Barry v. Stover*, 941.

3. **HUSBAND AND WIFE—Estoppel to Deny His Authority.**—The wife of a loan broker, who permits him to take and transfer notes and securities in her name, is bound by his act in receiving payment from a mortgagor who gave a non-negotiable note and mortgage to her which her husband has transferred to another. (S. D.) *Barry v. Stover*, 941.

Gifts Between.

4. **HUSBAND AND WIFE—Proof of Gift Between.**—A gift of personal property from husband to wife must be clearly proved. There must be clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it, and of vesting title in the wife. (N. J. Eq.) *Farrow v. Farrow*, 714.

Alienation of Affections.

5. **ALIENATION OF AFFECTIONS—Conspiracy by Parents.**—Husband and wife, accomplishing by concert of action the deprivation of their son in law of his marital rights, are both liable for the resulting damage. (Wis.) *Jones v. Monson*, 1082.

6. **ALIENATION OF AFFECTIONS—Liability of Parents.**—What a father and mother may do in relation to their daughter continuing to reside with her husband, without an inference of bad intent arising therefrom, is quite different from what a stranger may do in regard to such an interference. Parents may properly, to some extent, watch over the welfare of a daughter after marriage as well as before; they may advise her, under some circumstances, contrary to the inclination of her husband, and even to the extent of advising desertion of him, and may act upon her mind successfully to that end from proper motives. (Wis.) *Jones v. Monson*, 1082.

7. **ALIENATION OF AFFECTIONS—Liability of Parents.**—Acts done by a stranger in accomplishing the deprivation of another of his marital rights may well be regarded as malicious, while similar acts by parents of the husband or wife would not give rise to a well-grounded suspicion of bad intention. (Wis.) *Jones v. Monson*, 1082.

8. **ALIENATION OF AFFECTIONS—Liability of Parents.**—In determining whether parents are liable for influencing their daughter to leave her husband the test is, were they, in what they did, actuated with reasonable parental regard for their child, or were they actuated by unreasonable ill-will toward husband or wife, as the case may be. If the former, and they yet, from the standpoint of better judgment, were wrong, excusably mistaking the true situation, the resulting injury is *damnum absque injuria*. (Wis.) *Jones v. Monson*, 1082.

9. **ALIENATION OF AFFECTIONS—Liability of Parents.**—The acts of parents in inducing their daughter to leave her husband are

presumed to be in good faith, and for the purpose of promoting their child's welfare. (Wis.) *Jones v. Monson*, 1082.

10. JURY TRIAL—Instruction, Error in Charging One Person with the Acts of Another.—Where two persons are sued for alienating a wife's affections and carrying her away from her husband, and the evidence shows that when she was so taken away, one of such parties was not present, it is error to give an instruction which will permit the jury to find both persons liable, if either was present aiding or abetting the parties who were acting in such taking. (Ark.) *Boland v. Stanley*, 114.

11. ALIENATION OF WIFE'S AFFECTION, Basis of Actions for.—The loss of consortium, or, in other words, of society, companionship, conjugal affection, fellowship and assistance of a wife, is the principal basis of the action for alienating her affections. (Ark.) *Boland v. Stanley*, 114.

12. ALIENATION OF WIFE'S AFFECTIONS, Liability for, When and Against Whom Exists.—Whoever invades the precincts of a home, and without justifiable cause, by any means whatsoever, severs the tie that binds husband and wife, alienating her affection from him and depriving him of the aid, comfort and happiness of a loyal union between them, is liable in civil damages therefor. (Ark.) *Boland v. Stanley*, 114.

13. ALIENATING WIFE'S AFFECTIONS.—Malevolence or Improper Motive is not Always Necessary to sustain an action for alienating a wife's affections. (Ark.) *Boland v. Stanley*, 114.

14. ALIENATING WIFE'S AFFECTIONS—Burden of Proof.—If a Stranger Interferes between husband and wife, and by advice or inducement causes her to leave him, or takes her away with or without her consent, and encourages her to remain from him, or harbors or protects her while away, he does so at his peril, and must assume the burden of proving good cause and good faith for his conduct. (Ark.) *Boland v. Stanley*, 114.

15. ALIENATING WIFE'S AFFECTIONS—Burden of Proof in Action Against Father.—Bad or improper motives on the part of a father in taking his daughter from her husband or in permitting her to return to the father's home cannot be presumed, but the burden of proving them must be assumed by the husband in an action against the father for alienating the wife's affections. (Ark.) *Boland v. Stanley*, 114.

16. ALIENATING WIFE'S AFFECTIONS, Liability for, When not Shown.—If no enticements are held out to a wife to leave her husband or to cease to live with him, and nothing is said or done by a third party to cause her to abandon him, her act being of her own accord and for reasons best known to herself, no action can be sustained for alienating her affections. (Ark.) *Boland v. Stanley*, 114.

17. ALIENATING WIFE'S AFFECTIONS—Evidence.—Statements of a Wife After Returning to her father's home are not admissible in an action for alienating her affections, brought against him and a third person. (Ark.) *Boland v. Stanley*, 114.

18. APPEAL AND ERROR—Error in Excluding Evidence, When not Shown.—If evidence is offered in an action for alienating a wife's affections of statements made by her after she left her husband and returned to her father's home, and the offer does not show what such statements were, it cannot be seen whether they were relevant or not, and error in excluding them is not presumed. (Ark.) *Boland v. Stanley*, 114.

See Judgments, 4-6.

IMPAIRMENT OF OBLIGATIONS.

See Constitutional Law, 7-10.

INDICTMENT AND INFORMATION.

1. CRIMINAL PROSECUTION—Information, Amendment of Without Reverifying.—In Missouri, an information for murder may be amended by leave of court by inserting in one place the word "deliberately" and in another the word "willfully," without reverifying. (Mo.) *State v. Darling*, 526.

2. CRIMINAL PROSECUTION—Information, Amendment of, When not Prejudicial to the Accused.—If an information for murder is amended by inserting the word "willfully," and the accused is found guilty of manslaughter only, he has not been prejudiced by such amendment. (Mo.) *State v. Darling*, 526.

3. INDICTMENT OR INFORMATION not in the Language of the Statute.—When an indictment uses substantially the same language in charging an offense as is used in the statute in creating the offense, the indictment is sufficient. (Okl. Cr.) *Reed v. Territory*, 861.

4. INDICTMENT, Motion to Set Aside—Insufficient Statement of Grounds of.—A general allegation that the grand jury which found the indictment was not properly and legally drawn is too indefinite and uncertain to require notice. (Okl. Cr.) *Reed v. Territory*, 861.

5. INDICTMENT, Application to Take Evidence to Set Aside, by What must be Supported.—An application to take evidence to sustain a motion to set aside an indictment, upon the ground that the jury was not properly drawn and impaneled, must be supported by an affidavit in which the allegations of the motion are alleged to be true. (Okl. Cr.) *Reed v. Territory*, 861.

6. INDICTMENT, Motion to Set Aside, When Proper and Necessary.—It is not error to overrule a motion to set aside an indictment, when the facts alleged in the motion are not sufficient to show that the motion should be sustained, if proven to be true. (Okl. Cr.) *Reed v. Territory*, 861.

7. INDICTMENT, Finding of a Second Before the First has been Disposed of.—The fact that an indictment or information is pending against a defendant will not of itself prevent a grand jury from finding another indictment against the defendant for the same offense. (Okl. Cr.) *Reed v. Territory*, 861.

8. INDICTMENT, Pendency of One as an Abatement or Bar of Another.—The pendency of an indictment or information against a defendant, when there has been no jeopardy upon it, cannot be pleaded, either in abatement or bar to a second indictment or information for the same offense. (Okl. Cr.) *Reed v. Territory*, 861.

INFECTED SHEEP.

See Animals, 2-4.

INJUNCTIONS.

1. EQUITY—Right to Enjoin Crimes.—Courts of equity are without power to enjoin threatened crimes or threatened prosecutions under a municipal ordinance, but this rule does not prevent such courts from restraining any act, whether connected with the crime or not, which tends to the destruction or impairment of property or a property right. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

2. INJUNCTION Against the Enforcement of a Municipal Ordinance.—Where a municipal ordinance and its threatened enforcement greatly diminish and practically destroy the value of property by forbidding the only use to which it is adapted, its enforcement may be restrained by equity. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

3. INJUNCTION Against Proceedings Under Execution, Denial of Because They were not a Cloud on Complainant's Title.—If a sheriff is about to sell property on execution against a person other than the complainant, he is not entitled to an injunction against the sale, because it will not cast a cloud on his title. (Cal.) *Brum v. Ivins*, 137.

4. INJUNCTION Against Enforcement of a Judgment, Because Complainant was not Correctly Named Therein.—If an action was brought against M. S. de B., but the process served on M. S. B., who, failing to appear, judgment was taken by default, and an execution was levied on property of M. S. B., he is not entitled to enjoin its enforcement on the ground that he was not liable upon the original cause of action, and was not the party intended to be sued or served with process, where it is not shown that his failure to appear was due to any imposition or fraud on the part of the adverse party, nor is there any showing of mistake, surprise or other equitable ground causing his failure to defend. (Cal.) *Brum v. Ivins*, 137.

5. INJUNCTION—Discretion in Issuing Against Nuisance.—The remedy by injunction against a mere nuisance is in the sound discretion of the court; but when the wrong is clear, and the injury present and manifestly impending, the court will not refuse an injunction, especially if public property, safety or health is impaired or threatened, or the nuisance is permanent and maintained in defiance of the express public policy of the state. (S. C.) *State v. Columbia Water Power Co.*, 876.

6. INJUNCTION—Modification to Protect Public Rights.—In enjoining the obstruction of a navigable canal by the bridge and pipes of a water company, the court will frame its judgment so as to protect, as far as possible, the welfare and health of a city depending upon the defendant for its water supply. (S. C.) *State v. Columbia Water Power Co.*, 876.

7. INJUNCTION and Attorneys' Fees.—Defendant is not entitled to counsel fees for dissolving an injunction, where the services of his counsel were rendered exclusively on the trial of the case on the merits. (La.) *Lee Lumber Co. v. Hotard*, 368.

INSANE PERSON.

See Divorce, 13-17; Insurance, 5.

INSTRUCTIONS.

1. JURY TRIAL.—An Instruction Assuming that there was a conspiracy to do the acts complained of by the plaintiff is erroneous if the existence of such conspiracy is not admitted. (Ark.) *Boland v. Stanley*, 114.

2. JURY TRIAL—Singling Out Specific Testimony.—It is not error to refuse an instruction referring to specific evidence when, under the general instruction, the jury must have known that such evidence was to be considered with the other evidence in determining the issues submitted to them. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

3. INSTRUCTIONS.—A Charge to the Jury is not Required to Contain a Discussion of the Evidence in connection with legal propositions applicable thereto, nor to state any such proposition more than once, nor adopt any particular phrasing of a proposition by counsel, nor is it advisable to state any such proposition in an argumentative way, and it is not necessary to indulge in enlarging upon the importance of a particular proposition in its moral or other aspects. (Wis.) *Jones v. Monson*, 1082.

4. INSTRUCTIONS—Quantum or Preponderance of Evidence.—It is not error against the defendant to instruct the jury that the burden of proof is on the plaintiff to "establish the facts essential to his cause of action by a preponderance or greater weight of evidence," but it would be better to use the expression "satisfied by a preponderance of evidence," or "satisfied to a reasonable certainty by a preponderance of the evidence." (Wis.) *Jones v. Monson*, 1082.

5. INSTRUCTIONS.—The Word "Established," as Applied to the quantum of evidence necessary to warrant the existence of a fact in issue, is more appropriate to a criminal than to a civil case. (Wis.) *Jones v. Monson*, 1082.

6. INSTRUCTION.—An Erroneous Instruction may be Withdrawn from the jury with a direction from the court that it is withdrawn and is to be disregarded by the jury. (W. Va.) *State v. Hood*, 964.

7. JURY TRIAL, Instruction Which Should not be Refused.—If there is any evidence in the record upon which an instruction offered could properly be predicated, it should be given. (Okl. Cr.) *Driggers v. United States*, 823.

8. JURY TRIAL—Refusal of Instruction Because Misleading.—It is not error to refuse an instruction, though it correctly states the law, if, as applied to the case, it is misleading and assumes facts as to which there is conflict in the evidence. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

9. JURY TRIAL—Effect of Disregarding the Instructions.—When the court properly instructs the jury as to the measure of damages and they bring in a verdict contrary to such instructions, the verdict should be set aside and a new trial granted. (Okl.) *Myers v. Fear*, 795.

INSURANCE.

Life Insurance.

1. LIFE INSURANCE.—The Purchaser of a Policy on the life of another in which he has no insurable interest except as creditor holds the proceeds of the policy, over and above the debt, in trust for the beneficiaries of the policy. (Ky.) *Irons v. United States Life Ins. Co.*, 318.

2. LIFE INSURANCE—Judicial Sale—Confirmation.—When a judicial sale of a life insurance policy is reported for confirmation, the court does not inquire of its own motion whether the purchaser has an insurable interest, and the order of confirmation does not establish that he takes title absolutely and not as trustee for beneficiaries named in policy. (Ky.) *Irons v. United States Life Ins. Co.*, 318.

3. LIFE INSURANCE—Rights of Purchaser at Judicial Sale.—Where a paid-up life insurance policy in favor of the sister of the insured and her minor children is sold under order of court to raise money for the support of the children to a purchaser having no insurable interest in the life of the insured, he does not acquire absolute title upon confirmation made without objection, but must account to the children for the surplus after deducting what he pays at the sale. (Ky.) *Irons v. United States Life Ins. Co.*, 318.

Fire Insurance.

4. FIRE INSURANCE.—The Destruction of the Property by the assured relieves the insurer from liability, though there is no stipulation to that effect in the policy. (Ky.) *Bindell v. Kenton County A. F. Ins. Co.*, 303.

5. FIRE INSURANCE—Destruction by Lunatic.—A fire insurance company cannot escape liability for loss on the ground that the in-

sured, when insane, destroyed the property, if the policy makes no exemption in such cases. (Ky.) *Bindell v. Kenton County A. F. Ins. Co.*, 303.

6. INSURANCE—Waiver by Agent of the Conditions of a Policy. In an action arising on an insurance policy issued in the Indian Territory and pending in the United States court of appeals of the Indian Territory at the time of the admission of the state into the Union, an insurance company cannot be deemed to have waived a condition in a policy of fire insurance to the effect that the entire policy, and each and every part thereof, shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage, because the agent who countersigned and delivered said policy had notice or knowledge at that time of the existence of a mortgage on the property, where such policy provides that no officer, agent, or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto, and as to such provisions or conditions no officer, agent or representative shall have power or be deemed or held to have waived such provision or condition unless such waiver, if any, be written upon or attached thereto. (Okl.) *Sullivan v. Mercantile Town Mut. Ins. Co.*, 761.

7. INSURANCE—Waiver of Forfeiture Arising from Encumbrance.—Where an insurance policy contains the provision aforesaid, an insurance company issuing the same cannot be deemed to have waived a condition in said policy rendering it void in case the subject of insurance be personal property and be or become encumbered by mortgage, because the agent who countersigned and delivered said policy, with notice of the existence of a mortgage upon a portion of said property, collected a portion of the premium thereon after the property covered by said policy had been destroyed by fire, or because an adjuster of such company, with knowledge of the existence of such mortgage, stated to the insured that the claim would be adjusted. (Okl.) *Sullivan v. Mercantile Town Mut. Ins. Co.*, 761.

8. INSURANCE—Forfeiture Clause, When Divisible.—Under a stipulation that the entire policy, and each and every part thereof, shall become void if the subject of insurance be personally, and be or become encumbered, a forfeiture cannot be claimed because one item of personal property insured by said policy, separately set out and separately valued therein, was encumbered by mortgage, where the subject of insurance was partly real and partly personal property. (Okl.) *Sullivan v. Mercantile Town Mut. Ins. Co.*, 761.

9. INSURANCE, When Divisible.—Where an insurance policy is issued and different classes of property insured, each class being separated from the others and insured for a specific amount, and there is a breach of the condition of the contract as to one class of the property insured, the contract should be considered not as one entire in itself, but as one which is separable and in which the separate amounts specified may be distinguished, and a recovery had for one or more without regard to the other items, provided the contract is not affected by any question of fraud, act condemned by public policy, or any increase in the risk of the property insured. (Okl.) *Arkansas Ins. Co. v. Cox*, 808.

10. INSURANCE, Unconditional Sole Ownership, What Amounts to.—A vendee of land occupying the same under an executory contract of purchase, on which he has paid a portion of the purchase price, is an unconditional and sole owner in fee simple of the equitable title within the condition of a policy providing that it shall be void if the interest of the insured is other than unconditional

and sole ownership of the fee simple title. (Okl.) *Arkansas Ins. Co. v. Cox*, 808.

11. INSURANCE, Estoppel by Knowledge of the Facts.—Where it is shown that the insured truthfully and correctly stated the nature and condition of his title in making the application for insurance, he will not be precluded from recovering in case of loss on account of a contrary title stated in the policy by the underwriter. (Okl.) *Arkansas Ins. Co. v. Cox*, 808.

Reinsurance.

12. FIRE INSURANCE.—A Contract of Reinsurance is Simply to Indemnify the original insurer for a loss he may sustain upon his contract of insurance; it is a guaranty to reimburse him for any sum he may be compelled to pay under his contract of insurance with the owner. (Neb.) *Allison v. Fidelity Mut. Fire Ins. Co.*, 694.

13. REINSURANCE—Power of Mutual Company to Contract.—Mutual fire insurance companies organized under the provisions of chapter 45, Laws of 1897, are not authorized to transact a reinsurance business. (Neb.) *Allison v. Fidelity Mut. Fire Ins. Co.*, 694.

14. REINSURANCE—Effect of Mutual Company's Contract.—A contract of reinsurance made by a mutual insurance company organized under the provisions of chapter 45, Laws of 1897, is *ultra vires*, and assessments cannot be collected on account of such policy. (Neb.) *Allison v. Fidelity Mut. Fire Ins. Co.*, 694.

15. REINSURANCE—Effect of Mutual Company's Contract.—In an action by one insurance company against another, both of which were organized under the provisions of chapter 45, Laws of 1897, to recover assessments on policies of reinsurance, the reinsured company is not estopped from pleading the defense of *ultra vires*. (Neb.) *Allison v. Fidelity Mut. Fire Ins. Co.*, 694.

Premium Notes.

16. INSURANCE, Premium Notes, Effect of Nonpayment of.—Where two notes are given in payment of the premium on a fire insurance policy, and no reference is made to them in the policy, nor the validity of the policy is in any way made contingent upon the payment of the notes, the policy is not invalidated by nonpayment of the notes at their maturity. (Okl.) *Arkansas Ins. Co. v. Cox*, 808.

Proof of Loss.

17. INSURANCE, Waiver of Defects in Proof.—Where an insurance company did not object, within a reasonable time, that proofs of loss furnished it by the insured were defective (as that the notary public before whom the same were sworn to did not designate his official title nor attach his seal), it must be held that the company waived all defects therein. (Okl.) *Arkansas Ins. Co. v. Cox*, 808.

Note.

Insurance Corporations, license and occupation taxes, when subject to, 288.

INTEREST.

INTEREST, When Allowable and at What Rate Under an Agreement to Sell Property and Apply the Proceeds.—If mortgagees receive a conveyance of the mortgaged premises and execute an agreement specifying that such conveyance has been received in satisfaction of the mortgage debt, but stipulating that if the property is sold for more than enough to pay all the claims of the grantees, including interest, insurance, taxes and all other legitimate expenses,

then all sums of money over and above all of the grantees' lawful claims are to be paid to the grantor, the grantees are entitled to interest, but at the legal rate only, and not at a rate specified in the notes which the mortgage was given to secure. (Wyo.) *Weltner v. Thurmond*, 1113.

See Corporations, 22, 23.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

Constitutional Law.

1. **CONSTITUTIONAL LAW**—Whether Sale of Liquors can be Legalized by Legislature.—The legislature is competent to legalize by license the sale of intoxicating liquors to be drunk as a beverage at the place of sale, for it is not forbidden by the constitution of the state or of the United States, and the practice of licensing such sales has been so long in vogue that it cannot be maintained that they are so destructive of public health and morals that they cannot be sanctioned. (Conn.) *Allyn's Appeal from County Commrs.*, 225.

2. **CONSTITUTIONAL LAW**—License to Sell Liquors.—In testing the validity of a statute licensing the sale of intoxicating liquors, the question whether the licenses are issued by way of regulation or for purposes of revenue is irrelevant. (Conn.) *Allyn's Appeal from County Commrs.*, 225.

Illegal Sales.

3. **INTOXICATING LIQUORS, Sale of by Agent, When does not Render His Principal Guilty.**—If one conducting a stand for the sale of nonintoxicating beverages employs a salesman, who, without the knowledge or consent of his employer, takes possession of and sells some intoxicating liquors which were not intended for sale, the principal is not guilty of selling such liquors. (Ark.) *Partridge v. State*, 100.

4. **CRIMINAL TRIAL**—Venue, When Sufficiently Proved.—If, on the trial of a prosecution for selling liquor without a license, there is evidence tending to show that the offense was committed in a designated town in the state, the evidence is sufficient to establish the venue, for the court will take judicial notice of the county in which the town is situated. (Okl. Cr.) *Reed v. Territory*, 861.

5. **CRIMINAL TRIAL**—Evidence of the Want of a License, What Sufficient.—On a prosecution for selling liquor without having a license so to do, the testimony of the deputy clerk of the county wherein the sale took place that he had examined the records of such county and they did not show that any license had been granted is sufficient to prove that no license existed. (Okl. Cr.) *Reed v. Territory*, 861.

Interstate Commerce.

6. **LIQUORS**—License for Selling—Interstate Commerce.—A statute requiring an annual license fee of a traveling salesman who solicits orders for intoxicating liquors in quantities less than five gallons is not, as applied to interstate transactions, in conflict with the commerce clause of the federal constitution, especially in view of the Wilson act. (S. D.) *State v. Delamater*, 907.

7. **LIQUORS**—Place of Interstate Sale.—One Who Solicits Orders for liquors in one state, the orders to be forwarded for acceptance to

another state where the liquor is to be delivered to the purchaser on board the cars, is within a statute of the first state requiring an annual license fee of salesmen soliciting orders for liquors. (Justice Hancy dissented.) (S. C.) *State v. Delamater*, 907.

JUDGES.

1. DISQUALIFIED JUDGE—Effect of His Judgment.—A district judge is disqualified from making an order confirming a judicial sale in an action which he commenced and prosecuted to judgment as attorney for the plaintiff, and where the fact of such disqualification appears upon the record, the order of confirmation made by the judge so disqualified is void, and may be collaterally attacked. (Neb.) *Harrington v. Hayes County*, 680.

2. DISQUALIFIED JUDGE—Suit to Vacate His Judgment.—In an action to set aside a sheriff's deed upon the ground that the order confirming the sale which it was executed to carry out was made by the judge disqualified to act, an allegation that the plaintiffs are the owners in fee simple of the land in question is a sufficient plea of ownership, when the petition is attacked by a general demurrer. (Neb.) *Harrington v. Hayes County*, 680.

JUDGMENT.

In General.

1. A JUDGMENT is the Sentence of the Law upon the Record. It is the application of the law to the facts and pleadings. (Mo.) *State v. Muench*, 536.

2. JUDGMENT—When Void for Uncertainty.—A judgment that does not show for and against whom it is, is void for uncertainty. A judgment must show in what case it was rendered, else it is void. (W. Va.) *Ferrell v. Simmons*, 962.

3. JUDGMENT NOT ENTERED, Whether may be Proved to Support Levy Under a Writ.—Where the sheriff seeks, in an action of replevin, to justify the seizure of property under an execution issued in another case, he must prove a valid and subsisting judgment in that case before he can attack a transfer of the property levied on as made in fraud of creditors. Where said judgment has been rendered but not entered upon the journal as required by law, it is not error to exclude secondary evidence offered in proof thereof. (Okl.) *Cockrell v. Schmitt*, 737.

Against Married Women.

4. JUDGMENT Against Married Woman—Misjoinder of Husband. A judgment against a married woman is not void because her husband was not made a party to the action, though the statute required him to be joined. (Cal.) *Emery v. Kipp*, 141.

5. A JUDGMENT Against a Married Woman by Her Maiden Name is Valid, especially where upon a contract executed by her in such name. (Cal.) *Emery v. Kipp*, 141.

6. A JUDGMENT Against a Married Woman by Her Maiden Name, Though Based on Constructive Service of Process, declaring her to have no title or interest in land claimed by her, is conclusive on her, especially when she acquired such property in her maiden name, and there is nothing of record to show the subsequent change in such name by her marriage. (Cal.) *Emery v. Kipp*, 141.

Service of Process.

7. JUDGMENT.—If Process in a Suit is Defective or Irregular, but not to the extent of being substantially worthless, a judgment by default thereon will be irregular and liable to be corrected or

set aside on motion, or reversed above, but not absolutely void, and hence not open to collateral attack. (W. Va.) *Town of Point Pleasant v. Greenlee*, 971.

8. JUDGMENT—Recital of Due Process.—If the writ, inspected as part of the record to overthrow the adjudication or recital in the judgment of due process, is an absolute contradiction thereof, an irreconcilable contradiction and denial, the invalidity of the judgment may be declared collaterally; but if the contradiction may be reconciled by a construction of the writ not absolutely at variance with reason and sound policy, a construction by the recital so given cannot be assailed collaterally. (W. Va.) *Town of Point Pleasant v. Greenlee*, 971.

9. JUDGMENT—Collateral Attack for Misstatement in Return of Process.—Where the record shows that such writ has been held by the court to which it was returnable to be due process, by a recital in the judgment thereon, such judgment cannot be collaterally assailed. (W. Va.) *Town of Point Pleasant v. Greenlee*, 971.

10. A JUDGMENT IS BINDING on the Person Served with Process Though He may have been Sued or Served by a False or Fictitious Name. If so served, although under a name not his own, he must appear and set up the misnomer and whatever defense he may have. Failing to do this, he is concluded by the judgment. (Cal.) *In re Collins*, 122.

11. JUDGMENT—Presumption that Different Names Designate Different Persons and Its Rebuttal.—Where the person against whom a judgment is sought to be enforced and the defendant bear different names, they are presumed to be different persons, but this presumption may be and is rebutted by proof that the former is the person who was served with process in the action. (Cal.) *In re Collins*, 122.

Persons Bound.

12. JUDGMENT Against One Taxpayer, When Binding on Another.—Where a citizen and taxpayer files a petition in behalf of himself and other taxpayers against a city council to contest the validity of a law, every citizen must be regarded as a party to the proceedings, and bound by the judgment entered therein. (Ala.) *City Council of Montgomery v. Walker*, 54.

Collateral Attack.

13. A COLLATERAL ATTACK on a Judgment cannot be sustained unless it is void on its face. (Cal.) *Emery v. Kipp*, 141.

14. JUDGMENT, Collateral Attack upon, What is.—Where, in an action to quiet title to real property, the defendant relies upon a judgment against the plaintiff which the latter seeks to avoid, the attack thus made by him is collateral. (Cal.) *Emery v. Kipp*, 141.

See *Homestead*, 6-8; *Judges*; *Principal and Surety*; *Setoff and Counterclaim*, 1.

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JUDICIAL NOTICE.

See *Evidence*, 1.

JUDICIAL SALE.

JUDICIAL SALE—Confirmation a Judicial Act.—An order confirming a judicial sale is a judicial, and not a ministerial, act. (Neb.) *Harrington v. Hayes County*, 680.

See *Execution*, 7-12; *Executors and Administrators*, 2-9; *Insurance*, 1-3.

JURISDICTION.

See Courts, 1-3; Trusts, 11.

JURY.

1. **JURY TRIAL.**—The Constitution Secures to a Litigant the Right of trial by jury only in those cases where the right existed at common law. (Ky.) *Cominger v. Louisville Trust Co.*, 322.

2. **CONSTITUTIONAL LAW**—Jury Trial.—The statute of Alabama of 1895 in reference to the drawing of jurors for the trial of capital cases does not conflict with section 6 of the constitution of 1901 of that state. (Ala.) *Wray v. State*, 18.

See Trial.

JUSTICE'S COURT.

JUSTICE'S COURT—Informality in Proceedings.—In relieving justices' proceedings from formality courts cannot dispense with substance and by amendment supply a substance not present. (W. Va.) *Ferrell v. Simmons*, 962.

LACHES.

See Equity, 4; Trusts, 10.

LANDLORD AND TENANT.*In General.*

1. **LANDLORD AND TENANT**—Recoupment for Misrepresentation—Setoff.—A lessee upon discovering fraudulent representations by the lessor of a material fact is not compelled to give up the premises and rescind the lease, but may offset any damage caused by the misrepresentation against the rent upon suit being brought for its recovery. (Okl.) *Myers v. Fear*, 795.

2. **LESSOR**—Obligation to Rebuild or Restore.—In the absence of a covenant in the lease to that effect, a lessor is under no obligation to rebuild or restore the premises in case of their destruction. (Md.) *Kirby v. Wylie*, 451.

3. **LESSOR**—Obligation to Make Repairs.—A covenant in a lease that the lessor shall repair the premises is not implied. (Md.) *Kirby v. Wylie*, 451.

4. **LESSOR**—Obligation to Restore Destroyed Building.—A building torn down by order of the building inspector because it has become unsafe through age, decay and alterations made by the lessee and prior tenants is not destroyed by act of God, within the meaning of a covenant in the lease that the lessor will rebuild in case of destruction by such act. (Md.) *Kirby v. Wylie*, 451.

Subtenants.

5. **LANDLORD AND TENANT.**—A subtenant holds the premises subject not only to the terms of his own demise, but also to the performance of the terms and conditions imposed upon the estate by the provisions of the original lease. (Ala.) *Brock v. Desmond*, 71.

6. **LANDLORD AND TENANT**—Subtenants.—If the original tenant fails to pay his rent or to perform any other condition of his lease, the landlord may enforce such performance, though the result may be to remove a subtenant who has paid his rent and performed all the other conditions of his lease from the original tenant. (Ala.) *Brock v. Desmond*, 71.

7. **LANDLORD AND TENANT**—Subtenant, Voluntary Surrender of the Original Tenant, When Affects.—If the original tenant has in-

curring a forfeiture of his lease, and for that reason the landlord annuls the lease with the consent of the original tenant, this is a mere surrender of possession to which the landlord is entitled, and carries with it the right to the possession as against the sublessee. (Ala.) *Brock v. Desmond*, 71.

Estoppel to Deny Title.

8. **ESTOPPEL to Question Lessor's Title, When does not Exist.—One Who Accepted a Lease of Real Property While Himself in Possession**, and who at no time obtained possession from his lessor, is not estopped from questioning the latter's title by asserting title in himself. (Cal.) *Strong v. Baldwin*, 149.

9. **ESTOPPEL to Assert Title to Water Rights, When does not Arise from Accepting a Lease.—One Having Title by Prescription to a ditch and the water flowing therein, and in actual possession thereof**, is not, by accepting a lease, estopped from asserting his title against his lessor. (Cal.) *Strong v. Baldwin*, 149.

LARCENY.

INDICTMENT—Larceny of the Property of Different Owners.—Where articles of property belonging to different owners are stolen at the same time and place, the offense is single and must be charged in the same count; but to come within the rule, the indictment must show affirmatively that the property of different owners was stolen at the same time and place. (Ala.) *Clemm v. State*, 17.

LATERAL SUPPORT.

See *Adjoining Owners*.

LEGATEES.

See *Wills*.

LIBEL AND SLANDER.

1. **LIBEL—Report of School Superintendent.**—A superintendent of schools who, in his official report to the school visitors, makes statements reflecting on the efficiency of a teacher, is protected by his privilege if he honestly believes his statements to be true and makes them in good faith. It is not necessary to his protection that he must have had what might seem to the jury "good reason" or "reasonable grounds" for believing the statements true, nor is he bound to prove that he published them with no intention of injuring the teacher. (Conn.) *Barry v. McCollom*, 215.

2. **LIBEL—Presumption of Malice and Falsity.**—Statements made in his official report by a superintendent of schools, which reflect on the efficiency of a teacher, are in the nature of a privileged communication, and she can rely on no presumption either of falsity or malice. (Conn.) *Barry v. McCollom*, 215.

3. **LIBEL.—The Declarations of a Person Charged with Libel** expressing his feeling with reference to the libelous statements, made a few days prior to the statements, may be relevant, if made in a natural manner and not under circumstances suggesting a purpose to manufacture evidence in his own favor, not as part of the *res gestae*, but as the best evidence of the existence of the facts as to which they speak. (Conn.) *Barry v. McCollom*, 215.

4. **LIBEL—Declarations of Defendant.**—Whether Remoteness in Point of Time so weakens declarations of a person charged with libel as to make them not worth being admitted in evidence is a matter addressing itself to the sound discretion of the trial judge. (Conn.) *Barry v. McCollom*, 215.

5. LIBEL—Statements Reflecting on Teacher.—Where one of the statements in the report of a superintendent of schools is that a teacher has not “even the externals of refinement,” the court should not instruct, after the teacher has taken the stand in her own behalf, that “the possession of the externals of refinement is rather a subject of your own observation, because you know by seeing a person whether they have or not the externals of refinement.” (Conn.) *Barry v. McCollom*, 215.

LICENSE.

1. LICENSE TAX—Equality and Uniformity.—An occupation tax on real estate agents, graduated in amount according to the class of the city in which the agents reside, and exempting those who reside or do business outside of cities and towns, is unconstitutional because not equal and uniform in its operation. (Ky.) *Hager v. Walker*, 238.

2. LICENSE TAX.—The Courts have Authority to Determine whether or not a statute imposing an occupation tax is in violation of the constitution, and this although the purpose of the statute may be the raising of revenue. (Ky.) *Hager v. Walker*, 238.

See Commerce, 2, 3.

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LIENS.

See Mechanics' Liens.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

Trust Relations.

1. **LIMITATION OF ACTIONS—Voluntary and Involuntary Trustees.**—The rule as to when the statute of limitations begins to run is entirely different in the case of voluntary and of involuntary trustees. (Cal.) Norton v. Bassett, 162.

2. **LIMITATIONS OF ACTIONS.—As Long as a Voluntary Trustee does not Repudiate the Trust**, but continues to act under and in harmony with it, the beneficiaries have no right of action against him, and the statute of limitations must remain inoperative. (Cal.) Norton v. Bassett, 162.

3. **STATUTE OF LIMITATIONS—Trustees.—No Repudiation of an Implied or Constructive Trust is Necessary** to set the statute of limitations in operation. (Cal.) Norton v. Bassett, 162.

4. **LIMITATIONS—Involuntary Trust—Promise or Recognition by Minor Trustee or His Guardian.**—Where a minor becomes by operation of law, through the death of his father, who was a voluntary trustee, the involuntary trustee of the same property, no recognition or oral promise by such minor or his guardian can make the trust voluntary or prevent the running of the statute of limitations against any and all actions by the beneficiaries for the recognition or enforcement of the trust, or an accounting of its proceeds. (Cal.) Norton v. Bassett, 162.

5. **LIMITATION OF ACTIONS.**—In the case of an express and continuing trust, the statute of limitations does not begin to run until the repudiation or adverse possession by the trustee and the knowledge thereof on the part of the beneficiary. (Wyo.) Weltner v. Thurmond, 1113.

6. **LIMITATION OF ACTIONS.**—Under an agreement that if land sells for more than enough to pay certain claims, the balance shall be paid to one of the parties to the agreement, the statute of limitations does not run against him until he knows that the other party repudiates the agreement or denies holding the property under the trust. (Wyo.) Weltner v. Thurmond, 1113.

See Adverse Possession; Corporations, 16-19; Executions, 6; Negligence, 1.

LIQUORS.

See Intoxicating Liquors.

LIS PENDENS.

LIS PENDENS.—The Filing of a Statutory Notice of Pending does not constitute constructive notice of anything more than

the pendency of the action, and when the action has ceased to be pending under the law of *lis pendens*, the statutory notice ceases to be effectual for any purpose. (S. D.) *McVay v. Tousley*, 927.

See Mortgages, 20; Partition, 3.

Note.

Livery and Sales Stables, keepers of, when may be subject to, license and occupation taxes, 283.

LOCAL OPTION.

See Intoxicating Liquors.

LOGS AND TIMBER.

1. **LOGS—Contract to Cut and Bank.**—Where One Agrees to cut and bank logs under a contract providing that the logs shall be scaled by a scaler to be mutually agreed upon, and that either party dissatisfied with the scale may demand a test scale by a disinterested scaler, and the party cutting the logs demands a test scale to be made after an unsatisfactory scale has been made and at a time when it is possible to scale the logs, which demand the other party refuses and thus breaches the contract, the first party may show by other testimony the actual number of feet of logs cut and banked. (Wis.) *Thiel v. John Week Lumber Co.*, 1064.

2. **TIMBER, Sale of "Merchantable" Not Void for Uncertainty.**—A contract for the sale of all merchantable pine timber, measuring ten inches in diameter and over, on a described tract of land, was not void for uncertainty, the word "merchantable" being used to describe the grade or quality of the thing sold, and determinable by experts with approximate certainty. (La.) *Lee Lumber Co. v. Hotard*, 368.

3. **TIMBER, Sale of, When not Void as Being Uncertain as to Price.**—A contract for the sale of standing timber on certain described land for one dollar per thousand feet, to be paid in cash, or vendor's option of equivalent value, by the vendees on the fifteenth day of the succeeding month for all timber cut during any month, imposed an obligation on the vendees to cut, haul and scale the timber, and was therefore not objectionable for uncertainty as to the price. (La.) *Lee Lumber Co. v. Hotard*, 368.

4. **TIMBER, Contract for Sale of, When not Void Because of a Provision as to the Manner of Paying the Purchase Price.**—Where a contract for the sale of standing timber required payment in cash "or vendor's option of equivalent value," such clause should be construed to mean only that payment should be made in cash unless vendor chose to accept something other than cash of equivalent value if offered him by the vendee, and did not render the contract uncertain as to the price as giving the vendor the right to demand something other than money in satisfaction of the debt, and as so construed, the clause was mere surplusage. (La.) *Lee Lumber Co. v. Hotard*, 368.

5. **TIMBER—Contract for Sale of not Enforceable by Specific Performance is Still Obligatory.**—The fact that specific performance of a contract for the sale of standing timber could not be enforced did not deprive the contract of its obligatory character. (La.) *Lee Lumber Co. v. Hotard*, 368.

6. **TIMBER, Sale of, When not Void Because for Lump Sum.**—Revised Civil Code, article 2458, providing that when produce or other objects are not sold in a lump, but by measure, the sale is not perfect, inasmuch as the thing so sold is at the risk of the seller until measured, but the buyer may require either the delivery of them or damages, if there be any, in case of nonexecution of the contract, is

applicable to a sale of standing timber, the title to which does not pass until it has been cut. (La.) *Lee Lumber Co. v. Hotard*, 368.

7. TIMBER, Sale of, When Valid as Against Third Persons.—A contract of sale of standing timber of certain dimensions on described land for a specified price per thousand feet, to be paid on the fifteenth day of the month succeeding that in which the timber was cut, constituted a valid sale of the timber, and, being recorded, was valid as against third persons. (La.) *Lee Lumber Co. v. Hotard*, 368.

8. TIMBER, When Real Property.—Trees continue to be real estate, after they are sold apart from the land, until severance. (La.) *Lee Lumber Co. v. Hotard*, 368.

LOST PROPERTY.

See Finding Lost Property.

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LOTTERIES.

LOTTERY TICKET—Recovery by Vendee of Money Paid.—The rule that courts will not permit the recovery of the consideration paid upon an executed contract prohibited by statute does not apply to the vendee of a lottery ticket, for whose benefit the statute was enacted. *Bowen v. Lynn*, 73 Neb. 215, 102 N. W. 460, distinguished. (Neb.) *Becker v. Wilcox*, 690.

MANDAMUS.

MANDAMUS to Compel Court to Assume Jurisdiction.—Mandamus lies to compel a district court to assume jurisdiction to proceed in its regular exercise whenever, through an erroneous determination of a question of practice or procedure, it has refused to proceed if no other remedy is available. (Mont.) *State v. District Court*, 636.

MANSLAUGHTER.

See Homicide.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.*Rules and Their Disobedience.*

1. **RULES OF A CORPORATION, Violation of is Negligence Though Known to Its Officers.**—An employé of a railroad corporation is guilty of negligence in riding on the pilot of a locomotive, though the superior officers knew of the custom to so ride, and permitted it to continue, if the dangers of so riding are so imminent and obvious that no prudent man, under the circumstances, would have undertaken it. (Ark.) *El Dorado & Bastrop R. R. Co. v. Whatley*, 93.

2. **CUSTOM OF DISOBEYING RULES of a Railway, Effect of on the Question of Contributory Negligence.**—If it is the custom of the employés of a railroad, with the knowledge of their superiors, to violate a rule forbidding them to ride on the pilot of a locomotive, such custom may be considered in connection with other evidence in determining whether one so riding and injured while doing so was guilty of contributory negligence, but the court must not declare, as a matter of law, that such custom relieves him or does not relieve him of the charge of such negligence. (Ark.) *El Dorado & Bastrop R. R. Co. v. Whatley*, 93.

Selection and Competency of Employés.

3. **MASTER AND SERVANT—Presumption of Care in the Selection of Servants.**—The presumption is that an employer did his duty by exercising ordinary care in the selection of employés whose incompetency might lead to the injury of fellow-servants, and, as a general rule, the employer's knowledge of incompetency, or the fact that he could have obtained such knowledge had he made reasonable inquiry, must be shown by evidence independent of that showing the incompetency, and cannot be inferred therefrom. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

4. **MASTER AND SERVANT—Knowledge of Incompetency of Servant, When Inferable from the Fact of Such Incompetency.**—The incompetency of an employé at the time of his employment may be such as to rebut the presumption that his employer used requisite care in his selection, and make the question one for the jury. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

5. **MASTER AND SERVANT—Incompetency, Inquiry as to on a Change of Duties.**—An employer is bound to institute affirmative inquiries to ascertain the qualifications of an employé whom he transfers to a more responsible position for which special qualifications are demanded, unless the employé has given proof of his capacity in some similar position. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

6. **MASTER AND SERVANT—Incompetency of Servant, Knowledge or Want of Inquiry Respecting, When may be Presumed.**—If it appears that the conductor of a railway train did not understand the signification of a meeting order, and that it required him to wait until the arrival of the train he was directed to meet or until the order had been modified or withdrawn, and that a collision resulted, it is a fair inference not only that he was incompetent, but further, that reasonable inquiry must have disclosed the incompetency. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

7. **MASTER AND SERVANT—Competency of Employé, Inquiries Concerning, What Necessary.**—Personal examination of one about to

be employed, even in so responsible a position as that of conductor of a railroad train, is not always essential to the exercise of reasonable care, but such investigation as will warrant the assumption under all the existing circumstances that the employé has adequate knowledge and qualifications is essential. This assumption may be warranted by the knowledge of the employer of the experience or reputation of the employé as to work calling for the knowledge and qualification adequate to the change of the duties of the place, or by the recommendation of other persons on whom he is justified in relying. Each case must be determined on its own facts, and generally, the question whether due care was exercised by the employer in this regard is one exclusively for the jury and the trial judge. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

8. **MASTER AND SERVANT—Incompetency, What is.**—Incompetency on the part of a servant connotes the converse of reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with the person in the general employment. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

9. **MASTER AND SERVANT—Burden of Proof as to the Incompetency of a Fellow-servant.**—In an action against a master to recover for injuries claimed to be due to the incompetency of a fellow-servant, the plaintiff must assume the burden of proving such incompetency, that it was the cause of the injury, and that the defendant at the time of selecting the fellow-servant knew, or with the exercise of ordinary care would have known, of the incompetency. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

10. **MASTER AND SERVANT—Conductor of Railway, When Shown to have been Incompetent.**—A conductor who did not know the meaning of the rules and orders used on a railroad relative to the movement of trains was absolutely incompetent to act as conductor of a train, where he would be called upon to follow such rules and orders in moving trains, as where, receiving a special order to meet an inferior train before its arrival, he did not know that he was bound to wait such arrival unless the special order was modified or withdrawn. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

11. **MASTER AND SERVANT—Ordinary Care in the Selection of a Servant** means that degree of care which a man of ordinary prudence would use in view of the nature of the employment and the consequence of the employment of an incompetent person—a degree of care commensurate with the nature and danger of the business and the grade of service for which the servant is intended, and the hazards to which other servants are to be exposed from the employment of a careless or incompetent person. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

12. **MASTER AND SERVANT—Care Which Must be Exercised in the Employment of a Servant.**—Where the service in which a servant is to be employed is such as to endanger the lives and persons of co-employés if the servant is not competent, the employer is bound, in exercising ordinary care, to make reasonable investigations into the character, skill, qualifications and habits of life of the person to be employed. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

13. **MASTER AND SERVANT—Care in the Selection of a Servant When a Question for the Jury.**—Whether an employer made such investigation as was reasonable under all the circumstances before employing a servant whose incompetency might lead to the injury of his fellow-servants is a question for the jury. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

Fellow-servants.

14. **MASTER AND SERVANT—Fellow-servants—Conductor and Fireman on Different Trains.**—A conductor and fireman, though working upon different trains belonging to the same employer, are fellow-servants, in the absence of any statute to the contrary. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

15. **MASTER AND SERVANT—Liability for Injury to a Servant Resulting from the Employment of an Incompetent Fellow-servant.**—Under the Civil Code of California as it existed in 1903, an employer was not liable to an employé for injuries due to the incompetency of a fellow-employé in whose selection ordinary care was used. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

Assumption of Risk and Contributory Negligence.

16. **THE NEGLIGENCE of the Master may be Assumed**, whether committed directly or through a fellow-servant. (Ark.) *St. Louis I. M. & S. Ry. Co. v. Hawkins*, 112.

17. **MASTER AND SERVANT—Risks, Assumption of, When a Question for the Court and When for the Jury.**—Ordinarily, the question of assumption of risk is one of fact for the jury, unless the facts are inconsistent and present a situation so plain that intelligent men would not draw different conclusions. Then the court may declare, as a matter of law, that the risk was assumed. (Ark.) *St. Louis I. M. & S. Ry. Co.*, 112.

18. **MASTER AND SERVANT—Risk, When not Assumed by Servant Where He had Complained of a Fellow-servant.**—If a servant complains that a fellow-servant is in the habit of violating a rule intended for the safety of the employés, and knows that his complaint has been laid before the vice-principal, and returns to work while the fellow-servant is still on duty, he has a right to assume that the offending servant will obey the rule, and does not assume the risk of his not so doing. (Ark.) *St. Louis I. M. & S. Ry. Co.*, 112.

19. **MASTER AND SERVANT.—A Woman Employé Assumed the Risk of Her Hair Becoming Entangled in set-screws revolving on a machine which she operated where such screws were plainly visible when the machine was at rest.** (Me.) *Podvin v. Pepperell Mfg. Co.*, 411.

20. **EMPLOYER'S LIABILITY—Contributory Negligence.**—In an action by an employé against his employer for personal injuries, he must not show in his evidence that he failed to use due care, yet if contributory negligence, or any distinct affirmative matter of defense, is relied upon by the defendant, the burden is on him to prove it. (Md.) *Bernheimer Bros. v. Bager*, 458.

Order to do Dangerous Work.

21. **MASTER AND SERVANT—Order to do Dangerous Work.**—The rule that an employé cannot recover for an injury where he undertakes or continues work when the danger of working in the place or with the tools provided is obvious or known to him is modified where the work is done in an emergency and by the direction of the master, or by his express command in the absence of an emergency, and he gives the employé to understand that he does not consider the risk one which a prudent man would refuse to undertake. (Ky.) *Pullman Co. v. Geller*, 295.

22. **MASTER AND SERVANT.—Where an Employé is Ordered by His Superior to immediately perform a task, but states that the work cannot safely be done with the appliances at hand, whereupon the superior insists that the employé must, because of the necessity for haste, at once go on with the work with such appliances as he has,**

it is not contributory negligence for the employé to obey the order if in his judgment there is a reasonable probability that the work can be safely done by using extraordinary care. (Ky.) Pullman Co. v. Geller, 295.

Dangerous Machinery.

23. MASTER AND SERVANT, Duty of the Former as to the Safety of the Latter.—It is not the duty of an employer of labor upon machines to provide and use the safest known machines. There must be no weakness, nor want of repair, nor dangerous features not visible to an observing operative, or made known to him, and such as the employer should have known. If such a machine is provided, the employer has done his full duty. He can otherwise use machines of such pattern, detail of construction and roughness of finish as he prefers, leaving the operative the free choice of operating it as he prefers. (Me.) Podvin v. Pepperell Mfg. Co., 411.

24. MASTER AND SERVANT—Failure to Call Attention to Dangerous Parts of Machine.—An operative of a particular machine assumes the risk of injury not only from those parts of it called to his attention, but also from those parts open to observation. (Me.) Podvin v. Pepperell Mfg. Co., 411.

25. MASTER AND SERVANT—Ignorance on the Part of the Latter of Dangerous Set-screws.—Where set-screws are open and exposed to observation and plainly visible to anyone making the most cursory examination of the machine, the operative cannot recover for injury due to such screws on the ground that he did not know of their existence, and that they were not visible when the machine was in motion, if there were times when, because it was at rest, the screws could be plainly seen. (Me.) Podvin v. Pepperell Mfg. Co., 411.

Safe Place to Work.

26. EMPLOYER'S LIABILITY—Prop to Sustain Wall During Excavation.—Where an employer in excavating for the foundation of a building places a heavy prop against adjoining walls to sustain them, he should not be satisfied with taking ordinary measures to secure it for the safety of his employé working under and about it. (Md.) Bernheimer Bros. v. Bager, 458.

27. EMPLOYER'S LIABILITY—Prop to Sustain Wall During Excavation.—Where an owner of land in preparing to excavate for the foundation of a building places a heavy prop against adjoining walls to sustain them, his employé thereafter engaged to work under and about the prop have a right to assume that he has exercised reasonable care to make it safe. (Md.) Bernheimer Bros. v. Bager, 458.

28. EMPLOYER'S LIABILITY—Safe Place and Appliances—Delegation of Duty.—A master owes a duty to his servants to furnish a reasonably safe place to work, and he cannot delegate this duty to others so as to avoid his obligation. (Md.) Bernheimer Bros. v. Bager, 458.

29. EMPLOYER'S LIABILITY—Prop to Sustain Wall During Excavation.—When the owner of land in excavating for the foundation of a building insecurely places a heavy prop against an adjoining wall to sustain it, and subsequently an employé of an independent contractor (engaged by the land owner to remove old structures) digs at the base of the prop so that it falls, the land owner is liable for injuries sustained by one of his employé working under the prop. (Md.) Bernheimer Bros. v. Bager, 458.

30. EMPLOYER'S LIABILITY—Safe Place—Independent Contractor.—The duty of an employer to furnish his employé a safe

place to work cannot be delegated to an independent contractor. (Md.) *Bernheimer Bros. v. Bager*, 458.

31. EMPLOYER'S LIABILITY—Prop to Sustain Wall During Excavation.—Where a land owner in preparing to excavate for a building places a heavy prop against adjoining walls to sustain them, which prop afterward falls and injures one of his employés, he cannot escape liability by showing that the injured man's fellow-servants were negligent either in erecting the prop or in digging away its foundation. (Md.) *Bernheimer Bros. v. Bager*, 458.

MASTER COMMISSIONER.

See Equity, 3.

MECHANICS' LIENS.

1. MECHANICS' LIENS—Strict Construction of Law.—Statutes creating mechanics' liens are in derogation of the common law, and call for a strict rather than a liberal construction. (Conn.) *National Fireproofing Co. v. Huntington*, 228.

2. MECHANICS' LIENS—Public Schoolhouses.—A statute creating a mechanics' lien on "any building" does not apply to such public buildings as schoolhouses. (Conn.) *National Fireproofing Co. v. Huntington*, 228.

3. MECHANICS' LIENS—The Equities of Subcontractors are derived from their relation to the original contractor, and are not superior to his, so that if he is not entitled to a lien on a public building, they are not. (Conn.) *National Fireproofing Co. v. Huntington*, 228.

4. MECHANICS' LIEN—Property Which may be Included Within.—Under a statute providing for a lien upon a house or other structure and its appliances and upon the entire interest of the owner in and to the lot or piece of land not exceeding one quarter section, or if in any city or village not exceeding the lot or blocks upon or around or in front of which the improvement is made, it does not follow because a block in a city is divided into lots that the lien may not attach to more than are covered by the structure. A factory building, though upon certain platted lots only, may be said to be built upon the contiguous territory in the block necessary to the convenient use and enjoyment of the building. (Mich.) *Adams v. Central City G. B. & B. Co.*, 484.

5. MECHANICS' LIEN—Extent of Property Covered by and Evidence to Limit or Explain.—It is a general rule that the lien attaches to the extent of the statutory limit, and the claimant need aver and prove only that the quantity of land on which he claims a lien is within that limit. If the owner seeks to have a smaller quantity of land held subject to the lien, it is for him to present a reason and the facts supporting it; and if the claimant seeks an apparent enlargement of such quantity, he should by averment and proof advance the reasons in support of his demand. (Mich.) *Adams v. Central City G. B. & B. Co.*, 484.

6. MECHANIC'S LIEN for Factory Building, When Restricted to Lots on Which It Stands.—Where the owners of several blocks of land, each of which is divided into lots, erect a building standing partly on four of the lots, intending to engage in the manufacture and sale of brick, tiles, etc., and a considerable number of the lots contain materials useful for such manufacture and intended to be used therein, this does not warrant the extension of the lien over lots on no part of which the building stands. (Mich.) *Adams v. Central City G. B. & B. Co.*, 484.

7. MECHANIC'S LIEN—Contract Extending the Quantity of Land Covered by, When not Established.—The fact that the owners

of property, or their representative, told a person furnishing the material to be used in the erection of a building thereon that the company owned ninety-one or ninety-two lots that ought to satisfy any demand that would grow out of such building does not indicate that the parties, by the contract or otherwise, attempted to fix the quantity of land to which the lien should extend. (Mich.) *Adams v. Central City G. B. & B. Co.*, 484.

8. MECHANIC'S LIEN—Mortgagee is not Affected by Waiver by Owner.—If the owner of land waives compliance with some condition essential to the creation or enforcement of a mechanic's lien against his property, this cannot affect his mortgagee, nor subordinate the latter's lien to that of the claimant of a mechanic's lien. (Mich.) *Adams v. Central G. B. & B. Co.*, 484.

9. MECHANIC'S LIEN—Whether Attaches to Ward's Land.—Out of proceeds of a sale of an infant's land in a suit brought by his guardian to sell his land, under Code, chapter 83, the court authorizes the guardian to build a house on other land of the infant. This will not authorize a mechanic's lien for lumber used in construction against the land on which the house stands. (W. Va.) *Logan Planing Mill Co. v. Aldredge*, 1035.

10. MECHANIC'S LIEN—To Enable a Court of Equity to Enforce a mechanic's lien, the lien must have legal validity. (W. Va.) *Logan Planing Mill Co. v. Aldredge*, 1035.

11. MECHANIC'S LIEN—Whether Attaches to Infant's Land.—The mere fact that lumber is used in the construction of a house on an infant's land gives no lien on the land enforceable in equity. (W. Va.) *Logan Planing Mill Co. v. Aldredge*, 1035.

MINES AND MINERALS.

1. MINING LAWS AND CLAIMS—Lands Containing Petroleum or Other Mineral Oils or a Deposit of Natural Gas may be located as placer claims under the mining laws. (Wyo.) *Whiting v. Straup*, 1093.

2. MINING LAWS—Discovery, Necessity for.—The discovery of mineral within the limits of a claim is essential to the valid location of a mining claim on the public domain, whether it be a lode or placer claim. (Wyo.) *Whiting v. Straup*, 1093.

3. MINING CLAIM—Discovery, When must Take Place.—Though the validity of the location of a mining claim is dependent on discovery, it is not required, in the absence of intervening rights, that discovery shall precede other acts of location. If made prior to any intervening rights, though subsequent to the marking of boundaries and recording, the claim or location, if otherwise good, will be valid at least from the date of discovery. (Wyo.) *Whiting v. Straup*, 1093.

4. MINING CLAIMS—Discovery, What Required.—To constitute a prior discovery which will support a location of an oil placer claim under the mining laws, the locator must have actually discovered oil within the limits of his claim. Mere surface indications, however strong, are not sufficient, nor is the existence of oil on adjacent lands. (Wyo.) *Whiting v. Straup*, 1093.

5. MINING CLAIMS, Size and Amount Protected by One Discovery.—A placer claim is limited to twenty acres for each locator, but an aggregation may be located of one hundred and sixty acres by an association of eight or more persons, in which event one discovery is sufficient for the entire claim. (Wyo.) *Whiting v. Straup*, 1093.

6. MINING CLAIM, Right of Possession of.—On the valid location of a mining claim, the legal right to its possession follows. (Wyo.) *Whiting v. Straup*, 1093.

7. **MINING CLAIM, Location by Agent.**—In locating a mining claim, the locator may act by his agent, and the latter may act without the knowledge of his principal, if the local rules authorize it. There may be either an antecedent authorization or a subsequent ratification. (Wyo.) *Whiting v. Straup*, 1093.

8. **MINING CLAIM, Invalid cannot be Validated by Acts Done for Another.**—One who has made the location of a mining claim, invalid for want of discovery, and subsequently working the same land as agent of another and making a valid and sufficient discovery, does so for his employer and not for himself, and does not validate the previous void location. (Wyo.) *Whiting v. Straup*, 1093.

9. **MINING CLAIMS—Grantee of Locator of a Void Location, Rights of.**—If one makes a location of a mining claim without a sufficient discovery and conveys the property to another, after which he becomes the agent of a third person, and in such capacity makes a valid discovery on a portion of such ground, his act is the act of his principal or employer and does not inure to the benefit of his prior grantee. (Wyo.) *Whiting v. Straup*, 1093.

10. **MINING CLAIM—Estoppel Against Locator of Void, Effect of on His Subsequent Employers.**—If the locator of a mining claim, invalid for want of a discovery, conveys it and then enters the employment of third persons, they cannot be estopped by his prior acts, and are entitled to enforce for their benefit any discovery which he may make on any part of the lands contained within his prior location. They are not in privity with his prior grantee, and any estoppel existing against their agent and employé does not affect them as against such prior grantee. (Wyo.) *Whiting v. Straup*, 1093.

11. **MINING CLAIM, Location of, When not Prevented by Prior Possession.**—As a general rule, the mere naked possession will not avail against a location peaceably made, and hence confers no right against a bona fide prospector who enters upon the land peaceably for the purpose of acquiring title thereto as a mining claim. (Wyo.) *Whiting v. Straup*, 1093.

12. **MINING CLAIM, Location of Founded on Trespass.**—The right to locate a mining claim cannot be based on trespass. (Wyo.) *Whiting v. Straup*, 1093.

13. **MINING CLAIM, Possession for the Purpose of Completing Location.**—Where one seeks in good faith to make a location, he is entitled to exclusive possession of the land sought to be located for a reasonable time to complete his location, or for such time as may be allowed by the customs and rules of miners or the statutes of the state or territory. (Wyo.) *Whiting v. Straup*, 1093.

14. **MINING CLAIM—Character of Possession Which will Protect a Locator.**—Possession, to be available in favor of a locator or prospector to enable him to complete his location, must be actual and connected with active, diligent work of exploration, with a bona fide intention, if mineral is found, to make a location. (Wyo.) *Whiting v. Straup*, 1093.

15. **MINING CLAIM—Possession, When not Sufficient to Preclude an Entry and Location by Another.**—Persons holding a conveyance from the locator of a mining claim, void for want of discovery, and who for a year have done nothing on the property, except to dig a hole as preliminary to the erection of a drill machine and going across and watching the land, have not such actual possession as will preclude another from entering thereon and making a valid discovery for his own benefit or that of his employers. (Wyo.) *Whiting v. Straup*, 1093.

See Railroads, 13-15.

MINING RAILROADS.

See Railroads, 13-15.

MISTAKE.

See Reformation of Instruments.

MORTGAGES.*Form of Mortgage.*

1. **MORTGAGE**—Deed With an Agreement that if the Property is Sold, the Proceeds shall be Applied to Paying a Sum Designated.—If a mortgagor conveys the mortgaged premises to the mortgagees, and they give an agreement reciting that the mortgage has been paid by the conveyance and declaring that if the property is sold, the grantor shall have all the proceeds of the sale over and above the sum required to satisfy the mortgage indebtedness, with interest and taxes and other expenses, this does not constitute a mortgage where the evidence is not conclusive of the continuance of the debt as a personal obligation of the original mortgagor, and the mortgage has been released on the record. (Wyo.) Weltner v. Thurmond, 1113.

2. **MORTGAGE**.—A Conveyance cannot be a Mortgage Unless given to secure the payment of a debt. (Wyo.) Weltner v. Thurmond, 1113.

3. **MORTGAGE**—Writing in Form of Trust Deed.—An instrument by which land is conveyed to the grantee as trustee to secure the payment of a note given by the grantor to a third person, and which provides that "this trust deed or mortgage may be foreclosed," etc., and that a reconveyance shall be made on payment of the indebtedness, is a mortgage, governed by the rules of law applicable to mortgages. (S. D.) McVay v. Tousley, 927.

Unrecorded Assignment.

4. **MORTGAGE**—Unrecorded Assignment.—Purchasers and Encumbrancers for value, without notice other than is given by the records, are protected by the satisfaction of a mortgage executed by the mortgagee, where there is no assignment of the mortgage on record, though the debt was transferred prior to the recording of such satisfaction and the transferee has not been paid. (S. D.) McVay v. Tousley, 927.

5. **MORTGAGE**—Discharge of Record—Right of Assignee.—When a conveyance to secure the payment of a note provides, on payment of the indebtedness, for a reconveyance of the land by the grantee as trustee, a satisfaction of the indebtedness, recorded by the trustee, discharges the mortgage lien, although the mortgage and note are not surrendered to the grantor, and estops an assignee of the note and mortgage from claiming under the lien. (S. D.) McVay v. Tousley, 927.

5a. **MORTGAGE**—Unrecorded Assignment.—Where a Purchaser of Land subject to a mortgage pays the same to an authorized agent of the mortgagor without notice of unrecorded assignment of the note and mortgage, the mortgage is not enforceable against him by the assignee. (S. D.) Barry v. Stover, 941.

Mortgagee in Possession.

6. **MORTGAGEE**—When Entitled to Possession and Rents.—A mortgagee upon default is entitled to the possession of the property and to the rents therefrom. (Md.) Baker v. Baker, 439.

7. **MORTGAGEE IN POSSESSION**—Reimbursement for Expenditures and Improvements.—The general rule is that a mortgagee in possession is entitled to reimbursement by the owner of the right of

redemption for his reasonable expenditures to preserve the property, such as taxes, repairs, and the like, but not outlays for permanent improvements. (Wis.) *Lynch v. Ryan*, 1040.

8. MORTGAGEE IN POSSESSION—Reimbursement for Permanent Improvements.—If a mortgagee in possession makes permanent improvements of the property with the approval of the mortgagor, or which are necessary to the proper and profitable use of the property and without objection by the mortgagor, he is entitled to be equitably reimbursed therefor by the latter as a condition of his exercising the right of redemption. (Wis.) *Lynch v. Ryan*, 1040.

9. MORTGAGEE IN POSSESSION—Compensation for Permanent Improvements.—Where a mortgagee should be reimbursed as aforesaid, the proper basis of compensation is the reasonable cost. (Wis.) *Lynch v. Ryan*, 1040.

10. MORTGAGEE IN POSSESSION—Compensation for Repairs or Improvements.—Evidence showing that repairs or improvements of mortgaged property were made as a judicious owner would make the same in caring for his own property is sufficient, *prima facie*, to show that the charges therefor are reasonable. (Wis.) *Lynch v. Ryan*, 1040.

11. MORTGAGEE IN POSSESSION—Computation of Interest.—In an accounting between a mortgagee in possession and the mortgagor there should be no rest resulting in compounding interest. It is proper to close the account at the end of each year, striking a balance between debit and credit items, excluding the original debt and interest thereon, any balance in favor of the mortgagee after discharging the interest to be added to the principal, and any balance in favor of the mortgagor going in reduction thereof. (Wis.) *Lynch v. Ryan*, 1040.

12. MORTGAGEE IN POSSESSION—Interest on Improvements.—If a mortgagee in possession is not allowed expenditures in making permanent improvements of the property which increase its value and is charged with the rental value of the property as improved, he should be given credit with interest on the reasonable cost of the improvements, unless such cost exceeds the enhanced value of the property, in which case he should be credited with interest on such enhanced value. (Wis.) *Lynch v. Ryan*, 1040.

13. MORTGAGEE IN POSSESSION—Insurance.—If a mortgagee in possession incurs expenses for insuring buildings thereon against loss by fire, he should be allowed credit therefor. (Wis.) *Lynch v. Ryan*, 1040.

14. MORTGAGEE IN POSSESSION—Credit for Expense of Supervision.—A mortgagee in possession is not entitled to credit for services in supervising the property. (Wis.) *Lynch v. Ryan*, 1040.

15. MORTGAGEE IN POSSESSION—Computation of Interest.—In an accounting between mortgagor and mortgagee where there is an annual closing, interest on the items down to the time thereof should not to be charged or credited. (Wis.) *Lynch v. Ryan*, 1040.

16. MORTGAGEE IN POSSESSION—Action for Redemption—Costs.—As a general rule, in an action by a mortgagor against the mortgagee in possession to establish his right of redemption and for an accounting, the defendant should recover costs notwithstanding plaintiff prevails. (Wis.) *Lynch v. Ryan*, 1040.

17. MORTGAGEE IN POSSESSION—Action for Redemption—Costs.—In such an action as above mentioned, if the defendant is at fault, rendering expensive litigation necessary to establish plaintiff's right to redeem, the plaintiff may, in the discretion of the court, be allowed costs. (Wis.) *Lynch v. Ryan*, 1040.

18. MORTGAGEE IN POSSESSION—Action for Redemption—Costs.—Generally, in a suit for redemption of mortgaged property and for an accounting, if the circumstances are exceptional, warranting the imposition of costs upon the defendant, recovery should be contingent upon plaintiff exercising his right of redemption, but under exceptional circumstances whereby the plaintiff by defendant's wrong is put to very burdensome expenses to establish his right, the recovery of costs may properly be made absolute. (Wis.) *Lynch v. Ryan*, 1040.

Payment.

19. MORTGAGE—Tender of Payment Before Maturity.—The tender of the amount of a mortgage before maturity is not a legal tender and does not discharge the lien, for the mortgagee cannot be required to accept payment until the debt is due. The fact that he has previously accepted a part of the debt before maturity is not a waiver of his right to hold the remainder of the investment until maturity. (S. C.) *Pyross v. Fraser*, 901.

Foreclosure.

20. MORTGAGE FORECLOSURE—Notice of *Lis Pendens*.—When a conveyance given to secure a note provides, on payment of the indebtedness, for a reconveyance by the grantee as trustee, and after the execution and recording of a reconveyance the assignee of the mortgage and note institutes foreclosure proceedings which he subsequently dismisses, the notice of *lis pendens* therein being canceled of record, subsequent purchasers of the land acquire it free of the mortgage lien as against a subsequent assignee of the note and mortgage. (S. D.) *McVay v. Tousley*, 927.

21. MORTGAGE FORECLOSURE—Conflict of Laws.—In determining what constitutes a valid defense to an action to foreclose a mortgage the court administers the law of the forum, although the validity and interpretation of the contract are controlled by the law of another state. (S. D.) *Barry v. Stover*, 941.

22. MORTGAGE FORECLOSURE—Assignee of Non-negotiable Note.—An action to foreclose a mortgage, given to secure a non-negotiable note that has been assigned to the plaintiff, is without prejudice to any setoff or other defense existing before notice of the assignment. (S. D.) *Barry v. Stover*, 941.

See *Chattel Mortgages*.

MUNICIPAL CORPORATIONS.

In General.

1. MUNICIPAL ORDINANCE—Burden of Proof and Allegation.—If an ordinance is not void on its face, but its validity is dependent upon facts, a party claiming it to be invalid must allege and prove the facts making it so. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

2. MUNICIPAL ORDINANCES are Presumed to be Reasonable, and, when against the maintenance of a cemetery, to have been enacted for the protection of the city or certain parts thereof. (Ala.) *Bryan v. Mayor etc. of Birmingham*, 63.

3. MUNICIPALITIES have No Right to Change Their Contracts. (La.) *Shreveport Traction Co. v. Shreveport*, 345.

Defective Streets.

4. MUNICIPAL CORPORATIONS—Streets, Liability for Injuries Due to Defects in.—If certain lands constitute a public street, it is not material that the people of the neighborhood or the abuttees built

the sidewalk, or from time to time repaired it without any ordinance, or that the local drainage was by the neighbors conducted into a sink-hole, and the manhole was constructed at private expense. None of these acts, nor all combined, relieve the municipality from liability for defects in the street or sidewalk, or from a dangerous condition arising from the combination of these defects and the unguarded sink-hole adjacent to the sidewalk. (Mo.) *Benton v. St. Louis*, 561.

5. MUNICIPAL CORPORATION—Streets, Duty and Liability Respecting.—A city stands charged with the primary and bounden duty of keeping its streets free from nuisances, defects, and obstructions caused by itself or by third persons, if it has actual or constructive notice in time to abate the nuisance, remove the obstruction, or repair the defect. (Mo.) *Benton v. St. Louis*, 561.

6. MUNICIPAL CORPORATIONS—Streets, Liability for.—The absence of sewers or water mains or a curb line established, or paving or guttering, has nothing to do with the city's liability for injury resulting from defects in the street, if, notwithstanding, the existence of a public highway is determined. (Mo.) *Benton v. St. Louis*, 561.

7. MUNICIPAL CORPORATIONS.—A street may exist, so as to render the municipality liable for defects therein, though not condemned for public use by legal proceedings nor established by prescription. (Mo.) *Benton v. St. Louis*, 561.

Dedication or Existence of Streets.

8. MUNICIPAL CORPORATIONS—Public Streets, Dedication of, Evidence of.—The intent to dedicate is essential to the establishment of a public street, but the intent and the dedication itself are inferable from permanent fences long maintained on either side, so as to be practically in line with or in continuation of an existing street, the abandonment of the strip between these fences by the abutting property owners for many years, and their failure to impress upon it the usual earmarks of private ownership, such as possession and cultivation. This remains true though the strip between the fences is made up of various small strips, which at an early date bore different designations on maps and plats and were turned out to the public at different dates. (Mo.) *Benton v. St. Louis*, 561.

9. MUNICIPAL CORPORATIONS—Streets, Dedication and Acceptance Essential to.—Mere dedication is not enough to constitute a public street. There must also be an acceptance by the public. (Mo.) *Benton v. St. Louis*, 561.

10. MUNICIPAL CORPORATIONS—Streets, Acceptance of Dedication of.—The acceptance of the dedication of a street may be either express or implied. (Mo.) *Benton v. St. Louis*, 561.

11. MUNICIPAL CORPORATIONS—Streets, Acceptance of, When may be Implied.—The acceptance of a public street may be implied from general and long-continued use by the public as of right. (Mo.) *Benton v. St. Louis*, 561.

12. MUNICIPAL CORPORATIONS—Public Streets, Acceptance of, When Inferable.—The long public user as of right, the location and maintenance of street lamps and the poles of public corporations, the barricading of the whole of the strip of land when out of repair, and the employment of the usual city signs on the barricade, the maintenance of street signs on the corner, warrant the jury in inferring the acceptance of the strip of land as a public street. (Mo.) *Benton v. St. Louis*, 561.

13. MUNICIPAL CORPORATIONS—Public Streets—City, When Bound by the Maintenance of Street Lamps or Poles.—If street lamps and the poles of public service corporations have been erected and for a long time maintained in such a condition as to indicate a

dedicated street, the municipality must be held to have acquiesced in the public use of the strip which was apparently designated as a street, whether such lamps and poles were put there in accordance with the red tape and minutiae of detail of city charter regulations or not. (Mo.) *Benton v. St. Louis*, 561.

14. MUNICIPAL CORPORATIONS—Public Streets—Evidence—Subsequent Repairs.—If there is an issue of street or no street at the time of an accident, subsequent repairs made by the city are competent evidence as tending to show that the city recognized the locus as a public street. The remoteness of the repairs may affect the force but not the competency of the evidence. (Mo.) *Benton v. St. Louis*, 561.

Assessments for Public Work.

15. CITY ASSESSMENTS—Whether Lien on State Property.—A city cannot, without the permission of the state, assess benefits against it as the owner of land benefited by a public improvement; and general expressions granting liberty to assess all persons specially benefited do not import such permission. (Conn.) *State v. Kilburn*, 207.

16. CITY ASSESSMENT—Priority of School Mortgage.—The lien for a sewer assessment or for the expense of removing snow and ice from sidewalks, though taking precedence over prior liens held by a private individual because of the public interest, is inferior to a school fund mortgage, prior in date and record. (Conn.) *State v. Kilburn*, 207.

17. STREET ASSESSMENTS—Unauthorized Provision in Contract for the Work, When Avoids.—A provision in a contract for street work that "all loss or damage arising from the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from encumbrances on the lines of the work, or for any act or omission on the part of the contractor, or any person or agent employed by him not authorized by this agreement, shall be sustained by the contractor," is unauthorized, and has the effect of invalidating the contract, assessment and lien. (Cal.) *Stansbury v. Poindexter*, 190.

18. STREET ASSESSMENTS—Illegal Provision in Contract, Evidence Which does not Show It to have been Harmless.—Where, in an action upon a street assessment, a contract is invalid as imposing conditions on the contractor more onerous than were allowed by law, the evidence by all who presented bids for the work that the specifications quoted had not operated to increase the amount of their bids is properly excluded, because, conceding such to be the case, there may have been others who were deterred from bidding at all by reason of the unlawful restrictions in the contract. (Cal.) *Stansbury v. Poindexter*, 190.

See Cemeteries; Constitutional Law, 7-10; Injunction, 2; Street Railways.

Note.

Municipal Corporations. See License and Occupation Taxes.

MURDER.

See Homicide.

NAVIGABLE WATERS.

1. NAVIGABLE WATERS, Power of One State to Regulate the Waters of Another.—One state cannot regulate the use of the waterways of another. (La.) *State v. Leech*, 336.

2. NAVIGABLE WATERS.—A Canal Constructed to Improve the Navigation of navigable streams is itself navigable water. (S. C.) *State v. Columbia Water Power Co.*, 876.

3. NAVIGABLE WATERS.—The Navigability of Water does not Depend on Its Actual Use for navigation, but its capacity for such use. (S. C.) *State v. Columbia Water Power Co.*, 876.

4. NAVIGABLE WATERS.—Canal Out of Repair.—The Failure to Keep the Lock at one terminus of a canal in order, while impairing the full utility of the canal, does not destroy the public right of navigation. (S. C.) *State v. Columbia Water Power Co.*, 876.

5. NAVIGABLE WATERS.—Obstruction of Unfinished Canal.—The fact that a public highway, such as a canal, is unfinished does not make its obstruction any the less a public nuisance. (S. C.) *State v. Columbia Water Power Co.*, 876.

6. NAVIGABLE WATERS.—Exacting Tolls as Affecting Navigability.—The navigability of a canal is not affected by the fact that at one time the statutes exacted tolls for its use. (S. C.) *State v. Columbia Water Power Co.*, 876.

7. NAVIGABLE WATERS.—Use for Pleasure.—When Water is Navigable for Commercial Purposes, though not actually used therefor, the public is as much entitled to be protected in its use for floating pleasure boats as for any other purpose. Navigable water is a highway which the public is entitled to use for the purpose of travel either for business or pleasure. (S. C.) *State v. Columbia Water Co.*, 876.

8. NAVIGABLE WATERS.—Obstruction.—The State is Entitled to Enjoin the obstruction of a navigable canal by the pipes and bridge of a water company; the remedy by indictment or action for damages is inadequate. (S. C.) *State v. Columbia Water Power Co.*, 876.

9. NAVIGABLE WATERS.—Right of State to Protect.—The state, as trustee for the people, has the right to the intervention of a court of equity to protect the right of free navigation. (S. C.) *State v. Columbia Water Power Co.*, 876.

See Commerce, 1.

NEGLIGENCE.

In General.

1. NEGLIGENCE — Presentation of Claim — Limitations — Pleading.—The Connecticut statute providing that no action for personal injuries not commenced within four months shall be brought against any railroad company unless a written notice of the injury shall have been given within that period, simply places a limitation analogous to the general statute of limitations upon the right of action, creating a condition subsequent by which an existing right is cut off rather than a condition precedent to a continuing right. Therefore, a defense predicated upon it need not be anticipated and negatived by the plaintiff, but may properly be left to be pleaded by the defendant. (Conn.) *Bulkley v. Norwich & W. Ry. Co.*, 212.

2. COMPLAINT—Averment as to Time of Negligence.—An averment of the time when the events which furnish the basis of an action for negligence occurred is immaterial, and upon the trial proof that they occurred upon some subsequent day is admissible. (Conn.) *Bulkley v. Norwich & W. Ry. Co.*, 212.

3. NEGLIGENCE, Question of, When for the Jury.—Though there is no conflict in the evidence on the question of negligence, still, if the conceded facts are such that reasonable men might differ as to the conclusions to be drawn, the question is one for the jury. (Cal.) *Still v. San Francisco & N. W. Ry. Co.*, 177.

4. **JURY TRIAL**—Negligence on the Part of the Defendant, Instruction Ignoring the Question of.—An instruction that the jury should find for the plaintiff if he used ordinary care is erroneously misleading, where it was also necessary for them to find negligence on the part of the defendant before he could be subjected to an action for damages. (Ark.) *El Dorado & Bastrop R. R. Co. v. Whatley*, 93.

5. **JURY TRIAL**—Instruction, Modifying so as to Make It Contradictory and Meaningless.—If, in an instruction in a suit to recover for negligence, the court states the circumstances and conditions under which the plaintiff is entitled to recover, but adds, provided the defendant by using ordinary care could have prevented the injury, this modification destroys the effect which should be given to contributory negligence, renders the whole instruction contradictory and meaningless, and is erroneously prejudicial. (Ark.) *El Dorado & Bastrop R. R. Co. v. Whatley*, 93.

Proximate Cause.

6. **NEGLIGENCE**—The Proximate Cause of an Injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, without which the injury would not have occurred. It is not necessary to show that the wrongdoer ought to have anticipated the particular injury which did result; it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence. (Mont.) *Mize v. Rocky Mt. Bell Tel. Co.*, 659.

Act of God.

7. **ACT OF GOD**—Damage by the Elements and damage by the act of God are synonymous; but damage by the elements has reference to sudden, unusual or unexpected action, not to gradual changes and decay. (Md.) *Kirby v. Wylie*, 451.

8. **ACT OF GOD**—Intervention of Human Agencies.—An occurrence which is directly produced, wholly or partly, by the intervention of human agencies, is not an act of God. (Md.) *Kirby v. Wylie*, 451.

9. **ACT OF GOD**—The Destruction of a Building by Gradual Decay and natural causes is not by act of God; such expression has reference to some sudden, unusual or unexpected action of the elements. (Md.) *Kirby v. Wylie*, 451.

Fires.

10. **FIRES**—A Man may Lawfully Burn Rubbish or Brush upon his own land if he exercises that prudence in starting and managing the fire which ordinary care demands. (Wis.) *Miller v. Neale*, 1077.

11. **FIRES**—Duty Toward Adjoining Property.—When there is inflammable material on the ground and the wind is strong in the direction of neighbors' property, a land owner may be charged with negligence if he starts a fire, or if, having started it, he does not exercise that care to keep it under control which ordinary prudence dictates. (Wis.) *Miller v. Neale*, 1077.

12. **FIRES**—Liability for Destruction of Timber.—Where a land owner is negligent in setting out or managing a fire on his premises, so that it spreads to the timber of adjoining owners, he is liable thereof in damages. (Wis.) *Miller v. Neale*, 1077.

13. **FIRES**—Evidence as to Negligence.—In an Action Against a Land Owner for negligence in starting a fire which spreads to adjoining property, evidence is admissible as part of the res g that

just before starting the fire he asked a neighbor if it would harm his building, and the latter, after noting the direction of the wind, replied that it would do no harm. (Wis.) *Miller v. Neale*, 1077.

14. FIRE—Damages for Destruction of Timber.—The true measure of damages where standing timber is injured by fire is the diminution in the value of the land caused by the injury. In an action therefor, it is not error to instruct the jury that the plaintiff is entitled to recover such sum as will compensate him for the injury by the defendant's negligence, nor is it error to admit proof of damage to the timber itself. Such proof does not determine the measure of damages, but it is proper to be considered by the jury in fixing the diminished value of the land. (Wis.) *Miller v. Neale*, 1077.

See Adjoining Owners; Death; Electricity; Master and Servant; Municipal Corporations; Theaters and Shows.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NOTARY.

See Acknowledgments.

NOTICE.

See Appeal, 11.

NUISANCE.

See Injunction, 5; Navigable Waters.

Note.

Officers. See Returns of Officers.

OIL LANDS.

See Mines and Minerals.

OPINION TESTIMONY.

See Evidence, 2; Homicide, 17, 18.

PARKS.

See Theaters and Shows.

PARTIES.

PARTIES—Defects in, When Cured.—An exception to the ruling of the trial court on the defendant's demurrer upon the ground of a defect of parties defendant need not be considered on appeal if he consented to an order correcting the alleged defect. (Wis.) *Steele v. Korn*, 1051.

PARTITION.

1. PARTITION of Probate Homestead.—Where a wife occupies as a home the homestead set apart by order of the probate court for the use of herself and the family of her deceased husband, the same is not liable to partition at the suit of the assignee of some of the adult heirs. (Okl.) *Funk v. Baker*, 788.

2. PARTITION—Presumption on Appeal of Service of Process.—Where the record on appeal from an order in partition appointing a receiver does not show that the parties in interest were not in court, it will be presumed in support of the order that they were actually or constructively served with process. (Md.) *Baker v. Baker*, 439.

3. **PARTITION**—Persons Subject to *Lis Pendens*.—One taking an assignment of a mortgage after an action, to which the mortgagee is a party, is instituted for partition of the land, takes subject to the *lis pendens*. (Md.) *Baker v. Baker*, 439.

4. **PARTITION**—Appointment of Receiver Without Notice.—The court should not appoint a receiver in partition until the parties to be affected have an opportunity to be heard, when the petition does not fully disclose facts necessary to inform the court of the real situation, such as the right of the petitioner to relief and the necessity for proceeding without notice, especially if the petition shows some right of possession of the property or to the rents and profits in another. (Md.) *Baker v. Baker*, 439.

5. **PARTITION**—Grounds for Appointment of Receiver.—While receivers are sometimes appointed to collect rents pending partition proceedings, such an appointment is not authorized where there is nothing to show any real necessity therefor or imminent danger of loss. (Md.) *Baker v. Baker*, 439.

See *Waters and Watercourses*, 3, 4.

PARTNERSHIP.

1. **PARTNERSHIP**—Liability of Partner After Dissolution.—All the partners are still bound, after dissolution, by a contract made during the partnership. (W. Va.) *Burdett v. Greer*, 1014.

2. **PARTNERSHIP**—Admission of Partner After Dissolution.—An admission by one partner, made after dissolution, of the existence of a debt against a firm, or a settlement made with him finding a debt against it, the other partner not being present when such admission or settlement is made, does not bind the other partner, and is not admissible evidence against him. (W. Va.) *Burdett v. Greer*, 1014.

3. **PARTNERSHIP**.—A Promissory Note Made by One Partner alone for the debt of the firm does not operate as payment, and does not release another partner from the debt, unless the creditor agrees to accept it as payment and release the other partner. (W. Va.) *Burdett v. Greer*, 1014.

PATENT RIGHTS.

1. **PATENT RIGHTS**.—A State Court has No Jurisdiction at the suit of the assignee to restrain the assignor of a patent from manufacturing and selling articles covered by it. It may determine what the contract is and in whom the patent is vested, but it has no authority to pass directly upon the question of infringement and issue an injunction. (Md.) *Jones Cold Store Door Co. v. Jones*, 446.

2. **PATENT RIGHTS**—Contract in Restraint of Trade.—An agreement by the assignor of a patent that for five years he will not patent and dispose of any devices in the line of the business to be conducted with assigned patent, and that he will submit changes or devices conceived by him to the assignees, and if they do not purchase them he will withdraw them and not dispose of them to any other person, is in restraint of trade and unenforceable. (Md.) *Jones Cold Store Door Co. v. Jones*, 446.

Note.

Pawnbrokers, license and occupation taxes, when subject to, 279.

PAYMENT.

See *Assignment*; *Mortgages*, 19; *Tender*.

Note.

Peddlers, license and occupation taxes, when may be imposed upon, 262-264, 276-278.

Physicians and Surgeons, license and occupation taxes, when subject to, 293.

PILOTS.

1. **PILOTS AND PILOTAGE**—Adoption of State Laws Respecting.—The laws of the several states governing pilotage were, in effect, adopted by the Congress of the United States, with the modification that where the waters constitute the boundary between two states, a pilot might be employed if authorized or licensed under the laws of either state. (La.) *State v. Leech*, 336.

2. **PILOTS**—Laws of One State cannot Regulate as to Waters in Another.—Whilst the act of Congress of March 2, 1837, chapter 22, 5 Statutes at Large, 153, provides that either of two states, having a water boundary "between" them, may license persons to pilot vessels to and from "any port situate" thereon (i. e., on the "waters which are the boundary between" the two states), the waters of the Mississippi river, at South Pass, thence to New Orleans, and thence to the Mississippi state line, lie wholly within the state of Louisiana, and are no more the boundary between that state and the state of Mississippi than between Louisiana and any other state which the Mississippi river, or its tributaries, may pass through, or touch, on their way to the Gulf of Mexico. Hence the act of Congress does not, and the law of the state of Mississippi could not, furnish authority for the licensing of a person to pilot vessels in such waters. (La.) *State v. Leech*, 336.

3. **PILOTS**—Laws of Mississippi not Intended to Affect Other States.—An examination of the law of Mississippi does not lead to the conclusion that it was the intention of the legislature to authorize the issuance of licenses to persons to engage in piloting in waters wholly outside that state and wholly within the limits of the state of Louisiana. (La.) *State v. Leech*, 336.

PLEADING.*In General.*

1. **PLEADING**—Separating and Numbering Causes of Action.—Where it is not obvious that the petition states more than one cause of action, it is not error to overrule a motion to require plaintiff to separately state and number the several causes of action, when the motion is a general one and fails to specify wherein the petition states more than one cause of action. (Okl.) *Cockrell v. Schmitt*, 737.

2. **PLEADING**—Unverified Plea, When will be Stricken Out.—If, to an action on commercial paper, a plea is filed denying the plaintiff's ownership, it should be stricken out if not verified. (Ala.) *Stouffer v. Smith-Davis Hardware Co.*, 59.

3. **PLEADING**—Imposing Costs as Condition of Answering.—The imposition of ten dollars costs as a condition of answering on the overruling of defendant's demurrer furnishes no basis for complaint, when it appears that he participated in the trial to the extent of offering his evidence and presenting his claims by counsel. (Wis.) *Steele v. Korn*, 1051.

Code Rules and Reformed Procedure.

4. **PLEADING**—Liberal Rules of Code.—More and more, as time continues, the beneficent purpose of the code rule is appreciated that in the construction of a pleading for the purpose of determining its

effect its allegations shall be liberally construed with a view to substantial justice between the parties, and the disposition is evinced to give it the broadest scope which can reasonably be done. (Wis.) *Jones v. Monson*, 1082.

5. PLEADING—Purpose of Reformed Procedure.—The builders of the code proposed to sweep away, as far as possible, the technicalities of the common-law procedure, superseding it by a new system as near the ideal as practicable of a plain, simple, easy method of presenting controversies for judicial treatment and solution—one that would always give dignity to the substance of things, overcoming mere solvable indefiniteness and nonprejudicial imperfections. (Wis.) *Jones v. Monson*, 1082.

6. PLEADING—Liberal Rules of Code.—Criticism of a Pleading will not support a challenge for insufficiency if sufficient can be discovered reasonably by judicial construction to sustain it. The sole test is, "Will the language used permit of a reasonable construction which will sustain" the pleading? (Wis.) *Jones v. Monson*, 1082.

Demurrers.

7. PLEADING—General Demurrer to a Complaint Some of the Paragraphs of Which are Good.—Where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, a demurrer should be overruled. (Okl.) *Cockrell v. Schmitt*, 737.

8. COMPLAINT—Allegation of Time—Demurrer.—An allegation of time, originally immaterial, may become material by reason of subsequent pleading, but such a result does not follow from demurring. (Conn.) *Bulkley v. Norwich & W. Ry. Co.*, 212.

9. COMPLAINT—Recitals in Return as Basis for Demurrer.—Statements in the officer's return of service cannot be treated as part of the complaint and thus utilized by the defendant as a basis for demurrer. (Conn.) *Bulkley v. Norwich & W. Ry. Co.*, 212.

See Fraud.

Note.

Plumbers, license and occupation taxes, when subject to, 271, 272.

PREMIUM NOTES.

See Insurance, 16.

PRESCRIPTION.

See Adverse Possession.

PRESENTATION OF CLAIM.

See Negligence, 1.

PRINCIPAL AND AGENT.

1. AGENCY—Bona Fide Purchaser from Agent.—The doctrine that an agent disposing of the property of his principal without authority transfers no title as against the principal does not apply to currency or negotiable instruments without restrictive indorsement, where they have come into the hands of a bona fide purchaser for value without notice. (W. Va.) *Perry v. Oerman*, 1020.

2. AGENCY—Misuse of Principal's Fund.—To make one liable by reason of participation in misuse of money of the principal by an agent, upon the ground that it was used to pay the private debt of the agent, it is necessary to show not only that the party sought to be charged was aware that the money belonged to the principal, but

also that he was aware that the debt paid by it was in fact a private debt of the agent, or such a debt that payment thereof could not lawfully be made out of such money. (W. Va.) *Perry v. Oerman*, 1020.

3. PRINCIPAL AND AGENT, Liability of the Former for Negligence, When Dependent on the Liability of the Latter.—If two are sued for their alleged negligence and one of them is shown to have been the agent and the other his principal, and the former to have been in charge of the work, carrying it out without any express instruction from his principal, and the jury finds in favor of the agent, this finding necessarily exonerates the principal, and a verdict against him cannot be sustained. (Cal.) *Bradley v. Rosenthal*, 171.

4. JURY TRIAL—Erroneous Instruction, Presumed Effect of.—Where, in an action against a principal and agent for damages alleged to be due to negligence, the court erroneously instructs the jury that the principal alone can be held liable, and there is a verdict in favor of the agent but against the principal, the appellate court cannot presume that such verdict was due to such erroneous instruction, if the evidence as to the negligence was conflicting and the jury might have reached the conclusion that the agent was free from negligence. Therefore, both the judgment against the principal and that in favor of the agent must be set aside. (Cal.) *Bradley v. Rosenthal*, 171.

See *Brokers; Trover and Conversion*.

PRINCIPAL AND SURETY.

1. SURETYSHIP—Effect of Judgment Against Principal.—Where the effect of the undertaking of a surety is that he shall be liable for the result of a suit against his principal, he is conclusively bound by the judgment in such suit, even though he is not a party to it and have no notice of it. (W. Va.) *Town of Point Pleasant v. Greenlee*, 971.

2. SURETYSHIP—Conclusiveness of Bond.—The fair and voluntary execution of a bond is conclusive upon all who seal it of everything admitted therein. (W. Va.) *Town of Point Pleasant v. Greenlee*, 971.

3. SURETYSHIP—Estoppel to Question Bond.—When a bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure, and breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such defense. (W. Va.) *Town of Point Pleasant v. Greenlee*, 971.

4. SURETYSHIP—Estoppel Against Surety.—That in a bond which concludes or estops the principal operates likewise on the surety therein. (W. Va.) *Town of Point Pleasant v. Greenlee*, 971.

5. SURETYSHIP.—The Plea of Nul Tiel Record is a Proper Plea to test the existence of a judgment, in a suit on a bond with collateral conditions the breach of which assigned is the nonpayment of such judgment. (W. Va.) *Town of Point Pleasant v. Greenlee*, 971.

PROBATE COURTS.

See *Courts*, 4-6.

PROBATE LAW.

See *Executors and Administrators; Wills*.

PROCESS.

1. PARTY SERVED WITH PROCESS is Bound by It.—If a person bearing the name of the defendant is served with process, and

judgment is entered against him, he cannot avoid its effect by proving that he was not the person intended to be sued or served. (Cal.) *Brum v. Ivins*, 137.

2. OFFICER'S RETURN, Facts Which It is not Admissible to Prove.—Proof of the return of an officer on a subpoena that the witness is dead, the same not being authorized or required by law, and by the oral evidence of witnesses that they had been informed of his death, is insufficient to establish this as a fact to render competent in a final trial the testimony of such witness taken and transcribed at the preliminary examination. (Okl. Cr.) *Driggers v. United States*, 823.

3. PROCESS—Return Day—Misstatement and Correction.—A writ tested on the first day of August, and made returnable "on the first Monday in August next," is not absolutely void, since, read in the light of the law as to issuance and return of process, the error is self-correcting, and it appears that the first Monday of the month there mentioned was intended. (W. Va.) *Town of Point Pleasant v. Greenlee*, 971.

See Judgments, 7-11.

PROHIBITION.

PROHIBITION of Acts in Excess of Jurisdiction.—Where a court in a suit for the appointment of a trustee, after appointing him, undertakes to reserve jurisdiction of the cause, and afterward, pursuant to such reservation, to make new directions for the administration of the trust, such reservation and directions being in excess of the jurisdiction of the court, a writ of prohibition will issue and prevents its further action beyond its jurisdiction. (Mo.) *State v. Muench*, 536.

PROXIMATE CAUSE.

See Negligence, 6.

PUBLIC LANDS.

See Homesteads, 1, 2.

PULLMAN-CAR COMPANIES.

See Carriers, 4, 5.

QUIETING TITLE.

1. QUIETING TITLE—Equitable Nature of Action.—An action to quiet title under section 6870 of the Revised Codes is an action in equity, wherein the maxim applies that he who seeks equity must do equity. (Mont.) *Larson v. Peppard*, 630.

2. QUIETING TITLE—Payment of Taxes as Condition Precedent.—The plaintiff in an action to quiet title to land which has been sold at a tax sale, which, because of irregularities, did not divest him of title, must reimburse the tax purchasers before he is entitled to relief. (Mont.) *Larson v. Peppard*, 630.

3. QUIETING TITLE—Interest on Delinquent Taxes.—In an action to quiet title to land which has been irregularly sold for taxes, the court should allow the holder of the tax deed only legal interest on the delinquent taxes paid by him. (Mont.) *Larson v. Peppard*, 630.

4. QUIETING TITLE—Payment of Delinquent Taxes.—In an action to quiet title to land which has been sold for taxes, the court should enter an order requiring the plaintiffs to make payment of the delinquent taxes to the holder of the tax deed within a reasonable

time, say thirty days. If the payment is made within that time, then the decree quieting title should be entered; if not so made, the plaintiffs should be denied all relief. (Mont.) *Larson v. Peppard*, 630.

RACETRACKS.

See Theaters and Shows.

RAILROADS.

License to Cut Ditch on Right of Way.

1. **RAILROAD COMPANY—License to Construct Ditch.**—A railway company may grant a license to construct an irrigating ditch over its right of way. (Mont.) *Mize v. Rocky Mt. Bell Tel. Co.*, 659.

Maintenance of Siding.

2. **RAILROADS—Covenant to Maintain Siding.**—A covenant by a railroad company to establish and maintain a turnout and siding for private use is not necessarily against public policy. (Md.) *Whalen v. Baltimore & O. R. R. Co.*, 423.

3. **RAILROADS—Covenant to Maintain Siding.**—A covenant by a railroad company to construct and maintain a turnout and siding on the property of the covenantee, and there take up and set down all persons going to and from the farm of the covenantee, runs with the land; but a further covenant to leave at the siding to be unloaded any car in which are articles for the covenantee weighing a certain amount on which transportation has been paid, does not run with the land. (Md.) *Whalen v. Baltimore & O. R. R. Co.*, 423.

4. **RAILROADS—Maintenance of Siding After Change of Route.**—A railroad that has straightened its line so as to improve the roadbed and train service cannot be enjoined to operate trains over an abandoned part of the line and run cars on a private siding thereon in accordance with its covenant with the owner of the land at that point, when the burden will be wholly out of proportion to the benefits that will accrue to the covenantee. (Md.) *Whalen v. Baltimore & O. R. R. Co.*, 423.

Persons on Track.

5. **RAILROADS—Duty to Trespassers on Track.**—A railroad company ordinarily owes no duty to a trespasser until his peril is discovered, and is not liable to him unless, after discovering his peril, it could with proper care avoid injury. (Ky.) *Louisville & N. R. R. Co. v. McNary*, 308.

6. **RAILROADS—Duty to Persons on or Near Track.**—In Cities and Towns it is the duty of those operating a railroad to moderate the speed of trains, to give notice of their approach, to keep a lookout, and to take such other precautions as the occasion demands for the proper security of human life. (Ky.) *Louisville & N. R. R. Co. v. McNary*, 308.

7. **RAILROADS.**—A Person About to Cross a Railroad Track has a right to assume that notice of the approach of trains will be given. (Ky.) *Louisville & N. R. R. Co. v. McNary*, 308.

8. **RAILROADS—Going upon Track Without Looking.**—A pedestrian is not guilty, as a matter of law, of contributory negligence in going upon a railroad track without stopping, looking or listening for approaching trains. (Ky.) *Louisville & N. R. R. Co. v. McNary*, 308.

9. **RAILROADS—Lookout for Persons on Track.**—In Crowded Localities, where the presence of persons on a railroad track is to be anticipated, a lookout is required of those operating a train, notice

of its approach, and such moderation of speed as will make lookout and signals available for the safety of the public. (Ky.) *Louisville & N. R. R. Co. v. McNary*, 308.

10. RAILROADS.—A Person Crossing Railroad Track by Private Path in a town near the station is not guilty of contributory negligence, as a matter of law, in not stopping, looking and listening for approaching trains. (Ky.) *Louisville & N. R. R. Co. v. McNary*, 308.

11. RAILROADS.—Precaution Where Train Emerges from Cut.—It is peculiarly necessary that adequate notice of the approach of a train should be given, and that its speed should be such that the lookout by those in charge will not be idle, where the train passes through a cut and emerges from a curve within a town so close to the station that the presence of persons on or near the track may reasonably be expected. (Ky.) *Louisville & N. R. R. Co. v. McNary*, 308.

12. RAILROADS.—Contributory Negligence in Crossing.—A pedestrian who fails to use ordinary care in crossing a track in front of a train, but for which he would not have been injured, cannot recover from the railroad company notwithstanding its negligence. (Ky.) *Louisville & N. R. R. Co. v. McNary*, 308.

Mining Railroad.

13. MINING RAILROAD.—Unauthorized Use as Common Carrier, Railroad rights of way, annexed and subsidiary to mining rights, cannot be used for other purposes, such as the business of carrying passengers and freight generally. (W. Va.) *Jackson v. Big Sandy, E. L. & G. R. R. Co.*, 955.

14. MINING RAILROAD.—Enjoining Use as Common Carrier.—Equity has jurisdiction, independently of the constitutional inhibition of the taking of private property for public use, without payment of compensation or security therefor, to enjoin the operation of a railroad, built on a mining right of way, as a common carrier, no possessory remedy at law being available, for ejection from the premises. (W. Va.) *Jackson v. Big Sandy, E. L. & G. R. R. Co.*, 955.

15. MINING RAILROAD.—Enjoining Use as Common Carrier.—The constitutional inhibition of taking private property for public use, without compensation, gives equity jurisdiction to prevent such unauthorized use of a mining right of way or railroad, since the law affords no adequate remedy for the possession and use of the property, deprivation of which amounts in law to a taking thereof. (W. Va.) *Jackson v. Big Sandy, E. L. & G. R. R. Co.*, 955.

See Carriers; Street Railways.

Note.

Railroad and Sleeping-car Companies, license and occupation taxes, when subject to, 288-290.

REASONABLE DOUBT.

See Criminal Law, 1, 8, 9.

RECEIVERS.

1. RECEIVERS.—The Recital of Jurisdictional Facts in an Order Appointing a receiver is prima facie evidence of the existence of such facts. (Neb.) *Starr v. Bankers' Union of World*, 684.

2. RECEIVERS.—Appointment for Foreign Benefit Society.—Where all the property, books and records of a fraternal beneficiary association organized under the laws of another state are brought into this state, and the business of the association is attempted to be here

carried on by persons assuming to act as the officers or agents thereof, the courts of this state have power to appoint a receiver to administer the property of such associations. (Neb.) *Starr v. Bankers' Union of World*, 684.

3. **THE RECEIVER of an Insolvent Corporation** stands as the representative both of the creditors and the stockholders. He is not an agent or representative of the corporation exclusively, but is rather a trustee for both the creditors and stockholders. (Okl.) *Ardmore Nat. Bank v. Briggs M. & S. Co.*, 747.

4. **RECEIVERS OF CORPORATIONS, Title of and to What Subject.**—The receiver of an insolvent, nongoing corporation takes the property of the company for the creditors, subject to such equities, liens, or encumbrances, whether created by operation of law or by act of the corporation, which existed against the property at the time of his appointment. (Okl.) *Ardmore Nat. Bank v. Briggs M. & S. Co.*, 747.

5. **RECEIVER'S TITLE, When Vests.**—The receiver's title and right to possession of the property of an insolvent, nongoing corporation vests from the date of the original order for the appointment, although the proceedings may not be perfected until a later date. The receiver's title and right to possession during the interval between such original order and the time of perfecting his appointment are superior to those of a judgment creditor who levies upon the property under his judgment during such interval. (Okl.) *Ardmore Nat. Bank v. Briggs M. & S. Co.*, 747.

See Corporations, 21; Partition, 4, 5.

RECORDS.

See Mortgages, 4, 5.

REFORMATION OF INSTRUMENTS.

CONTRACT, Reform of for Mistake Due to Inattention and Negligence.—One is not entitled to have a contract reformed because it does not express his intention, if he did not read it nor have it read to him, and the mistake, if any, was due to his inattention and negligence without his being in any way misled as to the contents of the contract. (Wyo.) *Weltner v. Thurmond*, 1113.

REINSURANCE.

See Insurance, 12-15.

REPLEVIN.

IN REPLEVIN Plaintiff must Recover on the Strength of His Own Title. (Okl.) *Cockrell v. Schmitt*, 737.

RESIDENCE.

See Divorce; Domicile.

RES JUDICATA.

See Judgments, 12.

RESTRAINT OF TRADE.

See Patent Rights, 2.

RETURN.

See Execution, 3-5; Process, 2, 3.

Note.

- Returns of Officers**, admissibility of in evidence, tests of, 848, 853, 854.
 are admissible whenever the paper returned is, 850.
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 as evidence in creditors' suits, 852.
 as evidence in favor of officers making, 851, 852.
 as evidence of an excuse for not doing acts, 856.
 as evidence of a sale under a writ, 855.
 as evidence of a payment, 851, 854.
 as evidence of facts not required to be certified, 854, 856.
 as evidence of the acts of persons other than the officers making, 854.
 as evidence of the attachment of property, 850.
 as evidence of the fact and time of a levy, 850.
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RIPARIAN RIGHTS.

See Waters and Watercourses.

RULES OF COURT.

See Courts, 7-10.

SALES.***Rescission of Contract.***

1. **SALES**—**Rescission and Recovery of Damages.**—As a general rule, a party who counterclaims for damages for breach of a contract will be held to have affirmed it, and cannot be heard to assert its nonexistence because of its rescission. (Neb.) *Mundt v. Simpkins*, 675.

2. **SALES**—**Rescission and Recovery for Repairs or Improvements.** An exception to the rule above set out may exist where one expends money or material in the improvement of property before discovering the fraud by which he was induced to purchase it, or where the purchase is made on a warranty of its fitness for a prescribed use, and repairs are required to be made before the article can be tested and its fitness for the use ascertained. In such cases the purchaser may rescind the contract of sale and recover the reasonable cost of improving the property or of repairs made thereon. (Neb.) *Mundt v. Simpkins*, 675.

3. **SALES**—**Rescission for Breach of Warranty.**—A sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent at the election of the purchaser, and in the event of a breach of the warranty the property

may be restored and the sale rescinded. (Neb.) *Mundt v. Simpkins*, 675.

4. **SALES—Rescission—Return or Tender of Goods.**—The right of rescission is limited to cases where the seller can be put substantially in the position which he occupied before the contract, and this makes it the duty of the buyer, who would rescind for breach of warranty of quality, to restore the seller substantially to his former position, and requires him to return or tender back to the seller whatever of value to himself or to the other he has received under it. (Neb.) *Munt v. Simpkins*, 675.

5. **SALES—Rescission—Tender of Goods, What is not.**—In order to work a rescission, it is not sufficient for the purchaser, who has taken delivery of the goods at the vendor's place of business, to give notice to the vendor that he holds the goods subject to his order, or that the goods are at a designated place subject to his disposal. The goods must be returned to the place where accepted, unless, upon an offer to return, such offer is refused by the vendor. (Neb.) *Mundt v. Simpkins*, 675.

Bulk-sale Statute.

6. **BULK-SALE STATUTE—What Sales are Within.**—Where one who conducts a general store carries on a drugstore as a separate and independent business in another building and under another name, a sale of the stock in trade in the drugstore is within the purview of a statute invalidating the sale by a dealer of his entire stock in trade at a single transaction without giving notice of his intention so to do. (Conn.) *Young v. Lemieux*, 193.

7. **BULK-SALE STATUTE—Constitutionality of Act.**—A statute providing that a sale by a retail dealer of his entire stock at a single transaction, and not in the usual course of business, shall be void as against existing creditors unless he gives at least seven days' notice of his intention by writing recorded in the town clerk's office, is constitutional. (Conn.) *Young v. Lemieux*, 193.

8. **BULK-SALE STATUTE—Replevin of Goods.**—Where a dealer has sold his stock in trade in violation of the bulk-sale statute, his trustee in bankruptcy may recover of the buyer goods which are merely replacements purchased with the proceeds of sales of the original goods. (Conn.) *Young v. Lemieux*, 193.

See Logs and Timber.

SELF-DEFENSE.

See Homicide, 2-7.

SETOFF AND COUNTERCLAIM.

1. **SETOFF—Judgment of Sister State.**—A Claim for Unliquidated Damages for breach of contract can be set off in a suit by a non-resident, upon a judgment of a sister state, against a citizen of this state. (Conn.) *Hubley Mfg. & Supply Co. v. Ives*, 209.

2. **SETOFF.—It is a General Principle** that two suits shall not be maintained for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, or to both, when such determination can be had as effectually and properly in one suit. (Conn.) *Hubley Mfg. & Supply Co. v. Ives*, 209.

3. **SETOFF.—Equity Recognizes Rights of Setoff** which go far beyond those which the early legislation of England and of Connecticut introduced in actions at common law. Rights may be the proper subject of a counterclaim, under the Connecticut practice act, although not founded on any debt which could be called "mutual" according

to the earlier definition of that term. (Conn.) Hubley Mfg. & Supply Co. v. Ives, 209.

See Actions, 2.

SHEEP.

See Animals, 2-4.

SLEEPING-CAR COMPANIES.

See Carriers, 4, 5.

Note.

Stage-drivers, license and occupation taxes, when subject to, 286.

STARE DECISIS.

See Appeal and Error, 13.

STATE.

STATE—Whether must do Equity Toward Defendant.—A state by bringing an equitable action opens the door to any defense or cross-complaint germane to the matter in controversy. A sovereign who asks for equity must do equity. (Conn.) State v. Kilburn, 207.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. STATUTES.—The Letter of a Law is not in All Cases a correct guide to the true sense of the lawmaker. (Conn.) Kelley v. Killourey, 220.

2. STATUTES—Implied Exceptions Therein.—Statutes general in their terms are frequently construed to admit implied exceptions. (Conn.) Kelley v. Killourey, 220.

STAY BOND.

See Execution, 2.

STOCKHOLDERS.

See Corporations.

STREET RAILWAYS.

1. STREET RAILWAYS, Change by Municipality in Franchise of.—An ordinance, granting the right to a street railway company to run its cars on terms and conditions stated, by its acceptance confers a right, and thereafter the city council cannot lower the fare to be charged over the objection of the company.

If it were to do so it would impair the obligation of the contract: Cleveland v. Cleveland City R. R., 194 U. S. 517, 24 Sup. Ct. Rep. 756, 48 L. ed. 1102; Detroit v. Detroit, 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46 L. ed. 592; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 23 Sup. Ct. Rep. 531, 47 L. ed. 887.

The first authority cited directly reaffirms the other two; all three are pertinent. They announce the rule laid down by the supreme court of the United States.

In each of these decisions the agreement between the municipality and the street railway was treated as binding. (La.) Shreveport Traction Co. v. Shreveport, 345.

2. **STREET RAILWAYS, Regulation of, What does not Include.**—The right "to regulate" cannot be held to affect the contract right transferred by the ordinance and accepted by the company. (La.) *Shreveport Traction Co. v. Shreveport*, 345.

3. **STREET RAILWAYS, Grants to, When Operate as an Exemption from the Regulation of Fares.**—The contract in effect exempts the street railway from the municipal regulation of rates. (La.) *Shreveport Traction Co. v. Shreveport*, 345.

4. **STREET RAILWAYS, Municipal Power to Establish Rates for.**—A statute prohibiting the construction of street railways without the consent of the municipal council and giving it general power to regulate the use of streets gives the municipality power to establish rates by contract or agreement. (La.) *Shreveport Traction Co. v. Shreveport*, 345.

STRIKES.

See Telegraphs and Telephones.

SUBTENANTS.

See Landlord and Tenant, 5-7.

SUICIDE.

See Homicide, 9-12.

SUMMONS.

See Process.

SURETYSHIP.

See Principal and Surety.

SURVEYS.

See Boundaries.

TAXATION.

See License Taxes; Municipal Corporations, 15-17; Quieting Title, 2-4.

TELEGRAPHS AND TELEPHONES.

TELEGRAPH COMPANY—Message Delayed by Strike.—A telegraph company is not answerable in punitive damages for the delay of a message caused by a strike of its employes. (S. C.) *Sullivan v. Western Union Tel. Co.*, 903.

Note.

Telephone and Telegraph Companies. license and occupation taxes, when subject to, 290.

TENANCY IN COMMON.

See Adverse Possession, 8-14.

TENDER.

1. **PAYMENT—Tender Before Maturity.**—Legal tender of the amount of a debt cannot be made before maturity. (S. C.) *Pyross v. Fraser*, 901.

2. **PAYMENT—Right to Make Before Maturity.**—A creditor is not compelled to receive payment before the maturity of the debt. (S. C.) *Pyross v. Fraser*, 901.

THEATERS AND SHOWS.

1. THE OWNERS OF THEATERS, Circuses, Racetracks, Private Parks and the Like are not Bound to Receive Any Person in or to their places of amusement unless there is some statute regulating their business and providing the terms and conditions on which it may be carried on. The right to enter such place is a mere license, which though granted, may be revoked. (Mich.) *Meisner v. Detroit etc. Ferry Co.*, 493.

2. AMUSEMENT, PLACES OF—Assumption of Risks of Danger. If sports are carried on at places allotted to them at pleasure resorts, visitors who go to the vicinity of those places to witness sports assume the risk of the danger. (Mich.) *Blakeley v. White Star Line*, 496.

3. BASEBALL GROUNDS and Games, Risks Assumed by Visitors at.—Visitors standing in a position that may be reached by balls used in a game of baseball played at the usual and known place assume the risk of injury from the throwing or batting of balls incident to the game. (Mich.) *Blakeley v. White Star Line*, 496.

4. AMUSEMENT, PLACES OF—Liability of Owners for Injury Through Games Played in Unusual Places.—The owners of pleasure resorts may not permit dangerous sports to be played in parts other than those set apart for them, and one injured by such sports while in a place where he had been invited to be may recover therefor. (Mich.) *Blakeley v. White Star Line*, 496.

5. AMUSEMENT PLACES, Duty of Owners of.—The owner of a place of public amusement owes the duty to persons attending there either to prevent a dangerous game at an unusual place, or to notify them and other visitors that it is to be played, and to keep a reasonable number of watchmen and servants to see that the grounds are protected from the playing of dangerous games. (Mich.) *Blakeley v. White Star Line*, 496.

6. AMUSEMENT, PLACES OF, Throwing of Baseball at, When must be Deemed Wild or Careless.—If visitors are attending a place of public amusement and recreation, and certain other persons commence throwing and catching balls, and throw one of such balls with such force that, in striking the ankle of a bystander, it breaks the bones, such ball-throwing must be regarded as wild and reckless if carried on at an unusual place and where the public had no right to expect it. (Mich.) *Blakeley v. White Star Line*, 496.

7. THE OWNER OF A PARK is Bound to Protect Its Invited Guests from unusual occurrences which may result in serious damage to its patrons, if he has the requisite notice and knowledge. (Mich.) *Blakeley v. White Star Line*, 496.

8. AMUSEMENT PLACES, Right of Visitors at.—If in a public place of amusement, places are established for dangerous sports, visitors may properly assume that they may visit other places without being exposed to dangers from the same sports. (Mich.) *Blakeley v. White Star Line*, 496.

See Carriers, 1.

TIMBER.

See Logs and Timber.

TRADE NAMES.

1. TRADE NAME—Use of Own Name in Business.—Assuming that everyone has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, he

may not, in such use of his name, resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. (N. J. Eq.) *International Silver Co. v. Rogers*, 722.

2. **TRADE NAME**—Name Previously Used by Another.—Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, is an artifice calculated to produce the confusion alluded to. (N. J. Eq.) *International Silver Co. v. Rogers*, 722.

3. **TRADE NAME**—Use of Personal Name.—While a personal name may not constitute a technical trademark, yet where an article has come to be known by that personal name, one may not use that name, even though it be his own, to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. If he uses his own name, it must be so used as not to deprive others of their rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact. (N. J. Eq.) *International Silver Co. v. Rogers*, 722.

4. **TRADE NAME**—Proof of Fraudulent Use of One's Own Name. The normal presumption that the use of one's own name is an honest one may be rebutted by showing a prior fraudulent use of it touching the matter in issue. (N. J. Eq.) *International Silver Co. v. Rogers*, 722.

5. **TRADE NAME**—Use of Own Name—Distinguishing Mark.—Where a man's conduct has been such that he cannot engage in a particular business, even in his own name, without profiting by his prior fraud, to the detriment of another's trade, he must so distinguish his name as to avoid confusion. The words, "Not connected with any other of the same name," or words of similar import, do not suffice. (N. J. Eq.) *International Silver Co. v. Rogers*, 722.

Note.

Treasure-trove, definitions of, 400.

whether belongs to the finder, 401.

TRIAL

Demurrer to Evidence.

1. **PRACTICE**.—A demurrer to the evidence admits the facts as proved to be true and also such further facts as may be reasonably inferred from those proved. (Okl.) *Plotner v. Chillson*, 776.

Inspection by Jury.

2. **EVIDENCE** Neither Oral nor Written, but Consisting of Visible Objects.—It is not error to permit a jury to inspect, look at, and smell the contents of a bottle which has been properly identified and admitted in evidence and is alleged to contain whisky. (Okl. Cr.) *Reed v. Territory*, 861.

3. **EVIDENCE**, Permitting the Jury to Take into Their Room When It Consists of Whisky.—If a bottle of whisky is offered and received in evidence, the court should not permit it to be taken to the juryroom. In the absence of a statute to the contrary, the jury should not be permitted to have any kind of beer or intoxicating liquors in their room. (Okl. Cr.) *Reed v. Territory*, 861.

4. **JURY TRIAL**—**Inspection by the Jury of Anything Offered in Evidence Should be in the Presence of the Court and of the Accused.**—When, in the opinion of the court, the ends of justice will be advanced by permitting the jury to examine and inspect anything introduced in evidence, the court must permit it to be done, but the examination and inspection must be in open court, in the presence of the defendant, and at all times subject to the control of the court. (Okl. Cr.) *Reed v. Territory*, 861.

Submitting Uncontested Question to Jury.

5. **JURY TRIAL**—**Error in Submitting a Question of Fact Where the Evidence is not Contradicted.**—It is error to submit to the jury the question whether an employé had been warned of the danger of riding on the pilot of an engine when there is uncontradicted evidence that he was so warned. (Ark.) *El Dorado & Bastrop R. R. Co. v. Whatley*, 93.

6. **JURY TRIAL**—**Error in Submitting Uncontested Questions.**—It is error to submit as issues to the jury matters of which there is no dispute, or questions upon which there is no evidence. (Ark.) *El Dorado & Bastrop R. R. Co. v. Whatley*, 93.

Directing Verdict.

7. **TRIAL**—**Duty of Court to Direct Verdict.**—It is the duty of a trial court, if requested, to direct a verdict for the party who has adduced evidence sufficient to warrant a verdict in his favor, and no evidence appreciably tending to overthrow the case so made has been adduced by the opposite party. (W. Va.) *La Rue v. Lee*, 978.

8. **PRACTICE, Verdict, When Should be Directed.**—If there is not sufficient evidence of a fact essential to the plaintiff's cause or the defendant's affirmative defense, a verdict should be directed. (Okl.) *Cockrell v. Schmitt*, 737.

9. **PRACTICE**—**Directing a Verdict.**—If the evidence on behalf of plaintiff is sufficient to prove his cause of action, and there is no substantial evidence offered by defendant upon any material issue in the case, it is not error for the trial court to instruct the jury to return a verdict for the plaintiff. (Okl.) *Cockrell v. Schmitt*, 737.

See Instructions.

TROVER AND CONVERSION.

TROVER—**Liability of Agent.**—One Who Aids and assists in the wrongful taking of chattels is liable for the conversion thereof, though he acted as agent for another. (Neb.) *Starr v. Bankers' Union of World*, 684.

TRUSTS.

1. **EQUITY**—**Jurisdiction in, How Acquired.**—Though trusts and their administration are an ancient head of equity jurisdiction, yet jurisdiction of the matter of a concrete case in equity or law is acquired only by the court through pleadings filed, process issued, or appearance entered, and decrees entered within the lines of the issues framed by the pleadings. (Mo.) *State v. Muench*, 536.

2. **JURISDICTION** in a Suit to Appoint a New Trustee, When Exhausted.—In a suit having for its purpose the appointment of a new trustee, putting him in place of the old trustee and vesting the new trustee with the title to the property held in trust, the jurisdiction of the court is exhausted when these purposes are accomplished, and it cannot retain jurisdiction over the trust for other purposes. Therefore a provision in the decree appointing the new trustee that

the cause be retained in court until its further order in respect to all matters connected with the qualifications of said trustee and the administration of the trust must be regarded as in excess of the jurisdiction of the court and void. (Mo.) *State v. Muench*, 536.

3. CONSTRUCTIVE TRUST—Purchaser at Judicial Sale.—The doctrine of constructive trusts applies no less to judicial than to private sales. If the purchaser at a private sale will hold the property in trust for another, the purchaser at a judicial sale, under like circumstances, will so hold it. (Ky.) *Irons v. United States Life Ins. Co.*, 318.

4. TRUST, INVOLUNTARY, When Arises on the Death of a Trustee.—Where one who has purchased property for the benefit of himself and others under an agreement that they shall share in the proceeds, and who has, therefore, become, as to such property, a voluntary trustee, dies, and his title descends to his heir at law, the latter becomes an involuntary and not a voluntary trustee, and the statute of limitations, as to actions against him to establish and enforce the trust, commences to run at once, without any demand being made on him, or, in case he is a minor, on his guardian, or any repudiation of the trust either by him or such guardian, or the administrator of the estate of the original trustee. (Cal.) *Norton v. Bassett*, 162.

5. TRUST, When Created by an Agreement that if Property is Sold, Another shall have the Proceeds Above a Stated Amount.—An agreement given by the grantees of a deed received from their mortgagor that if the property is sold for more than enough to pay certain claims and expenses, all sums over and above this shall be paid to such grantor, amounts to more than a simple promise, and creates a trust under which the title is held for the purposes stated in the agreement. (Wyo.) *Weltner v. Thurmond*, 1113.

6. A TRUST is an Obligation upon a Person Arising Out of a Confidence reposed in him to apply property faithfully and according to such confidence. (Wyo.) *Weltner v. Thurmond*, 1113.

7. TRUST, Duty to Sell Property, When Creates.—A contract that if property shall sell for more than enough to pay certain claims, the balance of the proceeds shall be paid to a designated party, imposes a duty on the person holding the title to make sales for the purpose of paying the claims and realizing the balance to be paid as provided. Though there is some discretion as to the time of sale, it is only such as will enable the trustees to deal with the property prudently and reasonably in carrying out the evident purpose of the contract. (Wyo.) *Weltner v. Thurmond*, 1113.

8. TRUST TO SELL PROPERTY, When Requires an Accounting for Rents and Profits.—Where persons hold property under a trust to sell and to pay over all the proceeds after satisfying certain claims to another, he is entitled to have them account for rents and profits received, when it appears that they did not sell the property when they might have done so, and, on the other hand, refused, though a sale might have been effected and the claims thereby paid and the balance realized. (Wyo.) *Weltner v. Thurmond*, 1113.

9. TRUST TO SELL REAL PROPERTY and Apply the Proceeds—Right of the Beneficiary to Pay Obligation and Avoid the Sale.—Under an agreement that if property conveyed sells for more than enough to pay specified obligations, the grantor shall have the remainder of the proceeds, a decree permitting him to satisfy such obligations and thereupon to receive a conveyance of the property is not improper where, though having had an opportunity to make the sale themselves, the grantees did not do so. (Wyo.) *Weltner v. Thurmond*, 1113.

10. LACHES, When not Fatal to a Demand that Property be Sold and Proceeds Applied.—Under an agreement between a grantor and the grantees in a conveyance that if the premises conveyed sell for more than enough to pay specified claims, interest and expenses, the grantor shall have the remainder of the proceeds of the sale, he is not guilty of laches precluding his enforcing the agreement by the failure to bring any suit thereon until nine years after its execution, if the grantees had not repudiated nor denied the agreement until within a few days prior to the commencement of the suit, and did not appear to have suffered any loss or inconvenience from the complainant's delay, unless, possibly, the loss of a higher rate of interest than they might have realized had they sold the property at an earlier day. (Wyo.) *Weltner v. Thurmond*, 1113.

11. JURISDICTION Where Real Property is Sought to be Impressed with a Trust—Place Where may be Exercised.—Where one obtains money in another state by fraud, artifice and undue influence and with it purchases property in this state and causes it to be conveyed to another to hold in trust, a suit to impress such property with a trust in favor of the person so defrauded may be brought in the county in this state in which such real property is situate. (Mich.) *Morris v. Vyse*, 472.

12. TRUSTS—Misappropriation by Third Person.—It must be shown that he knowingly partakes in the breach of trust, to charge a third person as a party to misappropriation of a trust fund. (W. Va.) *Perry v. Oerman*, 1020.

See *Limitation of Actions*.

Note.

Vehicles, owners of, when subject to license and occupation taxes, 284-286.

VENDOR AND VENDEE.

Covenant as to Subdivisions and Streets.

1. VENDOR'S IMPLIED COVENANT as to Subdivision of Tract. One who plats his land into streets and lots as shown by a map, and sells some of the lots in accordance therewith, does not impliedly covenant not to change the size of the remaining lots nor to refrain from devoting any part thereof to such public uses as streets or parks. (N. J. Eq.) *Herold v. Columbia Inv. & R. E. Co.*, 718.

2. VENDOR'S IMPLIED COVENANT as to Location of Streets According to Map.—One who plats his land into lots and streets as shown by a map, and sells lots in accordance therewith, impliedly covenants with his grantees that he will not change the location or width of the streets; and if he attempts to do so, they may have him enjoined. (N. J. Eq.) *Herold v. Columbia Inv. & R. E. Co.*, 718.

Innocent Purchaser.

3. VENDOR AND PURCHASER.—Innocent Purchaser, Who is not.—If real property is subject to an option, the holder of which knows of certain facts and equities affecting the title, and he obtains a third person to comply with the option and take title by such compliance, the latter cannot be regarded as an innocent purchaser. (Mo.) *Seibel v. Higham*, 502.

Time as Essence of Contract.

4. VENDOR AND VENDEE—Time as Essence—Waiver.—Provisions in a contract for the purchase of land that time is of the essence are binding upon both parties, but if either seeks to take advantage thereof upon failure of the other to perform strictly, he must do so promptly upon such failure. (S. D.) *Keator v. Ferguson*, 947.

5. VENDOR AND VENDEE—Time as Essence—Waiver.—If a vendor receives payment some twelve days after it is due without objection, and permits the rent for one year to remain unpaid nearly two weeks after it is due before notifying the vendee of her election to terminate the contract, she waives the benefits of a provision making time the essence, to the extent at least that she is required to give the vendee notice of her intent to terminate the agreement and give him a reasonable opportunity to comply with the same. (S. D.) *Keator v. Ferguson*, 947.

Contract by Letter.

6. VENDOR AND VENDEE—Contract by Letters.—A valid contract for the sale of real estate may be made through the medium of letters. In case of a breach thereof by the vendor, the vendee may enforce specific performance; and in the event of a breach by the vendee, the vendor may maintain an action for the purchase price. The promise of the vendee to pay is a sufficient consideration for the agreement by the vendor to sell. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

7. VENDOR AND VENDEE—Contract by Letters.—Letters between a vendor and vendee must, in order to constitute a binding contract, contain a definite offer to sell and an unqualified acceptance thereof. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

Conditional Acceptance.

8. VENDOR AND VENDEE—Conditional Acceptance.—If a vendee's acceptance by letter of the offer of the vendor to sell is coupled with any condition that varies or adds to the offer to sell, it is not an acceptance, but a counter proposition. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

9. VENDOR AND VENDEE—Conditional Acceptance.—Where a vendee's letter of acceptance to the offer of the vendor to sell contains a mere suggestion or request that payment be made at a particular place, but the request is not a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell, and will not defeat specific performance. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

10. VENDOR AND VENDEE—Conditional Acceptance.—A statement in a letter accepting an offer to sell land that the vendee expects the vendor to "take care of" delinquent taxes does not impose a condition upon the acceptance. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

11. VENDOR AND VENDEE—Conditional Acceptance.—The statement in a vendee's letter replying to the vendor's offer to sell that "if it is just as satisfactory to you, will you please send your deed to National Bank of Merrill for collection," is not an attempt to impose a condition upon the acceptance. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

Good Title.

12. VENDOR AND VENDEE—Implied Agreement for Good Title. An agreement to convey land, in the absence of any reservation or exception, requires the vendor to convey a marketable title free of encumbrances. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

13. VENDOR AND VENDEE—Outstanding Tax Certificates constitute an encumbrance upon the land and a cloud upon the title. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

Description and Acreage

14. **VENDOR AND VENDEE.**—Under a Promise to Convey the "SW SW 6-35-8" in a specified county of the state at a certain price per acre, the unit upon which the price is made is the acre, not the forty. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

15. **VENDOR AND VENDEE.**—The Correct Acreage of Any Particular Forty is presumed to be shown by the government's survey. (Wis.) *Curtis Land & Loan Co. v. Interior Land Co.*, 1068.

WATERS AND WATERCOURSES.

1. **RIPARIAN RIGHTS in Lands not Abutting on the Stream.**—Lands which do not border on a stream may be entitled to riparian rights therein, as where all the tract having riparian rights, a portion is conveyed by the owner, in which case the part so conveyed, though not contiguous to the stream, may be given riparian rights by the conveyance. (Cal.) *Strong v. Baldwin*, 149.

2. **WATERS, Respective Rights of Parties in, When Need not be Determined.**—In an action brought to have certain persons declared to have no title in specified waters, it is not error for the court to fail to find the relative rights of all persons in the stream whose waters are in question, when some of such persons are not parties to the action and the evidence offered and received is not sufficient to enable the court to intelligently determine the rights of all parties in interest. (Cal.) *Strong v. Baldwin*, 149.

3. **RIPARIAN RIGHTS, Partition of Lands Which are Entitled to.** Where the owner of a parcel of land having riparian rights in a stream conveys portions of such land not contiguous to the stream, and the conveyance purports to convey with the land "the same rights as to the use of the water as appertain to such lands" in the hands of the grantor, such conveyance preserves the riparian rights of the lands conveyed. (Cal.) *Strong v. Baldwin*, 149.

4. **RIPARIAN RIGHTS, Decree of Partition, When Preserves to Lands not Contiguous to the Stream.**—Where a decree partitions lands having riparian rights, allots some of the parcels in such a manner as not to abut on the stream, but purports to allot with each parcel the riparian rights and privileges, the allottees become entitled to riparian rights on such stream. (Cal.) *Strong v. Baldwin*, 149.

See Navigable Waters.

WILLS.*In General.*

1. **WILL, Letter, When Constitutes.**—A letter written, dated, and signed by the author may serve as a last will, where it contains testamentary language indicating that it was so intended. (La.) *In re Billis' Will*, 355.

2. **WILLS, Presumption in Favor of.**—The law presumes that a testator intends a lawful rather than an unlawful disposition of his property, and though such presumption may be rebutted, and the creation by last will of a fidei commissum may be proved by presumptions arising from circumstances dehors the instrument, such presumptions must be grave, precise and consistent, and must leave no reasonable basis for a different conclusion. (La.) *In re Billis' Will*, 355.

3. **WILLS, Forbidden Trust, When not Implied from.**—Where, in sufficiently explicit terms, the person named as universal legatee is bequeathed the entire estate of the testator, the expressions or instructions, "Now, do as I told you, at the station, when you left," and "Do for my children as I have said" (referring to certain illegiti-

mate children), are too vague and uncertain to impose any charge on the legatee, and do not create a fidei commissum in favor of the children. (La.) *In re Billis' Will*, 355.

4. **WILL**—**Creation of Life Estate**.—Where a Will Devises Real Estate to a person for life, with remainder over to his issue, and provides that if he should leave no issue, the remainder over shall go to the testator's grandchildren living at the time of the devisee's death, this limits his interest to his life. (Wis.) *Steele v. Korn*, 1051.

5. **WILLS**—**Per Stirpes or Per Capita**.—Under a will giving "unto Hy. W. Morrell and W. F., L. M. and Hazel S. Gilbert all my notes . . . to be equally divided between them," the division of the property should be per capita. (S. C.) *Rogers v. Morrell*, 899.

6. **WILLS**.—When a Will is not Ambiguous in Terms it is unnecessary to resort to testimony as to the surrounding circumstances in order to ascertain its meaning. (S. C.) *Rogers v. Morrell*, 899.

7. **WILL**.—The Use of Pencil in Writing a Will, otherwise duly executed, or in making alterations in such will, raises no presumption that testator was only deliberating and that the will is not final. The use of such instrument may be as final and conclusive as to intent of testator as the use of any other. (W. Va.) *La Rue v. Lee*, 978.

8. **WILL**—**Contemplated Changes**.—Evidence to show that testator, in a will duly executed, contemplated changes therein, cannot affect its validity, in its integrity, or in any of its parts. Until there is a change in the legal mode, the presumption is that the result of such contemplation was a determination to adhere to the will as executed. (W. Va.) *La Rue v. Lee*, 978.

9. **WILL**—**Parol to Invalidate or Revoke**.—The spirit of the statutory law in regard to the making and revocation of wills is to restrain parol testimony on the subject within the narrowest practicable limits. (W. Va.) *La Rue v. Lee*, 978.

10. **WILL**.—**Conduct and Declarations of the Testator**, after a will is duly executed, manifesting ignorance of its existence, are not competent to question the validity or existence of such will. (W. Va.) *La Rue v. Lee*, 978.

Holographs.

11. **HOLOGRAPHIC WILL**.—The Only Requisites of a Holographic Will are that it must be wholly written by the testator and signed by him in such a manner as to make it manifest that the name is intended as a signature. No dating, attesting witnesses, or particular custody is required. (W. Va.) *La Rue v. Lee*, 978.

12. **HOLOGRAPHIC WILL**.—**Erasures by Hand of Testator** in a holographic will is legal revocation of such portions as are so erased, since it is in the manner required for a will of that character to be executed; and, for the same reason, new portions written into such will by hand of testator, his name remaining in such manner as to make it manifest that it is intended as a signature, may make the whole as changed a complete and valid new holographic will of such testator. (W. Va.) *La Rue v. Lee*, 978.

Personal Liability of Devisee for Charge Imposed by Will.

13. **WILL**—**Personal Liability of Devisee for Charge Imposed by Will**.—By accepting and taking possession of a devise the devisee becomes personally liable to pay a legacy charged thereon when it becomes payable by law. His situation is, that he owns real property subject to a lien which he has agreed to pay, and which may be foreclosed and enforced at any time after it falls due. (Wis.) *Steele v. Korn*, 1051.

14. WILL—Enforcing Liability for Legacy Against Life Estate.—Where a legacy is a lien upon lands devised for life, and it is apparent that a separate sale of the life estate or of the remainder will fail to bring a reasonable price, while a sale of the whole property in fee will operate to the advantage of all owners, it should be so sold. The value of the life estate in the proceeds may be ascertained under the rules for such computations, and if a balance remains over the amount required to pay the judgment, the life tenant becomes the absolute owner thereof; and if the funds are insufficient to satisfy the judgment, the deficit may be taken out of the estate in remainder. Whatever of the latter estate is not required must be placed in charge of a trustee to hold for accumulation for the persons entitled thereto on the death of the life tenant. (Wis.) *Steele v. Korn*, 1051.

Jurisdiction of Equity to Construe.

15. WILLS, Construction of in Equity.—Equity will not entertain jurisdiction of a suit brought solely for the purpose of construing a will without further relief, and will never exercise the power to interpret a will which only deals with legal estates and interests and makes no attempt to create a trust relation. (Ark.) *Frank v. Frank*, 73.

16. EQUITY.—Consent cannot Give a Court of Equity Jurisdiction to Construe a Will where otherwise it is without such jurisdiction. (Ark.) *Frank v. Frank*, 73.

Conflict of Laws—Executors.

17. WILLS—Conflict of Law.—Whether a Man Dies Testate or intestate is to be determined by the law of his domicile, in respect to his personal property, and in respect to his real estate by the law of the place where it is situated. (Conn.) *Murdoch v. Murdoch*, 231.

18. WILLS—Naming Executor—Conflict of Laws.—The determination of the question whether a will designates executors, and if it does whether they are to be approved or disapproved, is for the court of the testator's domicile. And when the will of a nonresident is produced for record in this state, it is to be accepted here, so far as concerns his appointment of executors, as meaning what the foreign court adjudged it to mean. But it does not follow that the probate court in this state is bound to issue letters testamentary to the same individuals; it has the right to approve or disapprove the appointment. (Conn.) *Murdoch v. Murdoch*, 231.

Foreign Probate.

19. FOREIGN PROBATE—Notice to Parties in Interest.—If the publication of notice merely, with nothing in the way of citation, in proceedings to establish the foreign probate of a will is erroneous, the defect is not jurisdictional, but a mere irregularity, and the only consequence of the fault, in the present case, is to make the decree as to some of the persons in interest *ex parte*. (Conn.) *Murdoch v. Murdoch*, 231.

Revocation of Probate.

20. PROBATE COURTS, Power of to Annul Decrees.—A probate court has power, upon petition, notice and hearing, to vacate or annul a prior decree probating a will clearly shown to have been without foundation in law or in fact and in derogation of legal right. (Me.) *Merrill Trust Co. v. Hartford*, 415.

21. THE PROBATE OF A WILL may be Annulled on the ground that the will was not signed by the testatrix nor by any person for her or at her request, nor subscribed by her in the presence of three credible witnesses, and the only evidence given in its support was

before a judge in vacation. (Me.) *Merrill Trust Co. v. Hartford*, 415.

22. PROBATE OF WILL, Failure to Appeal from, When does not Prevent Annulment.—The failure to appeal from an order probating a will does not prevent proceedings for the annulment of such probate, when it does not appear that the petitioner for annulment appeared at any hearing upon the matter of the decree or had any notice thereof prior to the expiration of the time for appeal. (Me.) *Merrill Trust Co. v. Hartford*, 415.

23. PROCEEDING to Annul the Probate of a Will, When not Barred by Receiving a Legacy.—The petitioner for the annulment of the probate of a will is not precluded from maintaining the proceeding by having received a legacy under the will, if she offers to return such legacy, and it does not appear that when receiving it she had any knowledge of the facts relied upon for annulment. (Me.) *Merrill Trust Co. v. Hartford*, 415.

24. PROCEEDING for the Annulment of a Will, When not Barred by a Prior Proceeding for the Same Purpose.—One who presents a petition for the annulment of the probate of a will which is dismissed because the facts disclosed were entirely insufficient is not precluded from prosecuting subsequent proceedings in which other and sufficient facts are alleged. (Me.) *Merrill Trust Co. v. Hartford*, 415.

25. PROBATE OF A WILL—Proceeding for Annulment, When not Barred by Laches.—The fact that ten years elapsed after the probate of a will before a petition for its annulment was filed does not convict the petitioner of laches if she was a distant relative of the decedent, living in another state, and did not know, nor have reason to suspect, the existence of the facts rendering the annulment proper. (Me.) *Merrill Trust Co. v. Hartford*, 415.

26. PROBATE OF A WILL—Decree Annuling cannot Also Declare that There was No Will.—A proceeding to annul the probate of a will must be confined to such annulment, and cannot also adjudge that there was no will and that the decedent died intestate. This question cannot be considered until the will is again presented for probate. (Me.) *Merrill Trust Co. v. Hartford*, 415.

Note.

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See Devisees.

WITNESSES.

1. **WITNESSES.**—Leading Questions are within the discretion of the trial court, and permitting them is rarely cause for reversal. (S. C.) *State v. Stockman*, 888.

2. **WITNESS.**—A Witness may be Contradicted as to His Statement to a person whom he did not know, if sufficiently advised as to the identity of the conversation to give him a fair opportunity to recollect and deny or explain. (S. C.) *State v. Stockman*, 888.

3. **WITNESS**, Impeaching by His Prior Consistent Statements.—Evidence is not admissible to support an impeached witness that he made prior consistent statements, except in those cases where not only his veracity is attacked, but his motive is also impugned. (Okl. Cr.) *Driggers v. United States*, 823.

4. **WITNESS**—Prior Consistent Statements to Support, When Inadmissible.—It is a general rule that where evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions consistent with his evidence are inadmissible. But where it is charged that the evidence of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive or personal interest, his evidence may be supported by showing that he made a similar statement before that relation or motive existed. (Okl. Cr.) *Driggers v. United States*, 823.

5. WITNESS.—It is not Necessary to Lay a Foundation in order to contradict the statement of a witness that he was at a particular place at a certain time. (S. C.) *State v. Stockman*, 888.

6. CRIMINAL LAW—Cross-examination of a Witness Whose Physical Condition will not Permit of Such Examination.—Where the condition of a witness is such, and the court so rules, that it is not proper to submit him to a cross-examination, it is error to permit his examination on a criminal trial against the objection of the accused, and the fact that the court does not refuse the right to cross-examine, but purports to admit it, does not relieve from prejudice its error in allowing such witness to be asked and to answer a question, and in refusing to exclude the answer when made. (Ala.) *Wray v. State*, 18.

See Criminal Law, 6-8.

WORDS AND PHRASES.

1. WORDS AND PHRASES.—The Word "Injury" includes any act or omission which harms or damages another, whether or not it is justified by law. (Conn.) *Barry v. McCollom*, 215.

2. WORDS AND PHRASES.—The Word "Between" Implies a Division between two persons or classes, yet it frequently is used colloquially in the sense of "among," especially when it follows the word "divided." (S. C.) *Rogers v. Morrell*, 899.

WRIT OF PROHIBITION.

See Prohibition.

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